AGRICULTURE DECISIONS

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AGRICULTURE DECISIONS

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COURT DECISIONS

SUPERIOR DAIRY, INC. v. USDA.
CASE NO.: 5:11CV1979.
Court Decision.
Filed September 27, 2011.

[Cite as: 5:11-cv-01979-JRA].

AMMA – AMA- Exhaustion of Administrative Remedies – TRO, factors to be considered.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JUDGE JOHN ADAMS

ORDER AND DECISION

This matter comes before the Court on Motion by Plaintiff Superior Dairy, Inc. ("Superior Dairy") for a Temporary Restraining Order. Doc. 2. The Court has been advised, has reviewed the parties' motions and supporting documents, and has reviewed the applicable law. For the reasons that follow, the motion is DENIED.

I. Facts

The United States Department of Agriculture ("USDA') has a public hearing scheduled for October 4, 2011, in Cincinnati, Ohio. During that hearing, the USDA intends to hear proposed amendments to rules affecting Milk in the Mideast Marketing Area. Superior Dairy contends that these proposed amendments target it and only it. Moreover, Superior Dairy contends that such amendments, if they are adopted, will place it in a competitive disadvantage within the region. To counteract these proposals, Superior Dairy offered its own proposals and requested that the Secretary of the USDA include its proposals at the October 4, 2011 hearing. The Secretary declined, indicating that the proposals would

substantially expand the scope of the issues being presented. Superior Dairy also suggested that a national hearing be scheduled in order to entertain its proposals. The Secretary likewise responded that he did not believe that a national hearing was warranted. Case: 5:11-cv-01979-JRA Doc #: 44 Filed: 09/29/11 1 of 6. PageID #: 455 On September 20, 2011, Superior Dairy filed its complaint and request for injunctive relief with this Court. In response, the Secretary moved to dismiss the complaint and opposes any form of injunctive relief. The Court also granted the unopposed motion to intervene filed by nine dairy farmer cooperatives: Continental Dairy Products, Inc., Dairylea Cooperative, Inc., Dairy Farmers of America, Inc., Erie Cooperative Association, Foremost Farms USA Cooperative, Inc., Michigan Milk Producers Association, Inc., NFO Inc., Prairie Farms Dairy, Inc., and White Eagle Cooperative Association (collectively, the "Cooperatives"). The Cooperatives also oppose injunctive relief. Furthermore, the Court granted leave to certain parties to participate in this matter as *amici curiae*. Specifically, Darigold, Inc., Guers Dairy, Galliker Dairy Company, Schneider-Valley Farms, and Dean Foods Company were permitted to make filings. These filings likewise oppose injunctive relief. Having reviewed the motion, oppositions, and reply, the Court now resolves the pending request that seeks to halt or alter the scope of the October 4, 2011 hearing.

II. Law and Analysis

When determining whether to issue a temporary restraining order or a preliminary injunction, this Court considers the following four factors:

(1) whether the movant has a "strong" likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction. *McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (en banc) (quoting *Sandison v. Michigan High Sch. Athletic Ass'n*, 64 F.3d 1026, 1030 (6th Cir. 1995)). This Court must balance the four factors while noting that none should be considered a prerequisite to the grant of injunctive relief. See *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 347 (6th Cir. 1998). Case:

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A. Likelihood of success on the merits

The Court finds that Superior Dairy has not demonstrated through motion practice a strong likelihood of success on the merits with respect to its claims surrounding the October 4, 2011 hearing. There are several hurdles that appear to stand in the way of success for Superior Dairy in this matter. First, from the Court's initial review, the collective defendants have offered strong arguments that Superior Dairy has failed to exhaust its administrative remedies before filing this suit. Since the AMAA was enacted in 1937, courts have repeatedly held that its exhaustion requirement is mandatory, and that aggrieved handlers may not seek judicial review of milk marketing orders until they have exhausted their administrative remedies. *See Block*, 467 U.S. at 346, 104 S.Ct. 2450 (stating that "handlers may obtain judicial review" only after exhausting the AMAA's "formal administrative remedies"); *Ruzicka*, 329 U.S. at 294, 67 S.Ct. 207 (holding that "resort may be had to the courts" only after administrative remedies have been exhausted); *Hershey Foods*, 293 F.3d at 527 ("A handler of milk thus *must* petition the Secretary before seeking judicial review of a milk marketing order ....") (emphasis added); *United States v. United Dairy Farmers Co-op. Ass'n*, 611 F.2d 488, 490 (3d Cir. 1979) ("It has long been established that the administrative relief provided in the [AMAA] is not merely permissive but *exclusive* in the first instance: any challenge to the applicability of an order *must* first be made administratively.") (emphasis added); *Dairylea Co-op.*, 504 F.2d at 80 (holding that "handlers may apply for judicial review of agricultural orders only after exhausting their administrative remedies"). Consistent with this long line of cases, we hold that the AMAA's administrative appeal process is a *mandatory* procedure that handlers must follow prior to seeking judicial review of a milk marketing order. *Edaleen Dairy, LLC v. Johanns*, 467 F.3d 778, 784-85 (C.A.D.C. 2006). In reversing an injunction entered on a pre-hearing complaint, the Eleventh Circuit noted as follows: The district court dismissed this exhaustion requirement by claiming that 7 U.S.C. § 608c(15)(A) "pertains to a review of grievances after an order has been issued and, thus, is not pertinent to the question at hand concerning a pre-hearing complaint." This reasoning flatly contradicts section 608c(15)'s

language. If the statutory review procedures do not apply to an order before it issues, the administrative process could be interrupted at every step by injunctive orders. It would be perverse to permit an aggrieved handler, at its mere whim, to repair to the district court and interrupt the administrative process before an order issues, but insist that the handler exhaust the administrative remedies after the order issues. Such a practice would undermine the Secretary's ability to function effectively, and would thwart Congressional intent as to when judicial review should occur. Case: 5:11-cv-01979-JRA Doc #: 44 Filed: 09/29/11 3 of 6. PageID #: 457 *Alabama Dairy Products Ass'n, Inc., v. Yeutter*, 980 F.2d 1421, 1423 (11th Cir. 1993). Superior Dairy likewise appears to argue that its exhaustion requirement should somehow be excused. Accordingly, the October 4 hearing is the only hearing in which the Superior proposals might be given fair consideration, but USDA has decided to exclude them from the hearing agenda. At the same time, Superior Dairy's opponents maintain that Superior Dairy must endeavor to further seek consideration of its proposals in the proceedings in Cincinnati before it may apply for judicial relief. How that might be done, when agency policy is that such proposals "cannot be discussed" in Cincinnati, is not explained by Superior's opponent competitors. Doc. 29 at 3. Thus, it appears that Superior Dairy contends that any attempt to exhaust its administrative remedies would be futile. However, as noted above, the exhaustion requirement is mandatory. Furthermore, despite the extensive briefing in this matter and thorough research by the Court, no law has been found that would even allow consideration of this futility argument. Accordingly, Superior Dairy has not demonstrated a strong likelihood of success on the merits. Additionally, the Court finds it unlikely that Superior Dairy could succeed even if the Court were to excuse the exhaustion requirement. "While the Secretary's marketing regulations are referred to as 'orders,' they are really instances of notice and comment rulemaking. The Secretary has the authority to determine the reasonable scope of a rulemaking proceeding and this court will not interfere unless that determination has been shown to be arbitrary and capricious." *Marketing Assistance Program, Inc. v. Bergland*, 562 F.2d 1305, 1307 (C.A.D.C. 1977). In this regard, Superior Dairy seems to assert that the Secretary gave insufficient reasons for refusing to consider its proposed amendments. However, on the record before this Court, it seems apparent that the Secretary declined to include those amendments because they would substantially expand the scope of the currently

scheduled hearing. It is unclear what further explanation Superior Dairy believes that the law requires. It is clear, however, that Superior Dairy has not demonstrated a strong likelihood of success on the merits. Case: 5:11-cv-01979-JRA Doc #: 44 Filed: 09/29/11 4 of 6. PageID #: 458

B. Irreparable injury

Superior Dairy has likewise failed to demonstrate irreparable harm. With respect to this prong, Superior Dairy's argument hinges upon a belief that it has been deprived of meaningful participation in the rulemaking process. However, to justify this position, one must first find that Superior Dairy is likely to succeed on its claim that the Secretary acted arbitrarily and capriciously. As noted above, this fact has not been demonstrated. Furthermore, it is undisputed that Superior Dairy may participate in the upcoming hearing, offer argument and evidence against the items properly on the agenda, and have its voice heard. The simple fact that Superior Dairy has not been permitted to dictate the precise scope of the hearing does not somehow translate to a demonstration of irreparable harm. Accordingly, this prong also weighs against granting injunctive relief.

C. Substantial harm to others

In contrast, the grant of injunctive relief in this matter would serve to harm others. Others that proposed rulemaking have followed the administrative process. That process has culminated in the now pending and properly noticed hearing on October 4, 2011. Allowing Superior Dairy to circumvent the exhaustion requirement and postpone the hearing through a legal proceeding filed only two weeks before the hearing would cause harm to all those that have relied upon the statutorily created system. As such, this prong also weighs against relief.

D. Public interest

Finally, the public has an interest in seeing that the properly noticed hearing goes forward. Furthermore, as the hearing is open and will allow arguments both in favor and against the items on the agenda, the public interest is again served by open debate sooner rather than later.

Accordingly, this final prong also weighs against injunctive relief. Case: 5:11-cv-01979-JRA Doc #: 44 Filed: 09/29/11 5 of 6. PageID #: 459

III. Conclusion

Superior Dairy's motion for a temporary restraining order is DENIED. The October 4, 2011 hearing may go forward as scheduled. A telephone conference in this matter is hereby scheduled for October 14, 2011 at 1:00 p.m. Counsel only need participate, and Plaintiff's counsel shall initiate the call to the Court at (330) 252-6070 with all counsel for defendants and the *amici* on the line.

IT IS SO ORDERED.

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DEPARTMENTAL DECISIONS

GH DAIRY.
AMA M Docket No.10-0283.
Decision and Order.
Filed October 5, 2011.

AMAA – AMA Producer-Handler.

Alfred W. Ricciardi, Esq. for Petitioner.
Sharlene Deskins, Esq. for AMS.
Decision and Order by Administrative Law Judge Victor W. Palmer.

Decision and Order

Preliminary Statement

GH Dairy, "Petitioner," seeks to set aside the "Final Decision" by the Secretary of Agriculture that was published on March 4, 2010 (75 FR 10122-01, 2010 WL 723277 (F.R.)), and the implementing "Final Rule" that became effective on June 1, 2010 (75 FR 21157-01, 2010 WL 1625292 (F.R.)). These rulemaking actions by the Secretary limit the exemption of "producer-handlers" from the pricing and pooling requirements of Federal milk marketing orders to those with total Class I route disposition and sales of packaged fluid milk products to other plants of 3,000,000 pounds or less per month across all orders. In that GH Dairy is a producer-handler that distributes in excess of 3,000,000 pounds of packaged fluid milk products per month (Petition, p. 2, ¶3), the plant facilities of its integrated operation shall be regulated, pursuant to the Final Decision and the Final Rule, as a fully-regulated distributing plant, and its dairy farm facilities shall be deemed a "producer" under an applicable Federal milk marketing order (Petition, pp. 5-6, ¶21). GH Dairy shall be required to pay into the milk marketing order's producer equalization fund, the difference between its higher use-value of milk than the monthly blend price that is computed under the order so as to: (1) include the higher value fluid milk sales of large producer-handlers in the computation of Federal milk marketing order uniform minimum

blend prices that are paid to all dairy farmers supplying the order's regulated marketing area; and (2) reimburse milk handlers who pay blend prices higher than the actual use-value of the milk they acquired.

The challenged Final Decision and Final Rule were issued pursuant to the powers conferred upon the Secretary to promulgate and amend marketing orders through formal rulemaking proceedings under the Agricultural Marketing Agreement Act of 1937, as amended ("AMAA" or "the Act", 7 U.S.C. §§ 601 *et seq*.). Petitioner, GH Dairy, has instituted the instant proceeding under Section 8c(15)(A) of the AMAA, as an aggrieved handler petitioning for modification of, or exemption from the Secretary's Final Decision and Final Rule on the grounds that they are "not in accordance with law" (7 U.S.C. § 608c(15)(A)). Alfred W. Ricciardi and Ryan K. Miltner, Petitioner's attorneys, have agreed with Sharlene Deskins, Office of the General Counsel, United States Department of Agriculture, attorney for Respondent, the Secretary of Agriculture, that this proceeding should be decided on the basis of the formal rulemaking record upon which the contested actions are based, with both parties filing for my consideration briefs and an Appendix of excerpts of that record. In addition to the briefs filed by the parties, National Milk Products Federation and International Dairy Foods Association, represented by their attorneys, Marvin Beshore and Steven J. Rosenbaum, have been allowed to file an amici brief in opposition to Petitioner's brief. Petitioner has filed, in addition to its initial "Merit Brief", a brief in rebuttal of both Respondent's brief and the amici brief.

Specifically, GH Dairy asserts that the Final Decision, the Final Rule and the amendments of the Federal milk marketing orders by the Secretary are: (1) contrary to the authority conferred by the AMAA; (2) contrary to binding practices and interpretations by the Secretary as ratified by Congress, (3) unsupported by substantial record evidence, as well as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (4) based on a hearing record that excluded critical evidence; (5) in violation of the Regulatory Flexibility Act; (6) insufficient under the AMAA's "only practical means" test; and (7) in violation of the AMAA's prohibition against non-uniform pricing by imposing confiscatory, compensatory payments on producer-handlers. After reviewing the legal precedents applicable to the Secretary's powers under the AMAA and other statutes, and the record evidence upon which the Secretary's challenged action is based, I have concluded, for the reasons that follow, that the Secretary's action is in accordance with law;

is within the Secretary's powers under the AMAA and other statutes; is fully supported by substantial evidence of record; is not arbitrary, capricious or an abuse of discretion; and is based upon the record of a hearing that did not exclude critical evidence. Accordingly, an order is being entered that dismisses the Petition and denies the relief sought.

FINDINGS OF FACT

1. Producer-handlers are dairy farmers who produce and ship milk only of their own production. Prior to April 2009, each Federal milk marketing order had its own definition of "producer-handler." Though similar, each milk order defined the term so as to exempt milk handled by a "producer-handler" from the pricing and pooling regulations of the order, in slightly different ways. Some Federal milk marketing orders required the filing of an application; others prohibited acquiring milk from other sources. Nonetheless, for many years, the size of a producer-handler was not an issue in allowing exemption from the pooling and pricing regulations of Federal milk orders.

2. The regulatory requirements for the exemption of a dairy farmer as a producer-handler started to change in 2006. On February 24, 2006, "the 2006 final rule" was issued by the Secretary that changed the definition of an exempted producer-handler under the Arizona-Las Vegas milk order and the Pacific Northwest milk order. The 2006 final rule limited the exemption from the pooling and pricing regulations of those milk orders to producer-handlers that have Class I milk route distribution of three million pounds or less per month. *See* 71 FR 9430 (Feb. 24, 2006).

3. In April of 2006, Congress enacted the Milk Regulatory Equity Act of 2005 (Public Law 109-215 (April 11, 2006); codified at 7 U.S.C. § 608c(5)(M)-(O); "the MREA"). Its stated intent was: "To ensure regulatory equity between and among all dairy farmers and handlers for sales of packaged fluid milk in federally regulated milk marketing areas and into certain non-federally regulated milk marketing areas from federally regulated areas, and for other purposes." Subparagraphs (M) and (N) of the MREA approved the Secretary's determination in the 2006 final rule that limited the scope of the producer-handler exemption from regulation for those producer-handlers operating within Arizona as regulated by Order No. 131, but rejected such limitation in respect to producer-handlers operating within Nevada. In addition, Subparagraph

(M) instructed that the minimum and uniform requirements of a Federal milk marketing order shall apply to "…a handler of Class I milk products (including a producer-handler or producer operating as a handler)" within an area regulated by a Federal milk order that sells to States not subject to a Federal milk order. 7 U.S.C. § 608c(5)(M)(ii). On May 1, 2006, the Secretary issued an order implementing the instructions set forth in the MREA. Subparagraph (O) of the MREA also stated:

(O) Subparagraphs (M) and (N) shall not be construed as affecting, expanding, or contracting the treatment of producer-handlers under this subsection except as provided in such subparagraphs.

4. On April 3, 2009, the United States Department of Agriculture's Agricultural Marketing Service (AMS) issued a Notice of Hearing regarding the need to change the producer-handler definition in all Federal milk marketing orders and to increase the exempt plant monthly limit on the disposition of fluid milk products from 150,000 to 450,000 pounds. *See* 64 FR 16296 (April 9, 2009). The Notice of Hearing was in response to requests from the National Milk Producers Federation (NMPF) and the International Dairy Foods Association (IDFA) to hold such a hearing to address problems in the milk marketing order system caused by the exemption of producer-handlers from regulation by Federal milk marketing orders.

5. AMS, pursuant to its April 3, 2009 Notice of Hearing, held the hearing, on May 4 through May 20, 2009, at which transcribed testimony was taken and multiple exhibits were received on the need to limit the size of producer-handlers that are exempted by Federal milk marketing orders. Numerous witnesses testified regarding the original industry proposals as well as 17 alternate proposals on regulating producer-handlers. Jeff Sapp, the principal of a producer-handler, Nature's Dairy, that otherwise participated in the hearing and was represented by an attorney, could not travel to the hearing and give his testimony in person on the advice of a cardiologist administering tests to determine if Mr. Sapp needed surgery. The presiding Administrative Law Judge denied a motion to include Mr. Sapp's proffered written testimony and supporting exhibits as part of the record evidence because he was unavailable in person as the governing rules of practice require. After the filing of proposed findings and conclusions by industry members, the issuance of a recommended decision (74 FR 54383, published October 21, 2009) and the filing and consideration of exceptions, the Secretary issued the Final Decision (75 FR 10122, published March 4, 2010) that was implemented

by the Final Rule issued on April 23, 2010, that became effective June 1, 2010 (75 FR 21157). The Final Rule limited the exemption of producer-handlers from pooling and pricing provisions in all Federal milk marketing orders to those with total route disposition and sales of packaged fluid milk products to other plants of 3 million pounds or less during a month.

6. Petitioner, GH Dairy, is a producer-handler that distributes in excess of 3,000,000 pounds of packaged fluid milk products per month (Petition, p. 2, ¶3). Accordingly, the plant facilities of Petitioner's integrated operation shall be regulated, pursuant to the Final Decision, as a fully-regulated distributing plant, and its dairy farm facilities shall be deemed a "producer" under an applicable Federal milk marketing order (Petition, pp. 5-6, ¶21). As a result, GH Dairy shall be required to pay into the Federal milk marketing order's producer equalization fund, the difference between its higher use-value of milk and the monthly blend price that is computed under the order.

CONCLUSIONS

The Action of the Secretary Accords with the Powers Conferred By the AMAA

The Petitioner's initial challenge is to the Secretary's authority under the AMAA to impose the minimum pricing and pooling provisions of Federal milk marketing orders on producer-handlers who do not purchase the milk they distribute from others. Petitioner asserts that producer-handlers are exempt from these provisions under the plain language of the AMAA as well as by binding interpretative actions by the Secretary that Congress has ratified.

The AMAA states that the Secretary may promulgate Federal milk marketing orders which classify milk in accordance with the form or purpose of its use, and fix: "…minimum prices for each use classification which all handlers shall pay…for milk <u>purchased from producers or associations of producers</u>." 7 U.S.C.§608c(5)(A)(emphasis added).

This is the "plain language" of the AMAA upon which Petitioner would rely. But this language was found by the Supreme Court to require interpretation within the full context of the AMAA and the legislative intent underlying its enactment. When so read and interpreted, the word

"purchased" has the special meaning stated by the Supreme Court in its landmark decision holding the AMAA, and milk marketing orders promulgated under it, to be constitutional. *United States v. Rock Royal Cooperative*, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446 (1939).

Rock Royal rejected a challenge asserting that the plain meaning of "purchased" as used in the AMAA, precluded the application of a milk order's pricing and pooling provisions to milk handled by a cooperative of dairy farmers distributing milk as an agent. The Supreme Court stated:

It is obvious that the use of the word 'purchased' in the Act, Section 8c(5)(A)

and (C), would not exclude the 'sale' type of cooperative. When 8c(5)(F) was drawn, however, it was made to apply to both the 'sale' and 'agency' type without distinction. This would indicate there had been no intention to distinguish between the two types by (A) and (C). The section which authorizes all orders, Section 8c(1), makes no distinction. The orders are to be applicable to 'processors, associations of producers, and others engaged in the handling of commodities. The reports on the bill show no effort to differentiate (*citing*, House Report No. 1241, 74th Cong., 1st Sess.; Senate Report No.1011, 74th Cong., 1st Sess.). Neither do the debates in Congress. The statutory provisions for equalization of the burdens of surplus would be rendered nugatory by the exception of 'agency' cooperatives. The administrative construction has been to include such organizations as handlers (*citations omitted*). With this we agree. As here used the word 'purchased' means 'acquired for marketing.'

307 U.S. at 579-580 (emphasis added).

Petitioner would limit the application of the Supreme Court's holding that "purchase" means "acquired for marketing", to milk handled by cooperatives acting as intermediaries, and exclude its application to milk produced on one's own farm. But again, there is contrary, binding legal precedent.

In *Ideal Farms, Inc. v. Benson*, 288 F.2d 608 (3rd Cir.1961), *cert.denied*, 372 U.S. 965 (1963), the Third Circuit dismissed the argument that only 'purchased' milk is subject to regulation and that the word 'purchased' cannot be construed to include milk which the appellants had obtained from their own farms. The Third Circuit affirmed a lower court decision and held that it had correctly concluded:

'…that the provisions of …(the milk order)…are fully in accord with the enabling statute and that the refusal of the secretary to exempt the

plaintiffs (appellants) from the obligation to include their own-produced milk in the calculation of their net pool obligations, was in all respects legal and within his statutorily delegated power.'

288 F.2d at 618.

In reaching its holding, the Third Circuit undertook a thorough review of the provisions of the AMAA, pertinent prior case law and the AMAA's legislative history. As here, the appellants had attempted to distinguish their circumstances from those considered in *Rock Royal*, as well as those considered in *Elm Spring Farm v. United States*, 127 F.2d 920 (1st Cir.1942) and *Shawangunk Cooperative Dairies v. Jones*, 153 F.2d 700 (2d Cir.1946). After discussing the facts of those three cases, the Third Circuit stated:

In effect appellants make the argument that although an agency cooperative was held to have 'purchased' milk from its principals in *Rock Royal* and *Elm Spring*, two parties were involved whereas here there being only one party no 'purchase' is possible as the word was construed in those cases. Such reasoning would mean Congress intended to regulate a handler if he was the agent of a producer, but not a handler who is also the producer, although the effect in both instances is the same. Should the fact of agency make such a crucial difference? We do not think such an illogical distinction was intended. Although not embodying the fact pattern of specific identity of producer and handler in one entity present in appellants' situations the three cited cases make clear that the word 'purchased' is to be liberally construed so as to achieve the purpose of the Act and strongly buttress the position of the Secretary that 'own-produced' milk of a handler is subject to regulation. The purpose of the Act and Order was succinctly stated in *Elm Spring Farm v. United States, supra*, 127 F.2d at page 927:

'….The Act and Order seek to achieve a fair division of the more profitable fluid milk market among all producers, thereby eliminating the disorganizing effects which had theretofore been a consequence of cutthroat competition among producers striving for the fluid milk market. This is clearly set forth in the opinion in *United States v. Rock Royal Co-operative, Inc.*, 1939, 307 U.S. 533, 548, 550, 59 S.Ct. 993, 83 L. Ed. 1446.'

Were we to accept appellants construction of the word 'purchased' they would avoid the intent of the Act to achieve a fair division of the more profitable fluid milk market among all producers and they would avoid the necessity of sharing the burden of surplus milk. *See United States v. Rock Royal Co-operative, Inc., supra*, 307 U.S. at pages 548, 580, 59 S.Ct. at pages 1001, 1016.

Ideal Farms, Inc. v. Benson, supra, 288 F.2d at page 613.

In 1963, the Fifth Circuit in *Freeman v. Vance*, 319 F.2d 841 (5th Cir.1963), also reviewed the language of the AMAA in respect to the power of the Secretary to regulate own-produced milk and agreed with the reasoning and conclusion of the Third Circuit in *Ideal Farms, Inc.*.

Petitioner contends that a footnote reference to *Ideal Farms, Inc.* in a subsequent Third Circuit decision, *U. S. v. United Dairy Farmers Coop. Assn.*, 611 F.2d 488, 491 fn.7 (3rd Cir. 1979), limits its holding to handlers that purchase at least some milk produced by other parties. Though the cited footnote alluded to the fact that the producers held subject to regulation as handlers in *Ideal Farms, Inc.*, dealt " partially in milk produced at their own facilities," there is nothing in the later decision indicating any intent to narrow the court's prior holding. The subsequent Third Circuit decision in *United Dairy Farmers, id.,* was limited to its affirmance of a lower court decision that had granted a summary judgment motion by the Secretary on the grounds that the appellant, a dairy cooperative that transported, processed and distributed its own milk, was a "handler" within the meaning of the AMAA and therefore must first exhaust the administrative remedy provided "handlers" by section 8c(15)(A) of the AMAA.

Moreover, there are more recent liberal interpretations of the Secretary's power to regulate an individual who performs both producer and handler functions when acting as a handler that follow and are consistent with *Ideal Farms, Inc.*. *See Stew Leonard's v. USDA*, 199 F.R.D. 48, 60 Agric. Dec. 1 (D.Conn. 2001); *Marvin D. Horne, et al v. U. S. Dept. of Agric.*, Case No. 10-15270, slip opinion, pp. 11-12, July 25, 2011, __F.3d __ (9th Cir. 2011). *Horne* is a very recent decision by the Ninth Circuit concerning similar regulation under a Raisin Marketing Order:

….the AMAA contemplates that an individual who performs both producer and handler functions may still be regulated in his capacity as a handler. Even if the AMAA is considered 'silent or ambiguous' on the

regulation of individuals who perform both producer and handler functions, we must give *Chevron* deference to the permissible interpretation of the Secretary of Agriculture, who is charged with administering the statute. *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S.C. 837, 842-43; *see* 7 U.S.C.§ 608c(1); *see also Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1086-87 (9th Cir. 2010); *Midway Farms v. U.S. Dept. of Agric*., 188 F.3d 1136, 1140 n.5 (9th Cir. 1999). Other courts have similarly rejected the Hornes' argument that a producer who handles his own product for market is statutorily exempt from regulation under the AMAA. *See, e.g., Freeman v. Vance*, 319 F.2d 841, 842 (5th Cir. 1963)(per curiam); *Ideal Farms, Inc. v. Benson*, 288 F.2d 608, 614 (3d Cir. 1961), *cert. denied*, 372 U.S. 965 (1963); *Evans*, 74 Fed. Cl. at 557-58. Deferring to the agency's permissible interpretation, as we must, we conclude that applying the Raisin Marketing Order to the Hornes in their capacity as handlers was not contrary to the AMAA.

Id., Slip opinion at 11-12.

Petitioner has cited the lower court decision in *Horne*, as authority for the assertion that the word "purchase" as used in the AMAA, should be interpreted and applied solely on the basis of its "plain meaning" because *Horne's* determination of when raisins were "acquired" by a handler was based on the "plain terms of the regulation." However, the quoted language by the Ninth Circuit makes it clear that, in accordance with the doctrine of *stare decisis*, the liberal interpretation of the holding in *Rock Royal , id.*, by *Freeman v. Vance*, 319 F.2d 841, 842 (5th Cir. 1963)(per curiam); and *Ideal Farms, Inc. v. Benson*, 288 F.2d 608, 614 (3d Cir.1961), *cert. denied*, 372 U.S. 965 (1963); are binding precedents. Those cases require that deference be given to the Department's interpretation that the word 'purchased', as applied by the AMAA to milk orders, means 'acquired for marketing' in every circumstance where milk comes into a milk handler's possession regardless of its source.

The fact that various Supreme Court decisions since *Chevron* have been decided on the basis of a statute's "plain meaning" rather than an agency's interpretation, does not mean, as Petitioner seemingly urges in its rebuttal brief, we are now free to disregard either the seminal interpretation of the AMAA's language by the Supreme Court in *Rock Royal*, or what Petitioner characterizes as "simply wrong" subsequent

decisions by Circuit Courts that have applied it to producer-handlers' own milk. We may not now undertake to interpret the language anew. As the Supreme Court cautioned Courts of Appeal in *Rodriguez de Quijas v. Shearson/American Express, Inc*., 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-22, 104 L.Ed.2d 526 (1989):

If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

The fact that the challenged interpretation by the Supreme Court in *Rock Royal*, was made in 1939, without subsequent alteration by Congress, provides additional reason why it must be followed. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 763-64, 118 S.Ct. 2257, 2270 (1998) *quoting Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736, 97 S.Ct.2061, 2069-2070, 52 L.Ed.2d 707 (1977):

("[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation").

But even if we were free to treat the language of the AMAA as a matter of first impression, we would find its "plain meaning" to be less than obvious in light of the AMAA's other controlling language for milk orders, such as the following provision of section 8c(5)(C):

In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers <u>(including producers who are also handlers),</u> to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof. (Emphasis added.)

The "purchased from producers" language of section 8c(5)(A) must necessarily be reconciled with that of section 8c(5)(C) which contemplates the regulation of producers who are handlers. To do so, the legislative history of the Act needs to be consulted, and deference given to administrative interpretations by the Secretary. Exactly what *Rock Royal* and *Ideal Farms* did, and what is still appropriate under *Chevron*.

The Contested Action is Not Contrary to Binding Practices and Interpretations Ratified by Congress

Petitioner next asserts that practices and interpretations by the Secretary related to his power to regulate producer-handlers, as ratified in seven statutes enacted by Congress from 1965 through 1990, limit his actions and supercede the more liberal interpretations of his power under the AMAA expressed in *Rock Royal*, *Ideal Farms* and subsequent cases.

Petitioner argues that a self-imposed diminishment of power was first noted and approved by Congress when it stated in the Food and Agricultural Act of 1965, Pub. L. No. 89-321, 79 Stat. 1187, § 104:

The legal status of producer handlers of milk under provisions of the Agricultural Adjustment Act, as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended, shall be the same subsequent to the adoption of the amendments made by this title as it was prior thereto.

Similar statements are found in Pub.L.No.91-524, § 201(b), 84 Stat.1358 (Nov.30, 1970; Pub.L.No. 93-86, 87 Stat.221 (Aug.10, 1973); Pub.L.No.95-113, § 202, 91 Stat.913 (Sept.29, 1977); Pub.L.No.97-98, § 102, 95 Stat.1213 (Dec. 22, 1981); Pub.L.No.99-198, § 134, 99 Stat.1354 (Dec. 23, 1985); and Pub.L.No.101-624, § 115, 104 Stat.3359 (Nov. 28,1990).

However, Petitioner's interpretation of this language is contradicted by the fact that Congress, at the very time it enacted the Food and Agricultural Act of 1965, rejected an amendment that would have specifically denied authority to regulate producer-handlers. In 1967, the Secretary noted this fact when he interpreted section 104 of the 1965 Act and its implications:

Section 104 did not purport to change the previous law but merely reaffirmed it. The language is specifically directed to reaffirming legal status under the statute, rather than the provisions of any order that has been issued under the authority of the statute. The Congress rejected an amendment which would have specifically denied authority for regulation of producer-handlers. Thus producer-handlers who were potentially subject to regulation under the statute prior to the 1965 amendment remain potentially subject to regulation thereafter.

Decision on Proposed Amendments to Puget Sound, Washington Order, 32 FR 10742, 10746 (July 21, 1967).

Petitioner nevertheless argues that the statements in the seven cited statutes, constitute Congressional approval and ratification of a decision by the Secretary, subsequent to 1965, to exempt all producer-handlers from regulation and to deny proposals to eliminate their exemption. Petitioner relies upon the following comment by the Department when it denied a proposed rule on order reform (64 FR 16135, April 2, 1999):

One of the public comments received proposed that the exemption of producer-handlers from the regulatory plan of milk orders be eliminated. This proposal is denied. In the legislative actions taken by Congress to amend the AMAA since 1965, the legislation has consistently and specifically exempted producer-handlers from regulation. The 1996 Farm Bill, unlike previous legislation, did not amend the AMAA and was silent on continuing to preserve the exemption of producer-handlers from regulation. However, past legislative history is replete with the specific intent of Congress to exempt producer-handlers from regulation. If it had been the intent of Congress to remove the exemption, Congress would likely have spoken directly to the issue rather than through omission of language that had, for over 30 years, specifically addressed the regulatory treatment of producer-handlers.

The rejected proposal had sought the complete elimination of the exemption of every producer-handler from regulation including those small dairy farmers who sell such little milk that their sales have been treated as *de minimis non curat lex*. Black's Law Dictionary, 4th Edition. *See Stew Leonard's, supra,* 199 F.R.D.48 at 55; 60 Agric. Dec. 1, at 4 (2001):

…'Typically, a producer-handler conducts a small family-type operation, processing, bottling and distributing only his own farm production.' Decision on Proposed Amendments to Tentative Marketing Agreements and to Orders, 25 Fed. Reg. 7819, 7825 (Aug. 16, 1960). The rationale for this exemption is 'that such businesses are so small that they have little or no effect upon the pool.'

The reason given by the Department, in 1999, for rejecting a proposal that would have eliminated the exemption of producer-handlers with small family-type operations from regulation was inapt and, taken out of context, seemingly supports Petitioner's argument. But the ability of the

Secretary to regulate producer-handlers when they act as handlers has consistently been recognized by the Courts, Congress and, but for the language quoted, by the Secretary. Any doubt that the Secretary is empowered under the AMAA to regulate producer-handlers with large volumes of milk distribution sufficient to depress the blend prices paid to producers under a Milk Order and place other milk handlers at a competitive pricing disadvantage, was subsequently clarified by Congress. When it enacted the Milk Regulatory Equity Act of 2005, Congress specifically approved, adopted and mandated such action in respect to producer-handlers handling over 3 million pounds of milk per month in Arizona.

The following language of the MREA does not support Petitioner's premise that Congress presently requires the Secretary to exempt all producer-handlers from regulation regardless of their size and their ability to disrupt orderly marketing in areas regulated by Milk Orders:

(O) Subparagraphs (M) and (N) shall not be construed as affecting, expanding, or contracting the treatment of producer-handlers under this subsection except as provided in such subparagraphs.

This language merely recognizes the continuance of the Secretary's power under the AMAA to regulate, or not regulate, various types of producer-handlers subject to Congressional oversight.

The Amendments are Supported by Substantial Record Evidence, and are Not Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

The negative effects of exempting producer-handlers from regulation by Federal milk marketing orders were set forth in *Stew Leonard's v. Glickman,*199 F.R.D. 48, 50-51, 60 Agric. Dec. 1, 4-5 (D.Conn. 2001):

The effects of this exemption are twofold. First, if the producer-handler uses all the milk it produces as Class I milk, it avoids having to make payments into the producer settlement fund; it merely sells the milk at the market price, which is tempered only by the production costs. Assuming all other conditions are equal, the exemption allows the producer-handler to make a greater profit because it sells Class I milk without having to pay the full Class I price into the settlement fund.

The second effect of the exemption is upon the pool as a whole. Because the total amount of Class I milk purchased in the marketing area is a factor in calculating the aggregate blend price for the marketing area, removing a handler's Class I purchases from the calculus brings the aggregate price down. Exemption of a handler who purchases a significant quantity of Class I milk from producers in the pool depresses the blend price in the region.

The exemption may also provide an additional windfall to producer-handlers who 'ride the pool.' This term refers to a producer-handler who draws upon pool resources to compensate for any deficiency in its own supply during the lean production months, thereby allowing the producer-handler to maintain a relatively smaller supply of animals with a minimal surplus of milk in periods of greater production. Producer-handlers could also take advantage of the price regulation by 'riding the pool' if they do dispose of any surplus because the milk they dispose of most likely is used as Class II or Class III milk, but the producer-handler is still able to collect the relatively higher blend price. Thus, in theory, producer-handlers who 'ride the pool' could reap the benefits of the regulatory scheme without sharing the burdens.

The 2009 hearing on proposals to change the producer-handler definition in all federal milk orders was undertaken to address such concerns.

The initial proposals were made by the National Milk Producers Federation ("NMPF") and by the International Dairy Foods Association ("IDFA"). NMPF is a trade association representing thirty-one dairy farmer cooperatives that constitute three-fifth's of the nation's commercial dairy farmers and a like share of milk production. Most of the milk produced by NMPF members is purchased under Federal milk marketing orders, and NMPF members act as handlers regulated under Federal milk marketing orders, and many own and operate dairy processing and manufacturing plants that are either regulated by or receive milk regulated by Federal milk marketing orders. IDFA is a trade association of 530 dairy manufacturing and marketing companies and their suppliers. IDFA's members include 220 dairy processors that run more than 600 plant operations that range from large multi-national organizations to single-plant companies. Together, they represent more than 85% of the milk, cultured products, cheese and frozen desserts

produced and marketed in the United States. Most of the milk bought and handled by IDFA members is purchased under Federal milk marketing orders. (Amici brief, pp.1-2).

The two proposals jointly submitted by NMPF and IDFA were to: (1) eliminate the producer-handler provision from all Federal milk orders; (2) increase the exempt plant monthly limit on disposition of fluid milk products from 150,000 to 450,000 pounds; and (3) require unique labeling for fluid milk products distributed by exempt plants. *See*, Final Decision, 75 FR 10122 at 10125.

These initial two proposals prompted 17 alternative proposals also considered at the May 4-20, 2009 hearing held in Cincinnati, Ohio. *Id*. The Final Decision organized the evidence presented during the hearing into six categories, and identified for each category the industry groups supporting or opposing various proposals and then summarized their testimony and evidence. 75 FR 10122 at 10125-10140.

The evidence favoring greater restrictions on producer-handler exemption from Federal milk marketing order pricing and pooling regulation included analysis of marketing practices and trends by consultant dairy economists who qualified as experts, as well as the testimony by dairy farmers and plant operators on their personal observations and business experiences. These witnesses gave testimony on the disorderly marketing conditions they believed were presently being caused, and that were likely to become greater in the future, due to producer-handlers becoming large, integrated milk production and handling operations significantly different from the small *de minimis* dairy farm operations that the existing producer-handler exemptions were fashioned to accommodate.

Testimony was also received in opposition to placing greater limitations on producer-handler exemptions, from a panel of consultant witnesses representing the American Independent Dairy Alliance (AIDA), and from Petitioner, GH Dairy, and 16 other dairy interests and operations. AIDA's consultant witnesses, and Petitioner in its brief, dispute the correctness of the Secretary using the difference between a Federal milk marketing order's uniform blend price and its Class I price as the measure for assessing the need for producer-handlers to be subject to milk order pricing and pooling requirements. It is their contention that the actual costs associated with a producer-handler's operations should be used to measure the appropriate transfer price of acquiring own-farm milk rather than the blend price. They contend that when this standard is

employed producer-handlers do not have a competitive advantage over regulated handlers and their exempt status cannot be found to cause disorderly marketing. *See* testimony of Dr. Knutson (Tr. 3044, Tr. 3067-3069, Tr. 3119-20, Ex. 89), Dr. Knoblauch (Tr. 3022-23, Tr. 3411-12, Ex. 90). They supported this contention with testimony by various producer-handlers that their actual costs were higher than milk order blend prices (Tr. 254, Tr. 290-291, Tr. 630-640, Tr. 746, Tr. 1183-1189, Tr. 2462, Tr. 2565, Tr. 2663; Tr. 2910-2916, Tr. 3602).

The Secretary's final decision addressed these contentions directly:

While opponents to the elimination of the producer-handler definitions argue otherwise, this decision agrees with the proponent arguments, presented by witnesses testifying in support of NMPF and IDFA positions, that the difference between the Class I price and the blend price is a reasonable estimate of the price advantage enjoyed by producer-handlers even if it is not possible to determine the precise level of the advantage for any individual producer-handler. This price advantage is compounded as a producer-handler's Class I utilization increases. In addition, allowing producer-handlers to have unlimited Class I sales will result in a measurable impact on the blend price received by pooled producers.

This decision finds no reason to consider the higher costs purportedly associated with the operation of producer-handlers a relevant factor for determining conditions in which handlers should or should not be subject to full regulation. All handlers face different processing costs. These differences may be the result of divergent plant operating efficiencies related to size or to that portion, if any, of milk supplied, which may be produced or supplied from own-farm sources. Whatever the costs differences may be and the reasons for them, all fully regulated handlers must pay the same minimum Class I price, and equalize their use-value of milk (generally, the difference between the Class I price and the blend price) through payment into the order's producer-settlement fund. Similarly, all producers face different milk production costs. Producer cost differences, for example, may be the result of farm size or variation in milk production levels attributable to management ability. Producers, regardless of their individual costs, receive the same blend price.

75 FR 10122 at 10147-10148.

This finding is consistent with past Departmental precedent. *See, e.g.*, 70 FR 74166 at 74186 (Dec. 14, 2005). It is supported by testimony in the record evidence that a producer-handler has a competitive advantage in the market in that, unlike their competitors, they do not pay the difference between the Class I price and the blend price into the producer settlement funds of Federal milk orders. *See* testimony of Dr. Roger Cryan (Tr. 406-407, Tr. 1693, Ex. 23), Dr. Robert Yonkers (Tr. 2435, Ex. 80), Elvin Hollon (Tr. 3792), J. T. Wilcox (Tr. 1316-1317), Dennis Tonak (Tr. 516-517, Ex. 24) and Mike Asbury (Tr. 575-577).

Petitioner further argues that producer-handlers are self-sufficient and assume the entire burden of balancing their production with their fluid milk requirements. Petitioner cites prior rulemaking decisions that have used this rationale to exempt producer-handlers from Federal milk marketing order regulation. Petitioner recognizes that this rationale was modified when, in 2006, Orders 124 and 131 were amended to limit the exemption of producer-handlers to those with route disposition of no more than 3 million pounds per month because they were shifting the burden of balancing their milk production onto the orders' pooled producers as demonstrated by their sales of fluid milk products into the unregulated areas of Alaska and California (70 FR 74166 at 74187 (December 14, 2005); implemented by 71 FR 9430 (Feb. 24, 2006)). Petitioner asserts the impact of the Secretary's 2006 decision should be limited to its facts and "…does not stand for a wholesale departure from prior reasoning, but was allegedly premised on the unique marketing conditions of those two particular marketing areas." Petitioner then maintains that the present record evidence (Tr. 254, Tr. 630, Tr. 2462, Tr. 2565, Tr. 2633, Tr. 2910, Tr. 2915, Tr. 2931, Tr. 3602, Tr. 3639) demonstrates that producer-handlers do bear the burden of disposing all of their surplus milk.

Again, the Secretary addressed this contention directly:

The record supports the finding that adoption of a limit on producer-handlers' monthly Class I disposition and sales of packaged fluid milk products to other plants can mitigate the disorderly marketing which arises when producer-handlers are able to avoid bearing the burden of surplus disposal. Bearing the burden of surplus disposal is a fundamental demonstration of a producer-handler balancing their milk production with market demand for their Class I products. Disorderly marketing conditions are present when a producer-handler

becomes able to directly or indirectly balance their Class I marketings with the surplus milk of pooled producers. The record indicates examples of indirect balancing of producer-handlers on the regulated market. The record also indicates that as a producer-handler's sales volume increases, conditions arise that offer an even greater ability to effectively transfer the balancing burden to the regulated market.

75 FR 10122 at 10147

This finding is supported by the testimony of various witnesses (Tr. 521-524, Tr. 636-637, Tr. 1300-1311, Tr. 1384, Tr. 2309-2310, Tr. 2470). The ways in which producer-handlers are able to balance their milk production with market demand for their Class I products at the expense of pool market participants was explained by NMPF's witness, Dr. Roger Cryan:

…[P]roducer-handlers, even if they bottle all of their milk and buy or sell no one else's, can sell to wholesalers or large retail chains at a significant price advantage. Such wholesalers or retailers can either balance their own supplies of milk, with purchases from, and at the expense of, pooled market participants; or they can raise and lower their prices seasonally, so that consumers will balance their supply at other stores, also at the expense of pooled market participants….

* * * * *

The reality is that no producer-handler plant can truly be made to balance its own supply, because customers always have a choice of alternative sources for fluid milk.

Tr. 409-410, Ex. 23.

Petitioner next challenges the evidentiary and the statutory bases for the Secretary placing restrictions on the exemption of producer-handlers from Federal milk marketing order regulation because of increases in their size. The Secretary found:

The…de minimus impact on orderly marketing owed to producer-handler Class I sales volume has been, in part, the rationale for their exemption from full regulation. Simply stated, producer-handlers have historically conducted small scale operations and have been subject to certain requirements to remain exempt from full regulation.

* * * *

[A]mendments to the producer-handler definitions became necessary when producer-handler size was shown to be a cause of disorderly marketing conditions in the Arizona and Pacific Northwest marketing areas, and a cap of three million pounds per month on Class I dispositions in the marketing area was adopted.

The record reveals that the number of producer-handlers and all other categories of handlers is declining. Opponents of change from the status quo conclude that this is justification to leave the producer-handler provisions unchanged. This decision disagrees. In evaluating the impact producer-handlers may have on orderly marketing, the volume of milk marketed by any producer-handler is more important than the overall trend in the number of producer-handlers.

The size of individual producer-handlers will impact orderly marketing conditions in any of the Federal order marketing areas if left without limit. Size of operation will have a direct bearing on competitive equity between producer-handlers and fully regulated handlers. Producer-handler size will increasingly magnify disorderly marketing conditions and practices where the burden of balancing and surplus disposal is effectively transferred to the regulated market. These examples of the presence and anticipation of disorderly marketing conditions can be largely mitigated by establishing a reasonable limit on a producer-handler's Class I route disposition and sales of packaged fluid milk products to other plants.

75 FR 10122 at 10150.

Petitioner asserts that the testimony of Dr. Cryan and other witnesses that support these findings to be speculative and fail to provide a sufficient basis for restrictions based on size. Though the testimony of the proponents stressed potential threats posed by a future increase in the number of large producer-handlers, there was evidence of the present existence of large producer-handlers who threaten orderly marketing because of their ability to exploit the producer-handler price advantage while having the benefit of economies of scale in both milk production and fluid milk processing. Data developed at the hearing indicate 17 producer-handlers with route sales in excess of 300,000 pounds, including 7 with route sales above 2,000,000 pounds. Producer-handlers were shown to have grown from an average of 34,645 pounds of Class I sales in October 1959 to an average of 1,422,080 pounds in December

2008. (Ex. 7, Ex. 20). The sales of the 7 largest producer-handlers, according to the testimony of Dr. Cryan, were estimated to average some 80 million pounds per plant (Tr. 1867-1874). The Secretary's findings are therefore supported by record evidence showing present threats in addition to potential threats to orderly marketing attributable to large producer-handlers if left unregulated.

Moreover, it has long been recognized that the Secretary may regulate producer-handlers on the basis of their potential threats to orderly marketing. In 1961, the Secretary's amendment of the Puget Sound Milk Order was challenged on such basis and the Department's Judicial Officer held:

The Secretary can regulate to cope with potential threats to a then-existing orderly market. The Secretary need not stand powerless or shut his eyes to possible disruptive factors or eventualities in a regulated market….

* * * *

…As indicated above, potential threats to order objectives may form a basis for regulation and evidence indicating such possibility is sufficient to support regulation to maintain orderly conditions. In addition, while the number of producer-handlers has decreased since the inception of the order, the volume of milk handled by such handlers and the size of producer-handlers have substantially increased and the advantages which producer-handlers enjoy over fully regulated handlers clearly operate as an incentive to other producers, and at least one handler, to attain the producer-handler status and withdraw Class I milk from pooling under the order.

Independent Milk Producer-Distributors' Assn., 20 Agric. Dec. 1, 24-25 (1961).

Here, I feel it necessary to observe that pertinent decisions by the Judicial Officer, if affirmed or unappealed, do have precedential authority in this proceeding, and Petitioner's argument, at page 16 of its rebuttal brief, that they may be disregarded is rejected as contrary to our system of administrative adjudication that, like our system of courts under Article 3 of the Constitution, is built on the bedrock doctrine of *stare decisis*.

Petitioner next challenges the Secretary's conclusion that formerly exempt producer-handlers with over 3 million pounds per month disposition, such as Petitioner, should be required to pay into producer

settlement funds in order to mitigate disorderly marketing conditions. But including virtually all handlers in a marketing order's pooling and pricing provisions to achieve this purpose is the rule not the exception. *See*, *Leonard*, *id*. The historical background of Federal milk marketing orders and the central objective of the AMAA to maintain orderly marketing that may otherwise be undermined by free-lance farmers competing for fluid milk outlets with farmer members of cooperatives who pool their milk in acceptance of lower "blend prices", is set forth in *Schepps Dairy, Inc. v. Bergland*, 628 F.2d 11, 13-16 (D.C.Cir.1979). "The present statutory provisions can be seen as a shoring, with the power of the Federal Government, of the classified pricing system initiated by the cooperatives." *Id*, quoted in *Mil-Key Farm Inc.*, 54 Agric Dec. 26, 30 (1995), a decision by the Department's Judicial Officer that strictly limited the producer-handler exemption and expressed concern for the fact that a "… 'producer-handler' has a distinct economic advantage over the other producers." *Mil-Key*, at 33. For other descriptions of the historical background and the central objective of the AMAA to protect pricing and pooling of milk through the use of Federal milk marketing orders, s*ee also, Lehigh Valley Coop. Farmers, Inc. v. United States*, 370 U.S. 76, 78-81 (1962; *United States v. Rock Royal Coop., Inc., supra*, at 542-45, 550; *Fairmount Foods Co. v. Hardin*, 442 F.2d 762, 764 (D.C. Cir.1971); *Block v. Community Nutrition Institute*, 467 U.S. 340, 341-43 (1984); *Zuber v. Allen*, 396 U.S. 168, 172-178 (1969).

The previous review of the Secretary's challenged findings shows that they were fully supported by "substantial evidence" under the standard set forth in 5 U.S.C. § 706 (2)(E). The challenged findings were directly supported by the testimony of dairy industry members recounting actual operational and marketing experiences as well as by the analysis of operant market conditions and forces by expert dairy economists and consultants. Upon canvassing the entire administrative record, the competing evidence in opposition to the findings that eventuated in the Final Decision and the Final Rule, has not been found to be so compelling as to the require or permit the displacement of the Secretary's choice between two fairly conflicting views, even if a reviewing court would have made a different choice if the matter was before it de novo. *See, Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S. Ct. 456, 465, 95 L.Ed. 456 (1951). It is therefore concluded that the Secretary's challenged findings are supported by substantial evidence which is

defined as the relevant evidence that a reasonable person might accept to support a conclusion. *Consolo v. Federal Maritime Commission*, 383 U. S. 607, 619-620, 86 S.Ct. 1018, 1026, 16 L.Ed.2d 131 (1966).

The review also shows that the challenged findings should not be set aside under 5 U.S.C. § 706(2)(A) as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." As previously demonstrated, the Secretary did consider all relevant data and "articulate(d) a rational connection between the facts found and the choices made." *Public Service Comm'n of Kentucky v. FERC*, 397 F.3d 1004 (D.C.Cir. 2005) *quoting, Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 60 (D.C.Cir.1999). Under the "arbitrary and capricious" standard of the Administrative Procedure Act, an agency must "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). However, a reviewer "… is not to substitute its judgment for that of the agency," *id*., and should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974). These prior decisions by the Supreme Court were quoted by Justice Scalia writing for the majority, in *FCC v. Fox Television Stations, Inc*., 129 S. Ct. 1800, 1810, 173 L.Ed.2d 738 (2009), which held that even when agency action changes prior policy, a more substantial explanation is not required.

We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review.

Id., at 1810.

Thus, the findings of the Final Decision and the Final Rule fully meet the APA's "arbitrary and capricious" standard as it has been interpreted and applied by the Supreme Court and lower courts.

The Amendments are Based on a Hearing Record that did not Exclude Critical Evidence

All evidence critical to the decision made to amend the Federal milk marketing orders was before the Secretary despite the exclusion of a

declaration with attached exhibits by Jeff Sapp, co-owner of Nature's Dairy of Roswell, New Mexico.

Mr. Sapp, through his attorney, advised the Administrative Law Judge presiding over the administrative rulemaking hearing, on May 15, 2009 (11 days after the hearing's start), that health problems precluded his flying to Cincinnati to personally testify. His attorney moved that in Mr. Sapp's absence, his written declaration with attached exhibits be received in evidence. The motion was denied on the basis that the rules of practice (7 C.F.R. §900.8(b)(1) and (d)(1)(i)) require actual testimony that is open to cross examination (Tr. 3264-3294). Additionally, it is noted that under the governing rules of practice "when necessary, in order to prevent undue prolongation of the hearing, the judge may limit the… amount of corroborative or cumulative evidence….and shall, insofar as practicable, exclude evidence which is immaterial, irrelevant or unduly repetitious…"(7 C.F.R. §900.8(d)(1)ii) and(iii)). The declaration and the exhibits were placed in a sealed envelope and marked as Exhibits 92 and 93 (Tr. 3287). By May 15, 2009, there was an abundance of evidence in the Hearing Record on the competitive difficulties facing small producer-handlers which was the gist of Mr. Sapp's proffered testimony. A motion was later made to the Secretary to reverse the ruling and re-open the hearing for cross-examination of any material fact in genuine dispute. That motion was also denied. Copies of the motion to the Secretary with the written declaration and the exhibits are found in the Appendix of Excerpts from the Rulemaking Hearing Record as Appendices L and M.

I have reviewed the proffered declaration and the attached exhibits and find them to be inconsequential to the final outcome of the rulemaking action. Mr. Sapp's company, Nature's Dairy, is a producer-handler whose operation, according to his proffered declaration, has less than 3 million pounds of monthly milk distribution, and as such remains exempt from Federal milk order regulation under the Secretary's actions. The declaration and the exhibits Nature's Dairy sought to have introduced concerned an example of the economic disadvantages that a small producer-handler can experience in competing for accounts with large handlers. The hearing record has an abundance of other testimony on the same subject that was received prior to the contested motion. Moreover, although Petitioner is a producer-handler, it is not a small dairy operation. Its distribution exceeds the 3 million pound monthly limit that has been placed on the producer-handler exemption. Mr.

Sapp's testimony, if received, would have no relevance to Petitioner or any other of the large producer-handlers that are no longer exempt from regulation. It therefore makes no sense to debate the merits of the ruling on the original motion that excluded the declaration and exhibits, or the affirmance of that ruling by the Secretary. The rulings concerned evidence on a subject that has become moot. If any aspect of the ruling was in error, which I do not find to be the case, it must now be construed to be harmless error that does not merit setting aside the Final Decision and the Final Rule, or reopening the record upon which they were based for the receipt of the declaration and the exhibits.

The Secretary's Final Decision
did not violate the Regulatory Flexibility Act

Petitioner seeks to have the Secretary's Final Decision set aside for violating the Regulatory Flexibility Act by failing to analyze the impact of the Final Rule on small entity producer-handlers as measured by plant operator criteria instead of the size of their dairy farm operations.

The Secretary succinctly explained in the Final Decision why he employed the size of a producer-handler's dairy farm operation to distinguish those that are small from those that are large:

Producer-handlers are persons who operate dairy farms and generally process and sell their own milk production. A pre-condition to operating a processing plant as a producer-handler is the operation of a dairy farm. Consequently, the size of the dairy farm determines the production level of a producer-handler's farm operation and is also the controlling factor of the volume that is processed by the plant that is available for distribution. Accordingly, the major consideration in determining whether a producer-handler is a large or small business is its capacity as a dairy farm. Under SBA criteria, a dairy farm is considered large if its gross revenue exceeds $750,000 per year which equates to a production guideline of 500,000 pounds of milk per month. Accordingly, a producer-handler with Class I disposition and sales of packaged fluid milk products to other plants in excess of three million pounds per month is considered by this decision to be a large business.

Final Decision, 75 FR 10122 at 10147

Furthermore, the requirements of the Regulatory Flexibility Act were specifically addressed by the Secretary at the outset of the Final Decision:

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601-612), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a "small business" if it has annual gross revenue of less than $750,000, and a dairy products manufacturer is a "small business" if it has fewer than 500 employees. For the purpose of determining which dairy farms are "small businesses," the $750,000 per year criterion was used to establish a milk marketing guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most "small" dairy farms. For purposes of determining a handler's size, if the plant is part of a company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

Producer-handlers are dairy farms that process their own milk production. These entities must operate one or more dairy farms as a pre-condition to operating processing plants as producer-handlers. The size of the dairy farm(s) determines the production level of the operation and is a controlling factor in the capacity of the processing plant and possible sales volume associated with the producer-handler entity. Determining whether a producer-handler is considered a small or large business is therefore dependent on the capacity of its dairy farm(s), where a producer-handler with annual gross revenue in excess of $750,000 is considered a large business.

Final Decision, 75 FR 10122 at 10122-10123

The Final Decision went on to explain that its regulatory impact will be limited to producer-handlers exceeding the three million pounds of monthly disposition criterion.

In *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. United States Department of Agriculture*, 415 F.3d 1078,

1100-1102 (9th Cir.2005), the history and the requirements of the Regulatory Flexibility Act ("RFA") were explained:

….The RFA was passed in 1980 to 'encourage administrative agencies to consider the potential impact of nascent federal regulations on small businesses.' *Assoc. Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 111 (1st Cir.1997). In certain cases, it requires agencies to publish an 'initial regulatory flexibility analysis' at the time a proposed rule is published, and a 'final regulatory analysis' at the time a final rule is published. 5 U.S.C. §§ 603, 604. Judicial review is available only of the final analysis. 5 U.S.C. § 611.

* * * * *

The RFA imposes no substantive requirements on an agency; rather, its requirements are 'purely procedural' in nature. *United States Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C.Cir.2001); *see also Envtl. Defense Ctr., Inc. v. United States EPA*, 344 F.3d 832, 879 (9th Cir.2003), *cert. denied*, 541 U.S. 1085, 124 S.Ct. 2811, 159 L.Ed.2d 246 (2004) ('Like the Notice and Comment process required in administrative rulemaking by the APA, the analyses required by the RFA are essentially procedural hurdles; after considering the relevant impacts and alternatives, an administrative agency remains free to regulate as it sees fit.') To satisfy the RFA, an agency must only demonstrate a 'reasonable, good-faith effort' to fulfill its requirements. *United States Cellular*, 254 F.3d at 88; *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 625 (5th Cir.2000); *Assoc. Fisheries*, 127 F.3d at 114.

The Secretary has fully complied with the RFA. The Notice of Hearing (74 FR 16296, Appendix F) contained an initial RFA analysis. The Final Decision certified that the "… proposed rule will not have a significant economic impact on a substantial number of small entities," and then provided the requisite statement of the factual basis for such certification, as required by 5 U.S.C. § 605(b). The statement was in the form of findings that demonstrated that all essential elements had been considered, and gave a rational explanation of the choices made together with their anticipated effects on various industry members large and small. This is far more than what has been held sufficient for RFA compliance. *See, Carpenter, Chartered v. Secretary of Veteran Affairs*, 343 F.3d 1347, 1356-1357 (Fed.Cir.2003). *See also*, the cases cited in *Ranchers Cattlemen, id*.

The Final Rule Meets the AMAA's "Only Practical Means" Standard

Petitioner further argues that the Final Rule fails to comply with a provision of the AMAA that when marketing orders are issued over the objection of handlers they need to meet an "only practical means" test.

Under section 8c(9) of the AMAA, the Secretary may issue a federal marketing order "notwithstanding the refusal or failure of handlers…to sign a marketing agreement…on which a hearing has been held" upon determining:

(A) That the refusal or failure to sign a marketing agreement…tends to prevent the effectuation of the declared policy of (the AMAA), with respect to this commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity (which, in respect to milk, is favored by at least two-thirds of the producers in the specified marketing area).

7 U.S.C. § 608c(9)

The Final Rule contained the following determinations by the Secretary:

(1) The refusal or failure of handlers…of more than 50 percent of the milk, which is marketed within the specified marketing areas, to sign a proposed marketing agreement, tends to prevent the effectuation of the declared policy of the AMAA;

(2) The issuance of this order amending the Northeast and other orders is the only practical means pursuant to the declared policy of the AMAA of advancing the interests of producers as defined in the orders as hereby amended; and

(3) The issuance of this order amending the Northeast and other orders is favored by at least two-thirds of the producers who were engaged in the production of milk for sale in the respective marketing areas.

Final Rule, 75 FR 21157 at 21160.

Petitioner contends that these determinations are insufficient because they are unsupported by any analysis. However, this standard was

addressed in *Suntex Dairy v. Block*, 666 F.2d 158, 164-165 (5th Cir.1982) where it was held: r

….The Secretary must make a factual determination after the hearing about the tendency of the order to serve the purposes of the Act. In that situation, the Secretary's discretion is limited by his lawful consideration of the evidence that is presented at the 'tendency' hearing under 7 U.S.C. § 608c(4). Under 7 U.S.C. § 608c(9)(B), however, the Secretary is directed to determine, without the development of an additional evidentiary record, the necessity of the proposed order. The statute imposes rigorous obligations on the Secretary to develop an evidentiary record with respect to the 'tendency' aspect of the order, but leaves him to make a determination of its 'necessity' aspect without any further evidence to be taken. The most sensible construction of the statutory scheme, under these circumstances, is that the Secretary's determination for the 'necessity' of the order - once the evidentiary 'tendency' hearing establishes the Secretary's statutory authorization to issue it – is left to his administrative decision whether or not to issue it as 'the only practical means of advancing the interests of the producers…pursuant to the declared policy (of the Act)', 7 U.S.C. § 608c(9)(B).We are reinforced in our view that this is the proper interpretation of the statutory provisions, because the Act has been so administratively construed and administered (albeit it without issue being raised, until now) since its enactment.

The *Suntex* court also noted that:

On oral argument the Court was informed that never in the history of the Act have the handlers voted to approve a marketing arrangement. Thus, the additional finding of necessity has always followed as a matter of course without further hearing or findings. It would alter the established practice of over forty years under the Federal Milk Marketing Act to discover now a separate judicial review of the 'necessity' finding of the Secretary. Thus, the logic of the finding of 'necessity' being based upon the 'tendency' hearing coalesces with the entrenched practice to establish that the 'necessity' determination by the Secretary is discretionary administrative action.

Id. at 165.

There are no contrary judicial decisions and, in accordance with *Suntex*, the Secretary's explicit finding that 'the only practical means' test has been met, satisfies this provision of the AMAA.

The Final Rule Does Not Impose a Prohibited Form of Milk Pricing

Petitioner contends that the Final Rule will subject it to confiscatory, compensatory payments and non-uniform pricing prohibited by the AMAA. In support of its argument, Petitioner cites *Lehigh Valley Coop. Farmers, Inc. v. U.S.*, 370 U.S. 76, 82 S.Ct. 1168, 8 L.Ed.2d 345 (1962), and *Sani-Dairy, a Div. of Penn Traffic Co., Inc. v. Espy*, 939 F.Supp. 410 (W.D.Pa.1993), *aff'd* 91 F.3d 15 (3d Cir. 1996). Both cases are inapposite. They deal with so-called "compensatory payments" assessed upon nonpool milk brought into an order's marketing area that without the payments would unfairly compete with pool milk. The compensatory payments in both cases were found to have been higher than needed to place pool and nonpool milk on substantially similar competitive positions at source, and so excessive as to constitute economic trade barriers prohibited under section 608c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)) that states:

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production are in the United States.

The charges Petitioner seeks to avoid are not compensatory payments assessed on nonpool milk it handles. They are instead charges it must pay under the pricing and pooling provisions of the Federal milk order where it is now regulated as a handler of pool milk. As is presently the case for any other handler regulated by the milk order disposing all of its milk as Class I, Petitioner will now be required to pay the difference between the order's Class I price and the blend price whenever all of the milk it handles goes to Class I fluid milk outlets. Such payments are not "compensatory payments" on nonpool milk entering a market regulated by the milk order from sources outside the market, as were those that were the subject of the two cited cases. Petitioner is subject to the Order's regulation as a handler of pool milk and, as is the case with all other pool handlers, must therefore account for the milk it handles in accordance with the order's pricing and pooling provisions which are identical for all pool milk handlers. Petitioner argued at the rulemaking

hearing that because there was evidence that it cost producer-handlers more to produce milk than milk order blend prices, an order's blend price should not be used in computing a producer-handler's obligations to the order's producer-settlement fund if uniform pricing is to be achieved. But the Secretary fully addressed all of those arguments when he examined the record evidence upon which he based his Final Decision and Final Rule, and for the reasons discussed at length in Conclusion 3, *supra*, deference must now be given to his underlying findings.

Accordingly, having considered and discussed all of the Petitioner's arguments, the following Order is being entered.

ORDER

The Petition is dismissed and the relief it seeks is denied.

It is ruled that the Secretary's Final Decision, 75 FR 10122-01, 2010 WL 723277 (F.R.)) and the Secretary's implementing Final Rule (75 FR 21157-01, 2010 WL 1625292 (F.R.)) are both in accordance with law. Therefore, neither should be modified, nor should Petitioner be exempted from their regulatory effects.

This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on the Petitioner unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice (7 C.F.R.§ 1.145).

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

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DEPARTMENTAL DECISIONS

MITCHELL STANLEY d/b/a STANLEY BROTHERS LIVESTOCK.
AQ Docket No. 11-0235.
Decision and Order.
Filed October 4, 2011.

AQ --

Petitioner, Pro se.
Thomas Bolick, Esq. for APHIS.
Initial Decision and Order by Chief Administrative Law Judge Peter M. Davenport.
Decision and Order by William G. Jenson, Judicial Officer.

Decision and Order

PROCEDURAL HISTORY

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on May 17, 2011. The Administrator instituted the proceeding under sections 901-905 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. § 1901 note) [hereinafter the Commercial Transportation of Equine for Slaughter Act]; the regulations issued under the Commercial Transportation of Equine for Slaughter Act (9 C.F.R. pt. 88) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges, on or about May 10, 2007, Mitchell Stanley, d/b/a Stanley Brothers Livestock, commercially transported 27 horses from Bastrop, Louisiana, to Cavel International, in DeKalb, Illinois [hereinafter Cavel], for slaughter, in violation of the Commercial Transportation of Equine for Slaughter Act and the Regulations, and, on or about August 13, 2009, Mr. Stanley commercially transported 36

horses from Hamburg, Arkansas, to Carnicos de Jeres S.A. de C.V., in Jerez, Zacatecas, Mexico [hereinafter Carnicos], for slaughter, in violation of the Commercial Transportation of Equine for Slaughter Act and the Regulations.[1]

The Hearing Clerk served Mr. Stanley with the Complaint and a service letter on June 15, 2011.[2] Mr. Stanley failed to file an answer to the Complaint within 20 days after service, as required by the Rules of Practice (7 C.F.R. § 1.136(a)). The Hearing Clerk sent Mr. Stanley a letter dated July 8, 2011, informing Mr. Stanley that he had not filed a timely response to the Complaint. Mr. Stanley failed to file a response to the Hearing Clerk's July 8, 2011, letter.

On July 13, 2011, in accordance with the Rules of Practice (7 C.F.R. § 1.139), the Administrator filed a Motion for Adoption of Proposed Default Decision and Order [hereinafter Motion for Default Decision] and a Proposed Default Decision and Order. The Hearing Clerk served Mr. Stanley with the Administrator's Motion for Default Decision and the Administrator's Proposed Default Decision and Order on July 19, 2011.[3] Mr. Stanley failed to file objections to the Administrator's Motion for Default Decision and the Administrator's Proposed Default Decision and Order within 20 days after service, as required by the Rules of Practice (7 C.F.R. § 1.139).

On August 12, 2011, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ], in accordance with the Rules of Practice (7 C.F.R. § 1.139), issued a Default Decision and Order concluding Mr. Stanley violated the Commercial Transportation of Equine for Slaughter Act and the Regulations, as alleged in the Complaint, and assessing Mr. Stanley an $11,525 civil penalty.

On September 8, 2011, Mr. Stanley appealed the Chief ALJ's Default Decision and Order to the Judicial Officer. On September 23, 2011, the Administrator filed Complainant's Response to Respondent's Appeal.

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[1]Compl. ¶¶ II-III.

[2]Memorandum to the File, dated June 15, 2011, and signed by Carla M. Andrews, Assistant Hearing Clerk.

[3]United States Postal Service Domestic Return Receipt for article number 7009 1680 0001 9852 7836.

On September 28, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful review of the record, I affirm the Chief ALJ's Default Decision and Order.

DECISION

Statement of the Case

Mr. Stanley failed to file an answer to the Complaint within the time prescribed in the Rules of Practice (7 C.F.R. § 1.136(a)). The Rules of Practice (7 C.F.R. § 1.136(c)) provide the failure to file an answer within the time provided in 7 C.F.R. § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file an answer or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact. I issue this Decision and Order pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Mitchell Stanley, d/b/a Stanley Brothers Livestock, owns and operates Stanley Brothers Livestock and has a mailing address in Hamburg, Arkansas.

2. On or about May 10, 2007, Mr. Stanley commercially transported 27 horses from Bastrop, Louisiana, to Cavel, for slaughter but failed to properly fill out the required owner/shipper certificate, VS 10-13. The form had the following deficiencies: (1) the prefix and tag number for one horse's USDA back tag were not recorded, in violation of 9 C.F.R. § 88.4(a)(3)(vi); (2) the form did not indicate the breed or type of any of the horses, in violation of 9 C.F.R. § 88.4(a)(3)(v); and (3) Mr. Stanley did not sign the form on the owner/shipper signature line, in violation of 9 C.F.R. § 88.4(a)(3).

3. On or about August 13, 2009, Mr. Stanley commercially transported 36 horses from Hamburg, Arkansas, to Carnicos, a commercial horse slaughter plant, for slaughter. None of the horses in the shipment were tagged with a USDA back tag, in violation of 9 C.F.R. § 88.4(a)(2).

4. On or about August 13, 2009, Mr. Stanley commercially transported 36 horses from Hamburg, Arkansas, to Carnicos for slaughter but did not properly fill out the required owner/shipper certificate, VS 10-13. The form had the following deficiencies: (1) the form did not list the date and time that the horses were loaded onto the conveyance, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

5. On or about August 13, 2009, Mr. Stanley commercially transported 36 horses from Hamburg, Arkansas, to Carnicos for slaughter. Mr. Stanley's driver developed engine trouble while en route to the land border port in Eagle Pass, Texas, so he offloaded the horses at Atascosa Livestock Auction in Pleasanton, Texas, and took his truck in for repairs. Mr. Stanley sent a relief driver to Pleasanton, Texas, to load the horses onto a conveyance and take them to the border, but the relief driver did not prepare a second owner/shipper certificate, VS 10-13, noting the date, time, and place when and where the offloading occurred, in violation of 9 C.F.R. § 88.4(b)(4).

6. On or about August 13, 2009, Mr. Stanley commercially transported 36 horses from Hamburg, Arkansas, to Carnicos for slaughter. One of the horses in the shipment, bearing Louisiana back tag # 72DL3 285, had a severe laceration on the inside of its left rear leg that was causing the horse obvious physical distress. A USDA representative informed Mr. Stanley about the injured horse and directed him to seek veterinary assistance to alleviate the suffering of the horse. Despite being informed about the horse's injury and directed to obtain veterinary assistance for the injured horse from an equine veterinarian, Mr. Stanley did not obtain veterinary assistance for the horse and the horse had to be euthanized. Mr. Stanley thus failed to obtain veterinary assistance as soon as possible from an equine veterinarian for a horse that was in obvious physical distress, in violation of 9 C.F.R. § 88.4(b)(2). Mr. Stanley also failed to comply with the directions of a USDA representative to take appropriate actions to alleviate the suffering of the injured horse, in violation of 9 C.F.R. § 88.4(e).

Conclusions of Law

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

2. By reason of the Findings of Fact set forth in this Decision and Order, Mr. Stanley violated the Commercial Transportation of Equine for

Slaughter Act (7 U.S.C. § 1901 note) and the Regulations (9 C.F.R. pt. 88).

Mr. Stanley's Appeal Petition

Mr. Stanley raises three issues in his letter filed September 8, 2011 [hereinafter Appeal Petition]. First, Mr. Stanley denies some of the allegations of the Complaint (Appeal Pet. at 1).

The Hearing Clerk served Mr. Stanley with the Complaint on June 15, 2011.[4] Mr. Stanley was required by the Rules of Practice to file a response to the Complaint within 20 days after the Hearing Clerk served him with the Complaint;[5] namely, no later than July 5, 2011. The Rules of Practice provide that failure to file a timely answer shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint.[6] Mr. Stanley's denial of the allegations of the Complaint in his Appeal Petition, filed September 8, 2011, 2 months 3 days after Mr. Stanley was required to file an answer, comes far too late to be considered. As Mr. Stanley has failed to file a timely answer, Mr. Stanley is deemed to have admitted the material allegations of the Complaint, and I reject his late-filed denial of the allegations of the Complaint.

Second, Mr. Stanley asserts he is not able to pay the $11,525 civil penalty assessed by the Chief ALJ. Mr. Stanley requests that I reduce the $11,525 civil penalty assessed by the Chief ALJ to an amount that he is able to pay. Mr. Stanley asserts he can pay a $1,000 civil penalty in installments. (Appeal Pet. at 1.)

Neither the Commercial Transportation of Equine for Slaughter Act nor the Regulations provide that a respondent's ability to pay a civil penalty is a factor that must be considered when determining the amount of the civil penalty to be assessed for violations of the Commercial Transportation of Equine for Slaughter Act and the Regulations. I have consistently rejected requests that I consider a respondent's ability to pay a civil penalty when determining the amount of the civil penalty to be assessed in cases involving violations of the Commercial Transportation

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[4]See note 2.

[5]See 7 C.F.R. § 1.136(a).

[6]See 7 C.F.R. § 1.136(c).

of Equine for Slaughter Act and the Regulations.[7] Therefore, I reject Mr. Stanley's request that I reduce the $11,525 civil penalty assessed by the Chief ALJ based upon Mr. Stanley's inability to pay that civil penalty.

Third, Mr. Stanley states the Chief ALJ's findings have made him physically ill and emotionally upset (Appeal Pet. at 1-2).

I have no reason to doubt Mr. Stanley's assertions regarding the impact of the Chief ALJ's findings on his physical health and emotional state. While I empathize with Mr. Stanley, the impact of an administrative law judge's decision on a respondent's physical and emotional health is not a basis for setting aside that decision.

For the foregoing reasons, the following Order is issued.

ORDER

Mitchell Stanley, d/b/a Stanley Brothers Livestock, is assessed a civil penalty of $11,525. This civil penalty shall be paid by certified check or money order payable to the "Treasurer of the United States" and sent to:

U.S. Bank
P.O. Box 979043
St. Louis, MO 63197

Payment of the civil penalty shall be sent to, and received by, the U.S. Bank within 30 days after service of this Order on Mr. Stanley. Mr. Stanley shall state on the certified check or money order that payment is in reference to Docket No. 11-0235.

Done at Washington, DC.

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[7] *See In re William Richardson* (Order Denying Pet. to Reconsider), __ Agric. Dec. ___, slip op. at 11-12 (Oct. 28, 2010); *In re Leroy H. Baker, Jr.* (Order Denying Pet. to Reconsider), 67 Agric. Dec. 1259, 1261-62 (2008).

DEPARTMENTAL DECISIONS

ROBYN DAVIS.
AWG Docket No. 11-0196.
Decision and Order.
Filed July 5, 2011.

AWG --

Dennis Atteberry, Esq. for Petitioner.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing was held by telephone on June 28, 2011. Ms. Robyn L. Davis, formerly Robyn L. Edwards, the Petitioner ("Petitioner Davis") participated, represented by Dennis Atteberry, Esq. and Cara Pratt-Fleming, Esq. Petitioner Davis's husband, Mr. Jacob Davis, was present. [Petitioner Davis's husband is **not** liable to repay "the debt" described in paragraph 3.]

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Ms. Mary Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Davis owes to USDA Rural Development a balance of **$29,410.50** (as of May 4, 2011, *see* RX 11), in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX 3, esp. p. 2) for a loan made in 2005, the balance of which is now unsecured ("the debt"). Petitioner Davis borrowed, with the co-borrower, her then-husband, to buy a home in Illinois. *See* USDA Rural Develop-ment Exhibits RX 1 through RX 12 together with the Narrative, Witness & Exhibit List (filed May 17, 2011); and the testimony of Mary Kimball, all of which I admit into evidence.

4. I admit into evidence Petitioner Davis's testimony, together with Petitioner Davis's Exhibits PX 1 through PX 12, which include her "Consumer Debtor Financial Statement," together with her Narrative (filed June 3, 2011), her Supplemental Report and Narrative and PX 13 (filed June 22 and June 27, 2011), and her pay stubs filed June 30, 2011, together with Petitioner Davis's Hearing Request and accompanying documentation.

5. Petitioner Davis's co-borrower, her former husband, was required to and failed to pay the debt on the home. PX 5, pp. 1, 2; Petitioner Davis's Narrative. Petitioner Davis's divorce from the co-borrower was in October 2005. PX 5, p. 1. The "Due Date of Last Payment Made" was December 1, 2007. RX 5, p. 3. The "Date Eviction Started" was August 10, 2009; the "Date Eviction Completed" was October 8, 2009. RX 5, p. 3. Although Petitioner Davis may pursue the co-borrower for monies collected from her on the debt, that does not prevent USDA Rural Development from collecting from her under the ***Guarantee***. RX 3.

6. The ***Guarantee*** (RX 3) establishes an **independent** obligation of Petitioner Davis, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 3, p. 2.

7. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$29,410.50** would increase the current balance by $8,234.94, to $37,645.44. RX 11.

8. Petitioner Davis's Narrative filed June 3, 2011 explains that the lender Chase had Petitioner Davis's correct address and failed to use it. Petitioner Davis: "I had not been given any notification of delinquencies or opportunities to rectify the deficiency. When the process was initiated, my summons was reported as hand delivered to an address that the lender knew was not mine to a person that was not me. Chase did not request proper service by publication; rather they falsely certified that I was successfully notified through substitute service. Afterwards, the foreclosure occurred and a default judgment was granted against me. Chase then requested reimbursement from the USDA for default on the guaranteed loan." Petitioner Davis's Narrative, p. 1.

9. The Order Approving Sale was entered on April 9, 2009. If the lender Chase had effected service properly on Petitioner Davis, not only in the foreclosure action but also in all delinquency notices (all through 2008, for example, and into 2009), could USDA Rural Development have avoided the loss here? If Petitioner Davis had been given timely notification of delinquencies and opportunities to rectify the deficiency, would she have rectified the deficiency? Would she have prevented the lender's loss; therefore the lender's claim and USDA Rural Development's loss? Possibly so. USDA Rural Development maintains that Petitioner Davis's remedy would have to be pursued against the lender Chase. Petitioner Davis did achieve the Agreed Order and Partial Release entered January 20, 2011. PX 6. But the lender Chase did not need to concern itself, because it had already looked to USDA Rural Development to be made whole under the ***Guarantee***, and its claim had been paid, $31,341.50, nearly a year before, on February 12, 2010. RX 5, p. 7.

10. USDA Rural Development's evaluation of the lender's claim was unrelated to the lender's action to obtain a personal deficiency. USDA Rural Development's evaluation of the lender's claim is summarized in RX 5. USDA Rural Development evaluated, among other things,

timeliness at various stages of the proceeding; the appraised values of the security ($22,000.00 "As Is" Appraised Value; $45,000.00 "As Is" BPO [broker price opinion]; and $38,000.00 RHS Liquidation Appraised Value, *see* RX 4); and the reasonableness of costs and fees. USDA Rural Development's review of the lender's claim and determination of loss (*see* RX 5), finalized on February 12, 2010 (RX 5, p. 7), determined the lender's loss to be $31,341.50, which is the amount USDA Rural Development paid the lender and then began to collect from Petitioner Davis and her co-borrower. (USDA has since received one payment from Treasury totaling $1,931.00, which leaves the balance of **$29,410.50**.)

11. Petitioner Davis is NOT liable under the personal deficiency judgment entered effective April 9, 2009 against the co-borrower. *See* PX 5 and PX 6, including the Agreed Order and Partial Release entered January 20, 2011; included also in Petitioner Davis's Hearing Request and accompanying documentation. Petitioner Davis's success in obtaining deletion of any reference to a personal deficiency entered against her does not, however, prevent USDA Rural Development from collecting from her. This is in part because of the independent nature of the ***Guarantee***; and in part because administrative collections such as this do not require a valid judgment to support garnishment or ***offset***. An agency of the United States government collecting administratively has rules that differ from those of the various jurisdictions in which the loans were made.

12. Petitioner Davis directs my attention to 7 C.F.R. § 1980.301, *et seq*., especially 7 C.F.R. § 1980.308, which she asserts renders the loan note guarantee unenforceable because of negligent servicing, specifically here, the lender's failure to effect service on Petitioner Davis in the foreclosure action. After careful consideration of 7 C.F.R. § 1980.308, I find that, if USDA Rural Development were to seek a determination against the lender Chase that the loan note guarantee is unenforceable here, such action would inure to Petitioner Davis's benefit only insofar as USDA Rural Development recovered from the lender Chase some or all of the $31,341.50.

13. Petitioner Davis asks that I follow the lead of my colleague, Chief Judge Peter M. Davenport, in PX 9, PX 10, and PX 11, and find

that USDA Rural Development paid an entity not then the holder of the note. Under these circumstances, I do not so find. Here, I find that the original lender was Draper and Kramer Mortgage Corp. RX 1. The Assignment of Mortgage from Draper and Kramer Mortgage Corp. was to JP Morgan Chase Bank, N.A. RX 2. The servicing lender, allowed to foreclose in a judicial foreclosure and given the Order Approving Sale and Order of Possession on April 9, 2009, was Chase Home Finance LLC. *See* PX 6. USDA Rural Development paid the claim of Chase Home Finance LLC. RX 5. Additionally, but not essential here, I take official notice that JP Morgan Chase Bank, N.A. is the parent company of Chase Home Finance LLC.

14. Petitioner Davis summarizes, in part:

"I don't know what else I could have done. I literally woke up one day (August 10, 2010) and everything seemed fine, went to the post office and found out I was being pursued for $31,341.50 for something I knew nothing about, did not cause and did not get the opportunity to prevent.

If I had been afforded the chance, I would have taken every step possible to prevent this foreclosure. Since Chase chose not to provide me with that right, I believe and the law supports that they forfeited their right to collect on the foreclosure. Whether their actions were negligent or fraudulent, I don't know, but either way they broke the law and created an illegal foreclosure that could have been prevented. While I understand that a payment was made, by the USDA to Chase, it shouldn't have."

15. Petitioner Davis has presented her case with excellence, and I agree with her that her legal recourse against her co-borrower for monies collected from her on the debt seems inadequate. Once she entered into the borrowing transaction with her co-borrower, certain responsibilities were fixed that were addressed but not erased by the divorce orders, and that were addressed but not erased by the Agreed Order and Partial Release. PX 6. Thus, I conclude that Petitioner Davis still owes the balance of **$29,410.50** (excluding potential collection fees), as of May 4, 2011. Here, even where there is NO judgment entered against Petitioner Davis, and NO personal deficiency entered against Petitioner Davis,

USDA Rural Development may still collect administratively, pursuant to the ***Guarantee***.

16. Petitioner Davis and her husband Jacob Davis, who is **not** liable to repay the debt, support themselves and two children, with some child support help (sometimes sporadic) from her co-borrower and former husband, Mr. Edwards. Even when Mr. Edwards pays the full amount of ordered child support (for one of the two children in Petitioner Davis's household), the child support amounts to less than half of Petitioner Davis's daycare expense. Petitioner Davis is paid every two weeks, working in health care as a Customer Advocate. She makes $* per hour, plus benefits. She occasionally works some overtime, but my calculations do not rely on overtime. Petitioner Davis's gross pay every two weeks, excluding overtime, is $***, which is about $*** per month. From gross pay, I calculate disposable pay, which is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld. In Petitioner Davis's case, the only deduction that I have not allowed in calculating her disposable income is her 401K deduction. After adding back in the 401K deduction, and taking into account that certain health care deductions come out of only one pay check each month (12 paychecks a year deduct roughly $137.00 more), I find that Petitioner Davis's disposable pay (within the meaning of 31 C.F.R. § 285.11) is roughly $*** per month (*see* pay stubs filed June 30, 2011). Although garnishment at 15% of Petitioner Davis's disposable pay could yield roughly $** per month in repayment of the debt, she cannot withstand garnishment in that amount without financial hardship.

17. Petitioner Davis has the support of her husband, and some child support from her former husband (the court-ordered amount is $324.00 per month), but even taking this into account, her reasonable and necessary expenses for her household of four, including her two children, currently prevent her from paying 15% of her disposable pay. Daycare alone costs $** per month, which is 40% of her disposable pay. Her half of the mortgage and car payments would take another 40% of her disposable pay. Her half of the utilities, vehicle insurance, gasoline and vehicle repairs, would take the remainder of her disposable pay. Food and clothing and out-of-pocket medical expenses, among other things,

remain to be paid. So even when her husband's support and the child support from her former husband are factored in, Petitioner Davis's disposable pay (within the meaning of 31 C.F.R. § 285.11) does **not** currently support garnishment and **no** garnishment is authorized through **August 2013**. To prevent hardship, potential garnishment to repay "the debt" (*see* paragraph 3) must be limited to **0%** of Petitioner Davis's disposable pay through **August 2013**; then, beginning no sooner than September 2013, following review of Petitioner Davis's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, garnishment up to 15% of Petitioner Davis's disposable pay is authorized. 31 C.F.R. § 285.11.

18. Petitioner Davis may choose to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

19. **NO garnishment is authorized through August 2013.** I encourage **Petitioner Davis and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Davis, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. You may want to request apportionment of debt between you and the co-borrower. You may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

20. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Davis and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

21. Petitioner Davis owes the debt described in paragraphs 3, 6 and 7.

22. **NO garnishment is authorized through August 2013**, because garnishment would create financial hardship. 31 C.F.R. § 285.11.

23. **Beginning no sooner than September 2013**, following review of Petitioner Davis's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, **garnishment up to 15% of Petitioner Davis's disposable pay is authorized**. 31 C.F.R. § 285.11.

24. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Davis's **income tax refunds** or other **Federal monies** payable to the order of Ms. Davis.

Order

25. Until the debt is fully paid, Petitioner Davis shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

26. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment through **August 2013**. **Beginning no sooner than September 2013**, following review of Petitioner Davis's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, **garnishment up to 15% of Petitioner Davis's disposable pay is authorized**. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties, **including both Petitioner Davis AND her attorney**.

Done at Washington, D.C.

MELANIE E. ROMERO n/k/a MELANIE E. HALCROW.
AWG Docket No. 11-0231.
Decision and Order.
Filed July 7, 2011.

AWG –

Petitioner Pro se.

Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was held as scheduled on July 6, 2011. Ms. Melanie E. Halcrow, formerly known as Melanie E. Romero ("Petitioner Halcrow"), did not participate. (Petitioner Halcrow did not participate by telephone: no one answered the phone number provided in her Hearing Request; she did not provide any other phone number. I left a recorded message asking for a return call and giving my phone number and did not receive a return call.)

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Halcrow owes to USDA Rural Development a balance of **$17,001.28** (as of May 24, 2011) in repayment of a United States Department of Agriculture Farmers Home Administration loan made in 1995, for a home in Texas. The balance is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed June 9, 2011), which are admitted into evidence, together with the testimony of Mary Kimball.

4. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on

$17,001.28 would increase the current balance by $4,760.36, to $21,761.64. *See* USDA Rural Development Exhibits, esp. RX 8.

5. The amount Petitioner Halcrow (then Romero) borrowed in 1995 was $56,580.00. By the time of the short sale in 2001 (Assumption Agreement for less than was owed, *see* RX 6), that debt had grown to $74,780.28:

$ 60,539.28	Principal Balance prior to short sale[1]
$ 9,466.52	Interest Balance prior to short sale
$ 4,774.48	Fees Balance prior to short sale
$ 74,780.28	Total Amount Due prior to short sale
=========	
- $54,600.00	Proceeds from short sale
$ 20,180.28	Unpaid in 2001

RX 7 and USDA Rural Development Narrative.

Another $3,179.00 applied to the debt since then leaves **$17,001.28** unpaid now (excluding the potential remaining collection fees). *See* RX 7, esp. p. 2, and USDA Rural Development Narrative.

6. Evidence is required for me to determine whether Petitioner Halcrow's disposable pay supports garnishment without creating hardship. 31 C.F.R. § 285.11. Petitioner Halcrow failed to file a completed "Consumer Debtor Financial Statement" or anything in response to my Order dated June 3, 2011, so I cannot calculate either Petitioner Halcrow's income or her reasonable and necessary living expenses.

7. With no testimony from Petitioner Halcrow and no financial information, I cannot calculate Petitioner Halcrow's current disposable pay (after subtracting Federal income tax, social security, Medicare,

[1] The principal was increased in 1998 through a re-amortization, which allowed Petitioner to become current by the payment of delinquent taxes and insurance, which were then added to the principal balance. *See* Narrative.

health insurance, and any other "eligible" withholding from her gross pay). I cannot evaluate the factors to be considered under 31 C.F.R. § 285.11, so I must assume that Petitioner Halcrow can withstand garnishment without financial hardship.

8. Nevertheless, since Petitioner Halcrow has made progress in repaying the debt through the collections detailed on RX 7, p. 2, I find that through January 2012, potential garnishment to repay "the debt" (*see* paragraph 3) should be and will be limited to zero per cent (0%) of Petitioner Halcrow's disposable pay. 31 C.F.R. § 285.11. Beginning February 2012, garnishment up to 15% of Petitioner Halcrow's disposable pay is authorized. 31 C.F.R. § 285.11.

9. Petitioner Halcrow is responsible and able to negotiate the repayment of the debt with Treasury's collection agency. The 6 months' delay in beginning garnishment gives Petitioner Halcrow ample time to complete negotiation.

Discussion

10. NO garnishment is authorized through January 2012. Thereafter, garnishment up to 15% of Petitioner Halcrow's disposable pay is authorized. *See* paragraphs 6, 7 and 8. I encourage **Petitioner Halcrow and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Halcrow, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Halcrow, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Halcrow and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

12. Petitioner Halcrow owes the debt described in paragraphs 3, 4 and 5.

13. **NO garnishment is authorized through January 2012**. Beginning February 2012, **garnishment up to 15% of Petitioner Halcrow's disposable pay is authorized**. 31 C.F.R. § 285.11.

14. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Halcrow's **income tax refunds** or other **Federal monies** payable to the order of Ms. Halcrow.

Order

15. Until the debt is repaid, Petitioner Halcrow shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

16. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment through January 2012. Beginning February 2012, garnishment up to 15% of Petitioner Halcrow's disposable pay is authorized. 31 C.F.R. § 285.11.

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

Done at Washington, D.C.

_____

SYLVIA BORJON.
AWG Docket No. 11-0227.
Decision and Order.
Filed July 11, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Hearing Officer James P. Hurt.

Decision and Order

This matter is before me upon the request of Sylvia Borjon, Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On June 3, 2011, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The Rural Development Agency (RD), Respondent, complied with the Discovery Order and a Narrative was filed, together with supporting documentation RX-1 through RX-12 on June 9, 2011. The Petitioner filed her financial statement on June 24, 2011 (which I now label as PX-1) including her monthly expense statement for her household expenses. She stated her husband was not working and was receiving disability benefits and advised that her share of the household expenses were half of each category listed. Petitioner has been employed for less than a full year and thus will not be subject to a wage garnishment at this time.

Ms. Mary Kimball represented RD. The parties were sworn.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On February 7, 1992, Sylvia Borjon assumed a home mortgage loan in the amount of $35,000.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) to purchase her home on a property located in 10** Peach St. Floresville, TX 78###[1].

RX-1, RX-2.

2. At the time of the RD loan, borrower also obtained a loan and signed a Deed of Trust for $4,500.00 for the same property. RX-4.

3. Ms. Borjon became delinquent and was sent a Notice of Default on April 5, 2000. RX-8.

4. The borrower entered into a “short sale” on October 23, 2000 where the property was sold for $32,099.76. RX-9.

5. The principal loan balance for the both RD loans prior to the short sale was $48,997.15. The Principal balance for Act. # 2874929

[1] The complete address is maintained in USDA files.

was $33,450.15, plus $4,817.33 for accrued interest, plus $4,282.90 for fees for a total of $42,550.38. Narrative, RX-10.

6. RD received $30,600.00 from the short sale. The second loan (Act. # 2874916) was paid in full and RD released the lien on borrower's property; however the underlying debt remained as an unsecured debt. Narrative, RX-10.

7. The balance due of the remaining debt is $18,397.24 - exclusive of potential Treasury fees. Narrative, RX-10.

8. The remaining potential fees from Treasury are $5,151.23. RX-11.

9. Ms. Borjon states that she has been gainfully employed with her current employer for 7 months.

10. Ms. Borjon states that her husband is disabled and receives benefits.

Conclusions of Law

Petitioner is indebted to USDA Rural Development in the amount of $18,397.24 exclusive of potential Treasury fees for the mortgage loan extended to her.

In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $5,151.23.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is NOT entitled to administratively garnish the wages of the Petitioner at this time.

Order

For the foregoing reasons, the wages of Petitioner shall NOT be subjected to administrative wage garnishment at this time. After five months, RD may re-assess the Petitioner's financial position.

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

July 11, 2011

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RUTH E. WHIGHAM n/k/a RUTH E. PURVIS.
AWG Docket No. 11-0205.
Decision and Order.
Filed July 11, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was held as scheduled on June 23, 2011. Ms. Ruth E. Purvis, formerly known as Ruth E. Whigham ("Petitioner Purvis"), did not participate. (Petitioner Purvis did not participate by telephone: no one answered the phone number she provided in her Hearing Request; a recording identified the phone as that of Petitioner Purvis; Petitioner Purvis did not provide any other phone number where she could be reached.)

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
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314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Purvis owes to USDA Rural Development a balance of **$12,085.05** (as of May 6, 2011) in repayment of two United States

Department of Agriculture Farmers Home Administration loans made in 1989, for a home in Mississippi. The balance is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed May 9, 2011), which are admitted into evidence, together with the testimony of Mary Kimball.

4. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$12,085.05** would increase the current balance by $3,625.51, to $15,710.56. *See* USDA Rural Development Exhibits, esp. RX 6, pp. 1, 2.

5. The amount Petitioner Purvis (then Whigham) borrowed in 1989 was $39,500.00 ($30,900.00 on one loan, $8,600.00 on the other loan). In 1997, Petitioner re-amortized her accounts, which allowed her to become current, by adding the amount that was delinquent to the principal. By the time of the foreclosure sale in 2000, that debt had grown to $51,645.41:

$ 47,155.09	Principal Balance prior to foreclosure sale
$ 3,462.41	Interest Balance prior to foreclosure sale
$ 1,027.91	Fees Balance prior to foreclosure sale
$ 51,645.41	Total Amount Due prior to foreclosure sale
=========	
- $ 34,300.00	Proceeds from foreclosure sale
$ 17,345.41	Unpaid in 2000

RX 5 and USDA Rural Development Narrative.

Another $5,260.36 applied to the debt since then leaves **$12,085.05** unpaid now (excluding the potential remaining collection fees). *See* RX 5, esp. pp. 2, 3 and USDA Rural Development Narrative.

6. Petitioner Purvis's Hearing Request was late, so as of May 6, 2011, she had already experienced garnishment, at a rate of about $308.00 per month for six months. Petitioner Purvis's progress in repaying the debt is detailed on RX 5, pp. 2, 3. Petitioner Purvis wrote:

"The amount of garnishment is too much. I would like to be able to pay $100.00 per month on it myself by money order."

See Petitioner Purvis's Hearing Request.

7. Based on roughly $308.00 per month garnishment, I calculate Petitioner Purvis's current disposable pay to be roughly $2,050.00 per month. (Disposable pay is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.)

8. Taking into account the factors to be considered under 31 C.F.R. § 285.11, I find that potential garnishment to repay "the debt" (*see* paragraph 3) should be and will be limited to the following amounts of Petitioner Purvis's disposable pay:

(a) through January 2012, zero per cent (0%);

(b) beginning February 2012, through January 2014, up to $100.00 per month; and

(c) beginning no sooner than February 2014, following review of Petitioner Purvis's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, up to 15%.

9. Petitioner Purvis is responsible and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

10. NO garnishment is authorized through January 2012. Thereafter, garnishment of Petitioner Purvis's disposable pay is authorized as shown in paragraph 8. I encourage **Petitioner Purvis and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Purvis, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Purvis, you may choose to offer to the collection agency

to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Purvis and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

12. Petitioner Purvis owes the debt described in paragraphs 3, 4 and 5.

13. **NO garnishment is authorized through January 2012**. Beginning February 2012, 2012, through January 2014, **garnishment up to $100.00 per month** is authorized. Beginning no sooner than February 2014, following review of Petitioner Purvis's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, **garnishment up to 15% of Petitioner Purvis's disposable pay** is authorized. 31 C.F.R. § 285.11.

14. **NO refund** to Petitioner Purvis of monies already collected is appropriate, and no refund is authorized.

15. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Purvis's **income tax refunds** or other **Federal monies** payable to the order of Ms. Purvis.

Order

16. Until the debt is repaid, Petitioner Purvis shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

17. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment through January 2012. Beginning February 2012, through January 2014, garnishment up to $100.00 per month is authorized. Beginning no sooner than February

2014, following review of Petitioner Purvis's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, garnishment up to 15% of Petitioner Purvis's disposable pay is authorized. 31 C.F.R. § 285.11.

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

Done at Washington, D.C.

_____

DEBORAH KOVARY n/k/a DEBORAH HARTSHORN.
AWG Docket No. 11-0221.
Decision and Order.
Filed July 14, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Hearing Officer James P. Hurt.

Decision and Order

This matter is before me upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On May 20, 2011, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The Rural Development Agency (RD), Respondent, complied with the Discovery Order and a Narrative was filed, together with supporting documentation RX-1 through RX-6 on June 1, 2011. The Petitioner filed her financial statement on June 30, 2011 (which I now label as PX-1). Petitioner prepared her monthly expense statement for her share of the household expenses. Following the hearing, Petitioner provided a bi-weekly payroll statement and clarification to her financial statement (which I now label as PX-2 and PX-3, respectively.

Petitioner was present and was represented by her attorney, Michael Drain. Ms. Mary Kimball represented RD. The parties were sworn.

Petitioner advised that the payroll statement she provided represented 73.5 hours of work for a two week period whereas she normally has 80 hours of work for a two week period. I grossed up the income and taxes by a 1.088 factor. I did not allow life insurance and 401K expenses, but did allow $122 for half of her husband's car payment. On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On February 3, 1998, Deborah Kovary received a secondary home mortgage loan in the amount of $78,000.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) to purchase her home on a property located in 14*** Standish Ave. Middlefield, OH 440##[1].

RX-1, RX-2.

2. At the time of the RD loan, there was a pre-existing first mortgage from Cortland Savings and Banking on the same property which was originally $20,000.00.

2. Ms. Kovary reamortized her RD loan under the same terms on April 3, 2008 and the new principal amount became $71,619.82. RX-3.

3. The borrower became in default and a Notice of Acceleration was mailed on August 27, 2009. RX-4.

4. The borrower entered into a "short sale" where the property was sold for $87,000.00. RX-5.

5. The first mortgage to Cortland was paid in full and RD released the lien on borrower's property; however the underlying debt remained as an unsecured debt. Narrative, RX-5.

6. The principal loan balance for the RD loan prior to the short sale was $69,487.11, plus $5,525.64 for accrued interest, plus $2,050.39 for fees for a total of $77,109.90. Narrative, RX-5.

7. RD received a net $54,384.06 from the short sale. Narrative, RX-5.

[1] The complete address is maintained in USDA files.

8. Treasury offsets totaling $1,673.00 exclusive of Treasury fees have been received from borrower. RX-5.

9. The remaining unpaid debt is in the amount of $21,052.84 - exclusive of potential Treasury fees. RX-5.

10. The remaining potential fees from Treasury are $5,894.80. RX-6.

11. Ms. Kovary states that she has been gainfully employed for 4 years.

12. Ms. Kovary raised issues of financial hardship. I performed a Financial Hardship calculation using the financial statements and payroll statements she provided[2].

Conclusions of Law

Petitioner is indebted to USDA Rural Development in the amount of $57,575.51 exclusive of potential Treasury fees for the mortgage loan extended to her.

In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $5,894.80.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is entitled to administratively garnish the wages of the Petitioner at the rate of 5% of her monthly disposable income.

Order

For the foregoing reasons, the wages of Petitioner shall be subjected to administrative wage garnishment at the rate of 5% of her monthly disposable income. After one year, RD may re-assess the Petitioner's financial position.

[2] The Financial Hardship calculation is not posted on the OALJ website.

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

JESSIE L. FLOWERS.
AWG Docket No. 11-0176.
Decision and Order.
Filed July 15, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was begun on June 15, 2011. Mr. Jessie L. Flowers, the Petitioner ("Petitioner Flowers"), participated, representing himself (appearing *pro se*). The hearing was scheduled to resume on July 20, 2011, but that is CANCELED, because the documents Petitioner Flowers filed on July 12, 2011 are sufficient without more testimony.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Flowers owes to USDA Rural Development **$31,314.98** in repayment of a loan made in 1990 by the United States Department of Agriculture Farmers Home Administration, now known as USDA Rural Development. Petitioner Flowers borrowed to buy a home in Mississippi. The **$31,314.98** balance is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed April 28, 2011), which are admitted into evidence, together with the testimony of Mary Kimball.

4. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$31,314.98** would increase the current balance by $9,394.49, to $40,709.47. *See* USDA Rural Development Exhibits, esp. RX 8.

5. The loan Petitioner Flowers borrowed in 1990 from USDA Rural Development was $38,500.00. By the time of the foreclosure sale in 1997, that debt had grown to $54,097.98:

$ 38,426.37	Principal Balance prior to foreclosure sale
$ 14,629.39	Interest Balance prior to foreclosure sale
$ 1,042.22	Fee Balance prior to foreclosure sale
$ 54,097.98	Total Amount Due prior to foreclosure sale
=========	
- $ 22,500.00	Proceeds from foreclosure sale
$ 31,597.98 Unpaid in 1997	
=========	
RX 7.	

So the foreclosure sale left $31,597.98 unpaid in 1997. Another $ 283.00 applied to the debt in 2008 (Treasury ***offset***), leaves **$31,314.98** unpaid now (excluding the potential remaining collection fees). *See* RX 7.

6. Petitioner Flowers' testimony and his Hearing Request are admitted into evidence, together with the documents he filed on July 12, 2011, including his Consumer Debtor Financial Statement, the letter dated July 12, 2011 from Charles K. Hill, M.D., and Form SSA-1099-

SM, showing Petitioner Flowers' 2010 Benefits. Petitioner Flowers has no disposable pay; he testified that his medical condition prevents him from working. He testified that he had been trying to work part-time but his doctor stopped him in January 2011. Petitioner Flowers' current reasonable and necessary living expenses exceed his $** per month Social Security disability benefits. Even if Petitioner Flowers were able to do some part-time work, any garnishment would create hardship. 31 C.F.R. § 285.11.

7. Petitioner Flowers, you may want to negotiate the disposition of the debt with Treasury's collection agency. *See* paragraph 8.

Discussion

8. NO garnishment is authorized. *See* paragraph 6. I encourage **Petitioner Flowers and the collection agency** to **negotiate promptly** the disposition of the debt. Petitioner Flowers, this will require **you** to telephone the collection agency after you receive this Decision. Petitioner Flowers, you may request a ***financial hardship discharge***. You may want to explain your health problems, including the residuals from the aneurysms in your head and two craniotomies, and to obtain your physicians' statements for the collection agency. You may want to provide them a copy of the letter dated July 12, 2011 from Charles K. Hill, M.D., and another letter from your eye doctor. The toll-free number for you to call is **1-888-826-3127**.

Findings, Analysis and Conclusions

9. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Flowers and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

10. Petitioner Flowers owes the debt described in paragraphs 3, 4 and 5.

11. **NO garnishment is authorized**. Petitioner Flowers cannot withstand garnishment in any amount without creating financial hardship. 31 C.F.R. § 285.11. Petitioner Flowers has no earnings. His sole income is social security disability payments. Even if Petitioner

Flowers were able to supplement his disability payments with some part-time earnings, no garnishment would be authorized. 31 C.F.R. § 285.11.

12. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Flowers's **income tax refunds** or other **Federal monies** payable to the order of Mr. Flowers.

Order

13. Until the debt is repaid, Petitioner Flowers shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

14. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment. 31 C.F.R. § 285.11.

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

Done at Washington, D.C.

_____

PAUL W. DOTSON.
AWG Docket No. 11-0169.
Decision and Order.
Filed July 18, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was held as scheduled on May 19 and June 29, 2011. Mr. Paul W. Dotson, the Petitioner ("Petitioner Dotson"), participated, representing himself (appeared *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
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314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Dotson owes to USDA Rural Development a balance of **$42,190.21** (as of April 6, 2011) in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX 2, esp. p. 2) for a loan made on February 2, 2005 by Countywide Mortgage Co., an Ohio Corporation, for a home in Ohio, the balance of which is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed April 22, 2011), which are admitted into evidence, together with the testimony of Mary Kimball.

4. This ***Guarantee*** establishes an **independent** obligation of Petitioner Dotson, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of

my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 2, p. 2.

5. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$42,190.21** would increase the current balance by $12,657.06, to $54,847.27. *See* USDA Rural Development Exhibits, esp. RX 9.

6. The amount Petitioner Dotson borrowed from Countywide Mortgage Co. was $64,900.00 on February 2, 2005. RX 1. The Note was assigned to Huntington National Bank in 2005. RX 1, p. 3. The due date of the last payment made was June 1, 2005. RX 3, p. 2. Foreclosure was initiated on November 18, 2005. The home appraised for $35,000.00 as of September 21, 2008, in the appraisal done for USDA Rural Development. RX 6.

USDA Rural Development paid Huntington National Bank $46,045.71 on October 20, 2008 (the amount was $51.00 more, but there was a $51.00 recovery). RX 3, p. 7, RX 4. Thus $46,045.71, the amount USDA Rural Development paid, is the amount USDA Rural Development recovers from Petitioner Dotson under the ***Guarantee***.

7. Payments made in 2011 to USDA Rural Development have reduced the balance to **$42,190.21**. *See* RX 8 plus Narrative for detail.

8. Petitioner Dotson's Exhibits were filed on May 17, 2011 (Consumer Debtor Financial Statement), and July 18, 2011 (wage stub), and are admitted into evidence, together with his testimony, and his Hearing Request dated February 28, 2011. Petitioner Dotson pays reasonable and necessary living expenses for not only himself but also his wife. Petitioner Dotson pays child support for his 9-year old son Patrick, which is deducted from his pay, more than $400.00 per month. Petitioner Dotson contributes toward the support of his 19-year old stepson and his brother. Petitioner Dotson's gross pay is about $2,380.00 per month; between $14.00 and $15.00 per hour. From gross pay, I calculate disposable pay (which is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.) In Petitioner Dotson's case, the only deduction that I have not allowed when calculating his disposable income, is his child

support deduction. After adding back in the child support deduction, I find that Petitioner Dotson's disposable pay (within the meaning of 31 C.F.R. § 285.11) is roughly $2,000.00 per month (*see* pay stub filed July 18, 2011).

9. Although garnishment at 15% of Petitioner Dotson's disposable pay could yield roughly $300.00 per month in repayment of the debt, he cannot withstand garnishment in that amount without financial hardship. Petitioner Dotson's wife has residuals from being in a rollover motor vehicle accident relatively recently; she was laid off in August 2010. Petitioner Dotson's stepson is unemployed. Petitioner Dotson's brother is not working. Petitioner Dotson had back surgery last year. There are unpaid medical bills not included on his Consumer Debtor Financial Statement. He allowed nothing for gasoline and auto repairs on his Consumer Debtor Financial Statement. The expenses on his Consumer Debtor Financial Statement are understated. Petitioner Dotson's disposable pay (within the meaning of 31 C.F.R. § 285.11) does **not** currently support garnishment and **no** garnishment is authorized through **August 2013**. To prevent hardship, potential garnishment to repay "the debt" (*see* paragraph 3) must be limited to **0%** of Petitioner Dotson's disposable pay through **August 2013**; then, beginning no sooner than September 2013, following review of Petitioner Dotson's financial circumstances to determine what amount of garnishment he can withstand without financial hardship, garnishment up to 15% of Petitioner Dotson's disposable pay is authorized. 31 C.F.R. § 285.11.

10. Petitioner Dotson may want to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

11. NO garnishment is authorized through **August 2013**. *See* paragraphs 8 and 9. I encourage **Petitioner Dotson and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Dotson, this will require **you** to telephone the collection agency after you receive this Decision. Petitioner Dotson, you may request that you be permitted to compromise the debt for an amount you are able to pay, to settle the claim for less. The toll-free number for you to call is **1-888-826-3127**.

Findings, Analysis and Conclusions

12. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Dotson and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

13. Petitioner Dotson owes the debt described in paragraphs 3, 4, 5, 6 and 7.

14. Petitioner Dotson cannot currently withstand garnishment in any amount without creating financial hardship. 31 C.F.R. § 285.11. **NO garnishment is authorized through August 2013.**

15. **Beginning no sooner than September 2013**, following review of Petitioner Dotson's financial circumstances to determine what amount of garnishment he can withstand without financial hardship, **garnishment up to 15% of Petitioner Dotson's disposable pay is authorized**. 31 C.F.R. § 285.11.

16. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Dotson's **income tax refunds** or other **Federal monies** payable to the order of Mr. Dotson.

Order

17. Until the debt is repaid, Petitioner Dotson shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

18. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment through **August 2013**. **Beginning no sooner than September 2013**, following review of Petitioner Dotson's financial circumstances to determine what amount of garnishment he can withstand without financial hardship, **garnishment up to 15% of Petitioner Dotson's disposable pay is authorized**. 31 C.F.R. § 285.11.

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

Done at Washington, D.C.

_____

TRUDI S. LEE.
AWG Docket No. 11-0228.
Decision and Order.
Filed July 18, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Janice K. Bullard.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the request of Trudi S. Lee ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development ("Respondent"; "USDA RD"), and if established, the propriety of imposing administrative wage garnishment. On July 7, 2011, a telephonic hearing was held upon Petitioner's request, filed April 25, 2011.

The Respondent filed a Narrative, together with supporting documentation[1] on June 9, 2011. Petitioner filed a Consumer Debtor Financial Report (herein identified as PX-1) on June 30, 2011. The parties' submissions are hereby admitted to the record. At the hearing, Petitioner represented herself and Respondent was represented by Mary E. Kimball, Accountant for the New Program Initiatives Branch of RD, Saint Louis, Missouri. Petitioner and Ms. Kimball testified at the hearing.

In determining whether wage garnishment would constitute a hardship, I have considered the sworn testimony, Petitioner's signed

[1] References to Respondent's exhibits herein shall be denoted as "RX-1 through RX-8".

financial statement, Treasury Standard Form SF 329C (Wage Garnishment Worksheet), and standard geographical allowable per diem expense rates (www.irs.gov; www.opm.gov). On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law, and Order will be entered:

FINDINGS OF FACT

1. On April 13, 1994, the Petitioner and her ex-husband signed a promissory note for a home mortgage loan from USDA RD in the amount of $56,000.00 for the purchase of real property located in Athens, Pennsylvania. RX-1; RX 2.

2. On August 13, 2000, Petitioner reamortized the mortgage with USDA RD and the balance due at that time was $57,121.00.

3. On August 23, 2001, USDA RD sent a notice of acceleration of the debt to Petitioner. RX-4.

4. On September 13, 2002, Petitioner sold the real property at short sale, which yielded $21,000.00. RX-5.

5. After accounting for expenses relating to the sale, USDA RD received $19,855.59 which was applied against the balance of Petitioner's loan. RX-5.

6. After credit for the sale proceeds, the balance of Petitioner's account with USDA RD was $40,207.14. RX-5.

7. Petitioner's debt was thereafter referred to the U.S. Department of Treasury ("Treasury") for collection as required by prevailing statutes and regulations.

9. A total of $17,769.91 has been credited against the debt since it was referred to Treasury. RX 6.

10. The total of the debt is now $28,719.65, which consists of the sum of the balance of indebtedness ($22,437.23) plus potential Treasury fees ($6,282.42). RX-7.

10. Treasury, through its agent, issued a notice to Petitioner of intent to garnish wages.

11. Petitioner timely requested a hearing, which was held on July 7, 2011.

12. Petitioner contested the validity of the debt, and testified that her ex-husband had left her to pay the entire indebtedness, noting that his obligation for the debt had been discharged by a bankruptcy petition.

13. Petitioner did not receive a debt settlement package from USDA RD, as she was forced to move her family in with her mother when she vacated the real property.

14. Petitioner is employed sporadically and part-time at a Head Start program, and is currently receiving no income from wages.

15. Petitioner testified that the Consumer Debtor Financial Report that she signed represents her income and expenses.

16. Because of the status of Petitioner's employment she is not entitled to worker's compensation. See, PX-1, at RX-3.

17. Petitioner's sole source of income is Title 16 Social Security Disability, Supplemental Security Income, which was recently awarded, and consists of a monthly benefit of $472.17. PX-1 at RX-4.

18. Petitioner also qualifies for the SNAP program which provides assistance with food purchases. PX-1 at RX-5.

19. Petitioner testified that she was willing to pay the debt but had no resources.

20. Petitioner has no assets, and no vehicle to improve her likelihood of better employment. PX-1.

21. Petitioner's most recent paychecks were reduced by wage garnishment. RX-6, page 3.

CONCLUSIONS OF LAW

The Secretary has jurisdiction in this matter.

2. Petitioner is indebted to USDA Rural Development in the amount of $28,719.65, which consists of the sum of the balance of indebtedness, $22,437.23 plus potential Treasury fees of $6,282.42.

3. All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met with respect to Petitioner.

4. Petitioner's monthly income is insufficient to meet her expenses, and I conclude from consideration of her financial statement and Treasury collection guidelines that garnishment would present a financial hardship, as that term is recognized by law.

5. Petitioner's financial status is unlikely to change, and wage garnishment would be inappropriate.

ORDER

For the foregoing reasons, the wages of Petitioner shall NOT be subjected to administrative wage garnishment. Should Petitioner's financial situation improve, she is encouraged to attempt to contact the representatives of Treasury to discuss the debt. The toll free number for Treasury's agent is 1-888-826-3127.

Wage garnishments that were effected after notice of proposed wage garnishment constituted a financial hardship, and all amounts received through garnishments after April 25, 2011 shall be refunded to Petitioner.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. See, 31 C.F.R. § 285.13.

Petitioner shall give to USDA RD or those collecting on its behalf, notice of any change in her address, phone numbers, or other means of contact. Petitioner may direct questions to RD's representative Mary Kimball, c/o:

USDA New Program Initiatives Branch
Rural Development Centralized Servicing Center
4300 Goodfellow Blvd. F-22
St. Louis, MO 63120
314-457-5592

Petitioner's contact information has changed since her petition was filed. It is currently:

194 Horseshoe Lane
Athens, PA 18810
570-423-5044

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

So Ordered this _____day of July, 2011 in Washington, D.C.

_____

STEVEN BERRINGTON.
AWG Docket No. 11-0155.
Decision and Order.
Filed July 20, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was begun on May 3, 2011, and completed on May 4, 2011. Mr. Steven M. Berrington, the Petitioner ("Petitioner Berrington"), participated, representing himself (appeared *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Berrington owes to USDA Rural Development a balance of **$66,171.91** (as of March 2, 2011) in repayment of a United States Department of Agriculture / Rural Development / Rural Housing

Service ***Guarantee*** (*see* RX 2, esp. p. 2) for a loan made on August 9, 2007, by Valley Bank of Belgrade, a Branch of Flathead Bank of Big Fork, a Montana Corporation, for a home in Montana, the balance of which is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed March 21, 2011), which are admitted into evidence, together with the testimony of Mary Kimball.

4. This ***Guarantee*** establishes an **independent** obligation of Petitioner Berrington, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 2, p. 2.

5. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$66,171.91** would increase the current balance by $18,528.13, to $84,700.04. *See* USDA Rural Development Exhibits, esp. RX 9.

6. The amount Petitioner Berrington borrowed from Valley Bank of Belgrade, a Branch of Flathead Bank of Big Fork, was $169,830.00 on August 9, 2007. RX 1. The due date of the last payment made was February 1, 2008. RX 3, p. 2. Foreclosure was initiated on November 13, 2008. The home sold on July 2, 2009 for $132,000.00. RX 5, RX 6. Flathead Bank of Big Fork was the servicing lender, and Montana Board of Housing was the holding lender. USDA Rural Development paid Montana Board of Housing $66,171.91 during 2009. RX 3, p. 7, RX 4, Narrative. Thus $66,171.91, the amount USDA Rural Development paid, is the amount USDA Rural Development recovers from Petitioner Berrington under the ***Guarantee***.

7. Although my Order dated March 31, 2011 required financial disclosure, and in addition I held the record open post-hearing (*see* my notice dated May 12, 2011), encouraging Petitioner Berrington to file a Consumer Debtor Financial Statement and pay stub(s), he filed nothing,

so I have only his testimony. The evidence is insufficient for me to determine whether he can withstand garnishment at 15% of his disposable pay without financial hardship. 31 C.F.R. § 285.11.

8. At the times when we phoned Petitioner Berrington for the hearing, he reported that he was at a job site, and on another occasion he reported that he was dropping his boys off at school. Petitioner Berrington testified that he is a single parent with 3 children, ages 10, 13, and 16. He testified that he owes some back taxes and has some unpaid medical bills, including those from when his little one broke his collarbone when he fell off a slide, and dental bills from the orthodontist for braces. I suspect that Petitioner Berrington cannot withstand garnishment at 15% of his disposable pay without financial hardship, but I'll have to leave it to Petitioner Berrington to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

9. I encourage **Petitioner Berrington and the collection agency** to **negotiate promptly** the disposition of the debt or perhaps the garnishment amount. Petitioner Berrington, this will require **you** to telephone the collection agency after you receive this Decision. Petitioner Berrington, you may request that you be permitted to compromise the debt for an amount you are able to pay, to settle the claim for less. The toll-free number for you to call is **1-888-826-3127**.

Findings, Analysis and Conclusions

10. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Berrington and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

11. Petitioner Berrington owes the debt described in paragraphs 3, 4, 5 and 6.

12. Garnishment up to 15% of Petitioner Berrington's disposable pay is authorized. 31 C.F.R. § 285.11.

13. Petitioner Berrington is encouraged to disclose his financial circumstances by initiating contact through the toll-free number **1-888-826-3127**, for a determination of the amount of garnishment he can withstand without financial hardship.

14. Repayment of the debt may also occur through ***offset*** of Petitioner Berrington's **income tax refunds** or other **Federal monies** payable to the order of Mr. Berrington.

Order

15. Until the debt is repaid, Petitioner Berrington shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

16. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment up to 15% of Petitioner Berrington's disposable pay. 31 C.F.R. § 285.11.

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

Done at Washington, D.C.

_____

KIMBERLY WESTMORELAND.
AWG Docket No. 11-0239.
Decision and Order.
Filed July 20, 2011.

AWG –

Petitioner Pro se
Mary Kimball for RD
Decision and Order by Administrative Law Judge Victor W. Palmer.

Decision and Order

On July 19, 2011, I held a hearing by telephone on a Petition to Dismiss an administrative wage garnishment proceeding to collect a debt allegedly owed to Respondent, USDA, Rural Development for losses it incurred under an assumption of a mortgage and an additional loan it gave to Petitioner, Kimberly Westmoreland. Petitioner was not represented by an attorney, and represented herself pro se. Respondent, USDA Rural Development, was represented by Mary Kimball. Petitioner, Kimberly Westmoreland, and Mary Kimball who testified for Respondent, were each duly sworn.

Respondent proved the existence of the debt owed by Petitioner for payment of losses Respondent sustained on an assumption of a mortgage and an additional loan given to Petitioner, Kimberly Westmoreland, to purchase a home located at 304 Windmill Circle, Greenwood, South Carolina. The assumed mortgage in the amount of $26,350.17 is evidenced by RX-3, and the additional loan is evidenced by a Promissory Note and a Mortgage in the amount of $16,980.00, dated April 4, 1996 (RX-4 and RX-5). Payments were not made on the loans and a short sale was held on October 2, 2000. USDA, Rural Development received $24,000.00 from the sale. Prior to the sale, the combined amount Petitioner owed on the assumed loan and the additional mortgage loan to Respondent, USDA, Rural Development, was $45,799.46 for principal, accrued interest and fees. Petitioner owed $21,799.46 after the sale proceeds were posted (RX-8). Since the sale, $2,369.12 has been collected by the U. S. Treasury Department. The amount that is presently owed on the combined debt is $19,430.34 plus potential fees to Treasury of $5,440.50, or $24,870.84 total (RX-9). Petitioner has been employed as a Certified Medical Assistant by Medical Consultants of the Carolinas for 12 months earning a net monthly income of $***. She is making monthly payments of $** for a car that is needed to get to and from work. In addition to the car payments that will end in December, Petitioner has monthly expenses of: rent-$**; gasoline-$**; electricity-$**; food-$**; cable-$**; dental-$**; and clothing-$**.er monthly expenses Her present total monthly expenses of $***, when deducted from her net monthly income of $***, leave her with no disposable income that may now be subject to wage garnishment. After Petitioner completes her car payments six months from now, no more than $100 per month may then be garnished from her wages in order that excessive financial hardship is not imposed upon her.

USDA, Rural Development has met its burden under 31 C.F.R. §285.11(f)(8) that governs administrative wage garnishment hearings, and has proved the existence and the amount of the debt owed by the Petitioner. On the other hand, Petitioner showed that she has no present disposable income. Under these circumstances, I have decided and hereby

Order that nothing may be garnished from Petitioner's wages for the next six months, and after six months no more than $100.00 per month may then be garnished from her wages.

VIRGINIA WILLIS.
AWG Docket No. 11-0245.
Decision and Order.
Filed July 20, 2011.

AWG –

Petitioner Pro se
Mary Kimball for RD
Decision and Order by Administrative Law Judge Victor W. Palmer.

Decision and Order

Pursuant to a Hearing Notice, I held a hearing by telephone, on July 19, 2011, at 3:30 PM Eastern Time, in consideration of a Petition seeking to dispute Petitioner's present obligation to pay a debt that Petitioner, Virginia Willis, incurred when she obtained a single family mortgage loan in the amount of $28,400.00, on June 22, 1984, to facilitate her purchase of a primary residence located in Houston, MS. In that the loan was not paid, a short sale was held in the amount of $8,000.00, on November 10, 2009, when Petitioner owed $28,387.77 for principal, interest and fees respecting the unpaid loan. After application of the sale proceeds, Petitioner still owed $20,386.46. Since the sale $2,286.94 has been collected by the Treasury Department. Petitioner presently owes $18,099.52 plus $5,067.87 in fees to Treasury, or $23,167.39 total. Respondent has initiated administrative garnishment of Petitioner's wages for the nonpayment of the amount still owed. At the

hearing, Petitioner was represented by John P. Fox, Attorney at Law, 330 East Madison Street, Houston, MS, and Mary Kimball, represented Respondent. Both Petitioner and Ms. Kimball were sworn.

Petitioner contended that she did not owe anything to Respondent because the person who purchased the house at the short sale was the one who owed the balance of the debt to Respondent. This contention was found to be unsupported in law or fact. Petitioner is separated from her husband, Don Willis, has two adult children ages 41 and 39, and is employed part-time as a Dental Assistantealth Care AideH earning a net monthly income of $***. Her monthly expenses are: rent-$**; gasoline-$**; food-$**; clothing-$**; and medical insurance-$*. Total monthly expenses are: $***. The monthly expenses exceed her monthly net income. Respondent's representative, Mary Kimball, Accountant for the New Initiatives Branch, USDA Rural Development, filed supporting documents and gave testimony showing that the debt owed to it by Petitioner has a present balance of $18,099.52 plus $5,067.87 in fees to Treasury, or $23,167.39 total.

Under these circumstances, there is no present disposable monthly income available for garnishment and the proceedings to garnish Petitioner's wages are hereby suspended and shall not be resumed for two (2) years from the date of this Order.

LATAUSHA MAYE.
AWG Docket No. 11-0184.
Decision and Order.
Filed July 20, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Victor W. Palmer.

Amended Decision with Order Dismissing Pending Garnishment Proceeding

On May 18, 2011, at 11:00 AM, EDT, I held a hearing on a Petition to Dismiss an administrative wage garnishment proceeding to collect a debt allegedly owed to Respondent, USDA, Rural Development, for losses it incurred under a mortgage loan it gave to Petitioner, Latausha Maye, and her husband, Corey Maye, to purchase a house. Petitioner represented herself, and USDA Rural Development was represented by Mary Kimball. Petitioner and Mary Kimball were each duly sworn. Various exhibits were offered by Ms. Kimball that were received in evidence (RX-1 through RX-7).

Respondent sustained financial loss on the mortgage loan it gave to Petitioner and her husband to purchase a house located at 863 May Road, Greenville, AL 36037. The loan, dated June 24, 1998, was in the amount of $37,375.00 (RX-1 and RX-2). The payments on the mortgage were not met and a foreclosure sale was held on April 11, 2001. After selling expenses, USDA received $16,671.00 from the sale. Prior to the sale, $40,335.02 was owed by the Petitioner and her husband to USDA for principal, accrued interest and fees. Since the sale, USDA had received $2,108.54 from the United States Treasury Department (RX-5). The amount that was presently owed on the debt was $20,820.48 plus potential fees to Treasury of $6,246.14 or $27,066.62 total (RX-6).

Petitioner is employed by Hwashin-America Corp. as a factory assembler of auto parts and receives $* an hour or $** bi-weekly net. Her husband is also employed. They have three minor children. Petitioner and her husband have an arrangement by which they each pay various parts of their joint monthly household expenses. She usually pays: gasoline-$**; baby sitter-$**; and food-$**, or $** total.

Since that hearing, Petitioner saved up the needed amount of attorney's fees and has filed a petition in Bankruptcy. Respondent has agreed that under these circumstances, the pending proceeding to administratively garnish Petitioner's wages should be and, for that reason, is being dismissed.

ORDER

The Hearing Clerk is directed to enter this order dismissing the pending proceeding to administratively garnish Petitioner's wages and to serve copies of this Amended Decision and Order upon the parties.

_____

SONYA K. BARTON.
AWG Docket No. 11-0283.
Decision and Order.
Filed July 27, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Victor W. Palmer.

Dismissal of Petition

Pursuant to a Hearing Order, I scheduled a hearing to be conducted by telephone on July 26, 2011, 11:00 AM Eastern Time. In that Petitioner did not respond to the Hearing Order, and did not furnish a telephone number where she could be reached as the Order specified, the hearing could not be held. Mary E. Kimball, the representative for Respondent, United States Department of Agriculture-Rural Development (USDA-RD), was available for the July 26th hearing, but Petitioner was not. Petitioner did not comply with the Hearing Order that required her to file lists of exhibits and witnesses, and a narrative describing why she does not owe the alleged debt; why she cannot pay the alleged debt; and indicating what portion of the alleged debt she is able to pay through wage garnishment. Petitioner was further instructed to immediately contact my secretary and provide a telephone number where she could be reached for the scheduled Hearing by telephone, but she did not do so. The Order and various documents filed by Respondent were all sent to Petitioner by regular mail and none were returned as undelivered, and are presumed to have been served upon her.

Respondent filed copies of official USDA-RD records showing, and it is hereby found, that:

On December 10, 1993, Petitioner obtained a home mortgage in the amount of $30,600.00 to finance the purchase of property located at 1115 14th Street, Phil Campbell, AL, from USDA-RD's predecessor, USDA

Farmers Home Administration, as evidenced by a Promissory Note and Mortgages signed by Petitioner (Exhibits RX-1 and RX-2).

Petitioner defaulted on the mortgage loan and a foreclosure sale was held on April 22, 1998. USDA received $15,500.00 from the sale when the balance owed on the loan for principal, interest and fees was $31,927.92. After the sale proceeds were applied, Petitioner owed $16,427.92. USDA sent the debt for collection to the United States Treasury Department, and has received $5,094.33 from Treasury.

The amount of the debt presently owed by Petitioner is shown by Treasury to be $11,333.59 plus $3,400.08 for collection fees assessed by Treasury for a total of $14,733.67 (Exhibit RX-6).

Based on these findings and circumstances, it is concluded that: (1) the Petition should be dismissed; (2) Petitioner owes $14,733.67 including lawfully assessed fees by Treasury; and (3) the proceeding to garnish Petitioner's wages may be resumed.

Accordingly, the petition is hereby **DISMISSED**, and the proceeding to garnish Petitioner's wages may be resumed at the applicable percentage rate of her disposable income allowed by Federal regulations.

–

TINA FOOSHEE-PERRY.
AWG Docket No. 11-0170.
Decision and Order.
Filed July 28, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Victor W. Palmer.

Decision and Order

Pursuant to a Hearing Notice, I held a hearing by telephone, on June 7, 2011, at 10:30 AM Eastern Time, in consideration of a Petition seeking to dispute Petitioner's obligation to pay the full amount of a debt that Petitioner allegedly incurred under a USDA loan covering a single family mortgage that Petitioner, Tina Fooshey-Perry, and Timothy

Fooshee-Perry had assumed. The evidence showed the couple assumed a $30,000.00 USDA loan, on September 24, 1992, to acquire a home in Kingsridge, Texas. A foreclosure sale was held on March 3, 1998, after which $7,418.99 was still owed to Respondent, USDA. Since then, USDA has received $2,087.50 from The United States Department of Treasury. The remaining debt is $5,331.49 plus fees to Treasury of $1,492.82 or $6,824.31 total. Respondent has initiated administrative garnishment of Petitioner's wages for the nonpayment of the amount still owed.

Petitioner did not participate in the hearing. Petitioner was instructed by the Hearing Notice to file: 1. completed forms respecting her current employment, general financial information, assets and liabilities, and monthly income and expenses; 2. a narrative of events or reasons concerning the existence of the alleged debt and her ability to repay all or part of it; 3. supporting exhibits with a list of the exhibits and a list of witnesses who would testify in support of her petition. She was further instructed to contact my secretary, Ms. Marilyn Kennedy, and give Ms. Kennedy a telephone number where Petitioner could be reached at the time of the scheduled hearing. Petitioner did not telephone my secretary so as to participate in the scheduled hearing and the telephone number listed in the Petition has been disconnected. Petitioner also failed to comply with the other instructions and filed nothing in support of her assertion that she does not owe the full amount of the debt that is the subject of the wage garnishment proceeding.

Respondent participated in the hearing through its representative, Mary Kimball, Accountant for the New Initiatives Branch, USDA Rural Development who provided evidence proving the existence of the debt owed to it by Petitioner and that a balance of $5,331.49 plus fees to Treasury of $1,492.82, or $6,824.31 total, is currently owed on the loan that is the subject of the wage garnishment proceedings.

Under 31 C.F.R. § 285.11 (f)(2), a hearing on a Petition challenging wage garnishment may be, at the agency's option, either oral or written. An oral hearing may be conducted by telephone conference and is only required when the issues in dispute cannot be resolved by review of the documentary evidence 31 C.F.R. § 285.11 (f)(3).

An oral hearing was scheduled to hear and decide Petitioner's concerns.oweverH Petitioner never advised the Hearing Clerk, the Respondent, or this office how she could be personally contacted on the day of the scheduled hearing. Reasonable efforts were made to include

her in the scheduled hearing, but were to no avail. Accordingly, the petition is being dismissed for Petitioner's failure to participate and present evidence or arguments to refute the documents provided by Respondent showing the existence of Petitioner's obligation to pay the debt still owed to USDA-Rural Development.

USDA- Rural Development has proved the existence of the debt owed to it by Petitioner and the present balance of the loan. The Petitioner has not provided evidence refuting the existence of the loan or its present balance. Petitioner has also failed to provide any evidence showing, within the meaning and intent of the provisions of 31 C.F.R. § 285.11, that collection of the loan balance by administrative wage garnishment would cause Petitioner a financial hardship, or that collection of the debt may not be pursued due to operation of law. Therefore, the Petition is dismissed and the proceedings to garnish Petitioner's wages may be resumed provided the amount of wages garnished does not exceed 15% of her disposable income.

Petitioner is advised, however, that if she telephones the private agency engaged by Treasury to pursue the debt's collection, she might be able to settle the debt at a lower amount with lower payments.

TERESA ROBINSON.
AWG Docket No. 11-0289.
Decision and Order.
Filed July 28, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Hearing Officer James P. Hurt.

Decision and Order

This matter is before me upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On June 16, 2011, I issued a Prehearing Order to facilitate a meaningful conference with the parties as

to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The Rural Development Agency (RD), Respondent, complied with the Discovery Order and a Narrative was filed, together with supporting documentation RX-1 through RX-7 on June 20, 2011. The Petitioner filed her financial statement on June 29, 2011 (which I now label as PX-1). Petitioner has been employed for more than one year but Petitioner's husband is said to be disabled due to health reasons. Petitioner did not state whether the household income includes any part of her husband's income (if any). Petitioner prepared her monthly expense statement for her household expenses, but it is unclear whether the expenses are shared or are borne by her alone. It is unclear whether Petitioner's income is net or gross. Petitioner's expense statement included two small loans, each of which are scheduled to be satisfied in less than one year. Petitioner's IRS refund has been intercepted for several years by U.S. Treasury. On July 20, 2011 at the time set for the hearing, I called the phone number listed in Petitioner's Exhibit PX-1, but she was not available. Ms. Kimball of RD was present for the telephone conference. Neither Ms. Kimball not I have received any communication from Petitioner was to why she was not available for the hearing that she requested.

I prepared a Financial Hardship Calculation using the information supplied by Petitioner. On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On March 3, 1993, James Robinson and Teresa Robinson (Petitioner) received a primary home mortgage loan in the amount of $20,7000 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) to purchase her home on a property located in 7## E. Com**** Ave. Cooper, TX 754##[1].

RX-1, RX-2.

2. Borrowers reamortized their account on April 3, 1997 bringing the principal amount due to $23,149.39

[1] The complete address is maintained in USDA files.

3. The borrowers became in default and a Notice of Acceleration was mailed on June 21, 2002. RX-4, RX-5.

4. A foreclosure sale was held on August 5, 2003

5. RD received net $12, 000 from the sale. Narrative, RX-6.

6. The principal loan balance for the RD loan prior to the foreclosure was $24,387.05, plus $4,27.57 for accrued interest, plus $2,783.63 for fees for a total of $31,898.25. Narrative, RX-6.

7. Treasury offsets totaling $4,747.81 exclusive of Treasury fees have been received from borrower. RX-6.

8. The remaining unpaid debt is in the amount of $15,007.59 - exclusive of potential Treasury fees. RX-6.

9. The remaining potential fees from Treasury are $4,202.13. RX-7.

10. Ms. Robinson states that she has been gainfully employed for 3 years.

11. I performed a Financial Hardship calculation using the financial statements she provided[2].

Conclusions of Law

Petitioner is indebted to USDA Rural Development in the amount of $15,007.59 exclusive of potential Treasury fees for the mortgage loan extended to her.

In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $4,202.13.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is not entitled to administratively garnish the wages of the Petitioner at this time.

Order

For the foregoing reasons, the wages of Petitioner shall NOT be subjected to administrative wage garnishment at this time. After eight months, RD may re-assess the Petitioner's financial position.

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

[2] The Financial Hardship calculation is not posted on the OALJ website.

STEPHANIE D. MORRIS n/k/a STEPHANIE D. ZETTEL.
AWG Docket No. 11-0230.
Decision and Order.
Filed July 29, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was held on July 6, 2011. Stephanie D. Zettel, the Petitioner, formerly known as Stephanie D. Morris ("Petitioner Zettel"), represents herself (appears *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. USDA Rural Development's Exhibits, plus Narrative, Witness & Exhibit List, were filed on June 9, 2011, and are admitted into evidence, together with the testimony of Ms. Kimball.

4. Petitioner Zettel's completed "Consumer Debtor Financial Statement," filed on July 8, 2011; plus the accompanying pay stubs; are admitted into evidence, together with the testimony of Petitioner Zettel.

5. Petitioner Zettel owes to USDA Rural Development **$63,328.50** in repayment of a Rural Housing Service loan borrowed in 2004 for a home in Michigan, the balance of which is now unsecured ("the debt").

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$63,328.50**, would increase the current balance by $17,731.98, to $81,060.48. *See* USDA Rural Development Exhibits, esp. RX 6.

7. Petitioner Zettel's disposable pay (within the meaning of 31 C.F.R. § 285.11) is roughly $3,000.00 per month (*see* pay stubs filed July 8, 2011). [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.] Although garnishment at 15% of Petitioner Zettel's disposable pay could yield roughly $450.00 per month in repayment of the debt, she cannot withstand garnishment in that amount without financial hardship.

8. Petitioner Zettel has two children to support, her 14 year-old son and her 4 month-old son, in addition to herself. Although she receives child support, she also has child care expenses. To prevent hardship, potential garnishment to repay "the debt" (*see* paragraph 5) must be limited to 0% of Petitioner Zettel's disposable pay through August 2012; then up to 7% of Petitioner Zettel's disposable pay beginning September 2012 through August 2013; then up to 15% of Petitioner Zettel's disposable pay thereafter. 31 C.F.R. § 285.11.

9. Petitioner Zettel is responsible and willing and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

10. Through August 2012, no garnishment is authorized. Beginning September 2012 through August 2013, garnishment up to 7% of Petitioner Zettel's disposable pay is authorized; and thereafter,

garnishment up to 15% of Petitioner Zettel's disposable pay is authorized. *See* paragraphs 7, 8 and 9. I encourage **Petitioner Zettel and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Zettel, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Zettel, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Zettel and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

12. Petitioner Zettel owes the debt described in paragraphs 5 and 6.

13. **Garnishment is authorized**, as follows: through August 2012, **no** garnishment. Beginning September 2012 through August 2013, garnishment up to 7% of Petitioner Zettel's disposable pay; and thereafter, garnishment up to 15% of Petitioner Zettel's disposable pay. 31 C.F.R. § 285.11.

14. Repayment of the debt may also occur through ***offset*** of Petitioner Zettel's **income tax refunds** or other **Federal monies** payable to the order of Mrs. Zettel.

Order

15. Until the debt is repaid, Petitioner Zettel shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

16. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through August 2012. Beginning September 2012 through August 2013, garnishment up to 7%

of Petitioner Zettel's disposable pay is authorized; and garnishment up to 15% of Petitioner Zettel's disposable pay thereafter. 31 C.F.R. § 285.11.

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

Done at Washington, D.C.

JENNIFER J. FOGG f/k/a JENNIFER J. LYMAN.
AWG Docket No. 11-0288.
Decision and Order.
Filed August 2, 2011.

AWG –

Lawrence Sawyers. Esq. for Petitioner.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Victor W. Palmer.

Decision and Order

Pursuant to a Hearing Notice, I held a hearing by telephone, on July 26, 2011, at 2:30 PM Eastern Time, in consideration of a Petition seeking to dispute Petitioner's present obligation to pay a debt that Petitioner incurred when she assumed a single family mortgage loan in the amount of $70,00.00. Petitioner had assumed the loan jointly with a former boy friend when she was 18 years old, to help a friend with credit problems. In that the loan was not paid, a short sale was held in the amount of $100,000.00. After the application of the sale proceeds, Petitioner still owed on the debt. Since the sale, part of the debt has been collected from both her former boyfriend, Benjamin Glass, and from her through $50.00 garnishments from the salary she receives every two weeks. Petitioner presently owes $25,138.50 plus $7,038.50 in fees to Treasury, or $32,177.49 total. At the hearing, Petitioner was represented by Lawrence R. Sawyer, Attorney at Law, 17 Storm Drive, Windham, Maine. Mary Kimball, represented Respondent. Both Petitioner and Ms. Kimball were sworn.

Petitioner is married and has three children ages 18, 9 and 3, and is employed as a Buyer/Planner by Electronic Research, Inc.,Health Care

Aide earning a gross monthly income of $***. Her husband, Stephen Fogg her husband, Stephen Fogg, is employed as a Welder by Tri-Tank Welding and Tub, and earns a gross monthly income of $***. The couple's combined gross monthly income is $***. Their combined monthly expenses are: rent/mortgage payments-$***; gasoline-$**; electricity-$**; food-$**; cable TV-$*; clothing-$**; medical expenses-$**; day care-$***; phone-$*; cell phones-$**; and car insurance-$**. Total monthly expenses are: $***. The monthly expenses exceed their combined monthly gross income. Respondent's representative, Mary Kimball, Accountant for the New Initiatives Branch, USDA Rural Development, filed supporting documents and gave testimony showing that the debt owed to it by Petitioner has a present balance of $23,138.50 plus $7,038.50 in fees to Treasury, or $32,177.49 total.

Under these circumstances, there is no present disposable monthly income available for garnishment and the proceedings to garnish Petitioner's wages are hereby suspended and shall not be resumed for one (1) year from the date of this Order.

BILLY GATES.
AWG Docket No. 11-0162.
Decision and Order.
Filed August 5, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Victor W. Palmer.

Decision And Order

Pursuant to a Hearing Notice, I held a hearing in this proceeding by telephone, on April 27, 2011, at 11:00 AM Eastern Time. Petitioner, Billy Gates, and Respondent, United States Department of Agriculture, Rural Development (USDA-RD), through its representative, Mary E. Kimball, participated and were sworn. USDA- RD introduced documents pertaining to a home mortgage it gave to Petitioner and his since deceased wife, Annette Gates. Mr. and Mrs. Gates, on June 5,1986,

signed a promissory note and a Deed of Trust for a $40,000.00 home mortgage loan.

The mortgage loan was not paid as required, and on January 7, 2002, the house that it was used to purchase, was sold at a foreclosure sale in which USDA-RD received $16,185.00 when $34,438.00 was owed by Mr. Gates on the principal and accrued interest, plus various expenses associated with the foreclosure sale. Since then, Treasury has collected $10,200.23 through offsets against federal income tax refunds otherwise due to Mr. Gates. At present, $8,380.77 is owed on the debt plus "Remaining potential fees" of $2,514.23, or $10,895.00 total.

Mr. Gates testified that his wife has died and that he is presently employed as a tractor driver by a county government agency that pays him a net salary of $** every two weeks. From his monthly net income of $**, he pays monthly expenses of: $**-rent; $**-electricity; $*-gas; and $**-gasoline.

Under these circumstances, I have concluded that administrative garnishment of any part of Mr. Gallagher's wages "would cause a financial hardship to the debtor" within the meaning of the controlling regulation (31 CFR § 285.11(f)(8) (ii)). The evidence shows that Petitioner presently has no monthly disposable income. Accordingly, there is no disposable income that may be administratively garnished and therefore administrative wage garnishment may not be pursued.

Order

The relief sought in the petition is hereby granted, and the pending administrative wage garnishment to collect money from Petitioner's disposable pay to satisfy a nontax debt asserted by the Respondent, USDA-RD is hereby barred and dismissed.

This matter is stricken from the active docket.

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

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NICOLE JACOBS.
AWG Docket No. 11-0219.
Decision and Order.
Filed August 5, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Hearing Officer James P. Hurt.

Decision and Order

This matter is before me upon the request of the Petitioner, Nicole Jacobs for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against her. On May 18, 2011, I issued a Pre-hearing Order requiring the parties to exchange information concerning the nature of the debt and the ability of Petitioner to repay all or part of the debt, if established.

I conducted a telephone hearing at the established time on June 30, 2011. USDA Rural Development Agency (RD) was represented by Ester McQuaid. Ms. McQuaid testified on behalf of the RD agency. Petitioner was present and was self-represented.

RD had filed a copy of a Narrative along with exhibits on June 7, 2011 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner. After the hearing of July 5, 2011, Ms. McQuaid filed additional exhibits RX-7, RX-8 and RX-9 which were the signed copies of RD form 3560-8 for the rental assistance periods beginning 3/26/07, 4/1/08 and 4/1/09, respectively. On August 3, 2011, RD also filed RX-8 (which I re-label as RX-10) which is an explanation of the authenticity of prior exhibit RX-4.

The witnesses were sworn in.

Petitioner submitted no documents or exhibits pursuant to the Pre-Hearing Order.

Petitioner owes $4,224.00 on the USDA RD Rental Assistance Program as of August 04, 2011, and in addition, fees due the US Treasury of $1,182.72 pursuant to the terms of the repayment agreement.

Findings of Fact

1. On March 26, 2007, Petitioner Nicole Jacobs obtained USDA Rural Development Rental Assistance for an apartment located at Riverside Village Apartments in Baton Rouge, LA with signed affidavit as to her income and employment status. She stated she expected to earn $18,720.00 for that reporting period. RX-7.

2. On April 1, 2008, Petitioner Nicole Jacobs obtained USDA Rural Development Rental Assistance for an apartment located at Riverside Village Apartments in Baton Rouge, LA with signed affidavit as to her income and employment status. She stated she expected to earn $18,720.00 for that reporting period. RX-8.

3. On April 1, 2009, Petitioner Nicole Jacobs obtained USDA Rural Development Rental Assistance for an apartment located at Riverside Village Apartments in Baton Rouge, LA with signed affidavit as to her income and employment status. She stated she expected to earn $24,100.00 for that reporting period. RX-9.

4. The Riverside Village Apartment agency notified Petitioner on September 23, 2010 that an audit was conducted and advised Petitioner that their audit revealed improper Rental Assistance base upon employment records. RX-2, RX-3, RX-4.

5. The audit revealed that Petitioner actually had received wages from two employers totaling $29,910 for the 2007 period, $35,792 for the 2008 period, and $23,923 for the 2009 period. Narrative, RX-4.

5. RD's records of Ms. Jacob's income for the reporting periods are reported directly from the State of Louisiana Workforce Commission secured website. RX-10.

6. Ms. Jacobs failed to provide any records that showed RD's records were in error.

7. Based upon Rental Assistance guidelines, Ms. Jacobs received unauthorized Rental assistance in the 2007 and 2008 reporting periods resulting in an unauthorized overpayment of $4,224.00. RD-3, RX-4.

8. In addition, fees are due the US Treasury of $1,182.72 pursuant to the terms of the repayment agreement. Narrative.

9. RD termed the unauthorized rental assistance as "fraudulent" Narrative at paragraph two and I therefore will not entertain any request for a financial hardship calculation. Ms. Jacobs certified information that was materially false upon which the government relied. Sec. 1001 of Title 18 U.S.C.

Conclusions of Law

1. Petitioner Nicole Jacob is indebted to USDA's Rural Development program in the amount of $4,224.00.

2. In addition, Petitioner is indebted for fees to the US Treasury which are currently $1,182.72.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. § 285.11 have been met.

4. The USDA Rural Development Agency (RD) is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, provided the requirements of 31 C.F.R. § 288.11(j) have been met, the wages of the Petitioner, Nicole Jacobs, shall be subject to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as specified in 31 C.F.R.§ 285.11(i)

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

MICHELLE LUNA-MCGIMSEY.
AWG Docket No. 11-0188.
Decision and Order.
Filed August 15, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Hearing Officer James P. Hurt.

Decision and Order

This matter is before me upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On April 20, 2011, I issued a

Prehearing Order to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The Rural Development Agency (RD), Respondent, complied with the Discovery Order and a Narrative was filed, together with supporting documentation RX-1 through RX-11 on April 22, 2011. The Petitioner filed her financial statement on June 28, 2011 (which I now label as PX-1 thru PX-4), her separate Monthly Expense Statement which I now label as PX-5), her 4/28/2011 earnings statement which I now label as PX-6. Petitioner has been employed for more than one year, but she has been advised that her employment in Texas will terminate soon after January 2012. Petitioner is now divorced or separated and has two minor children living with her. She is scheduled to receive court ordered child support, but the support payments are now four months in arrears. Petitioner has substantial student loans with Federal Student Aid which pre-exist this hearing. Upon consideration, RD will not object to Petitioner's support of her church and will not object to inclusion of a monthly repay of a 410(K) loan as an expense. On August 12, 2011, Petition filed additional documents consisting of additional Earnings Statements (which I now label as PX-7 through PX-12), a new Monthly Expenses statement (which I now label as PX-13), a statement of her FSA loan payment schedule (which I now label as PX-14 & PX-15), her employer's estimated termination date Notice (which I now label as PX-16), her Child support payment log (which I now label as PX-17).

On June 7, 2011, at the time set for the hearing, both parties were available for the hearing. Ms. Kimball of RD was representing RD and was present for the telephone conference. Ms. McGimsey was available and represented herself.

Ms. McGimsey raised the issue financial hardship. I prepared a Financial Hardship Calculation using the information supplied by Petitioner. On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On October 3, 2007, Petitioner assumed a loan from ex-husband – variously Ivan or Ian McGimsey for the purchase of a primary home mortgage loan in the amount of $88,400 from Farmers Home

Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) to purchase her home on a property located in 1### Indian W****, Midlothian, TX 760##[1].

RX-1, RX-2.

2. Borrower reamortized her account on April 18, 2008 bringing the principal amount due to $168,720.73.

3. The borrower became in default and a Notice of Acceleration was mailed on November 4, 2008. RX-6, RX-7.

4. A short sale was held on April 23, 2010. RX-8.

5. RD received net $95,770.16 from the sale. Narrative, RX-9, RX-10.

6. The principal loan balance for the RD loan prior to the foreclosure was $168,506.15, plus $21,518.60 for accrued interest, plus $6,599.18 for fees for a total of $196,837.72. Narrative, RX-10.

7. After the sale proceeds were applied, borrowed owed $101,067.56 plus a pre-foreclosure fee of $663.00 for a total of $101,730.56. Narrative, RX-10.

8. The remaining unpaid debt is in the amount of $101,730.56 - exclusive of potential Treasury fees. RX-10.

9. The remaining potential fees from Treasury are $28,484.56. RX-11.

10. Ms. McGimsey states that she has been gainfully employed for 4 years. PX-1.

11. She expects to be unemployed after January, 2012. PX-16.

12. She is the custodial parent of two minor children and although is due to receive court ordered child support – that support has only been partially paid since May 2011.

13. She owes an outstanding balance to the Federal Student Aid fund. PX-14, PX-15.

14. I performed a Financial Hardship calculation using the financial statements she provided[2].

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[1] The complete address is maintained in USDA files.

[2] The Financial Hardship calculation is not posted on the OALJ website.

Conclusions of Law

Petitioner is indebted to USDA Rural Development in the amount of $101,730.56 exclusive of potential Treasury fees for the mortgage loan extended to her.

In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $28,484.56.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is not entitled to administratively garnish the wages of the Petitioner at this time.

Order

For the foregoing reasons, the wages of Petitioner shall NOT be subjected to administrative wage garnishment at this time. After March, 2012, RD may re-assess the Petitioner's financial position.

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

REBEKAH J. COLLINS, n/k/a REBEKAH J. TROMBLEY.
AWG Docket No. 11-0292.
Decision and Order.
Filed August 26, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was held as scheduled on August 23, 2011. Ms. Rebekah J. Trombley, formerly known as Rebekah J. Collins ("Petitioner Trombley"), did not participate. (Petitioner Trombley did not participate by telephone: no one answered the phone number she

provided in her Hearing Request; no one returned the message(s) left on the recording; Petitioner Trombley did not provide any other phone number where she could be reached.)

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Trombley owes to USDA Rural Development a balance of **$49,967.44** in repayment of two United States Department of Agriculture Farmers Home Administration loans, one assumed and one made in 1990, for a home in Maine. The balance is now unsecured ("the debt"), and is calculated as of August 4, 2011 on one loan; and as of July 15, 2011 on the other loan. *See* USDA Rural Development Exhibits, esp. RX 6, pp. 1, 2, plus Narrative, Witness & Exhibit List (filed August 5, 2011), which are admitted into evidence, together with the testimony of Mary Kimball.

4. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$49,967.44** would increase the current balance by $13,990.89, to $63,958.33. [This includes both loans.] *See* USDA Rural Development Exhibits, esp. RX 6, pp. 1, 2.

5. The amount Petitioner Trombley (then Collins) borrowed in 1990 was $64,376.22 ($33,500.00 on one loan, $30,876.22 on the other loan). In 1994, Petitioner re-amortized her accounts, which allowed her

to become current, by adding the amount that was delinquent to the principal. By the time of the foreclosure sale in 1998, the debt had grown to $97,887.33:

$ 81,736.94	Principal Balance prior to foreclosure sale
$ 12,391.20	Interest Balance prior to foreclosure sale
$ 3,759.19	Fees Balance prior to foreclosure sale
$ 97,887.33	Total Amount Due prior to foreclosure sale
=========	
- $ 40,000.00	Proceeds from foreclosure sale
$ 57,887.33	Unpaid after sale in 1998

RX 5 and USDA Rural Development Narrative.

An additional $1,450.00 pre-foreclosure fee was added; then, $9,369.89 was applied toward paying the debt, leaving **$49,967.44** unpaid now (excluding the potential remaining collection fees). *See* RX 5, and USDA Rural Development Narrative.

6. Petitioner Trombley's Hearing Request was late. The last collection shown was in 2008. RX 5, p. 2. Petitioner Trombley's pay has apparently not been garnished even though her Hearing Request was late.

7. Petitioner Trombley wrote in her Hearing Request:

"I do not owe the debt . . . ex husband owes debt"

See Petitioner Trombley's Hearing Request. Petitioner Trombley provided excerpts of a Property Settlement Agreement (signature page not included), showing that her co-borrower, Roderick Collins (her ex husband), was to be responsible for the Farmers Home Administration debt and was to have re-financed or sold the home during the year following signing of the Agreement. In 1996, Petitioner Trombley (then Rebekah J. Collins, also known as Rebekah J. Duncan), released all her claim on the home, signing a Release Deed, and making clear that the debt belonged to Roderick Collins. Roderick Collins failed to meet his

obligations regarding the debt. Nevertheless, USDA Rural Development is still entitled to collect from Petitioner Trombley. When Petitioner Trombley entered into the borrowing transaction with her co-borrower Roderick Collins, in 1990, certain responsibilities were fixed, as to each of them, that were addressed but not erased by the Property Settlement Agreement and the Release Deed.

8. According to the Narrative filed August 5, 2011, Roderick Collins filed for Chapter 7 bankruptcy in 2002, and his obligation to pay the debt was discharged on January 1, 2003. [Petitioner Trombley may want to consult with a lawyer with bankruptcy expertise to determine whether she has a right to recover from Roderick Collins, money collected from her on the debt, in spite of his bankruptcy discharge. Petitioner Trombley may want to consult with a lawyer with bankruptcy expertise to determine all of her own options.]

9. Petitioner Trombley failed to file a completed "Consumer Debtor Financial Statement" or anything in response to my Order dated August 5, 2011, so I cannot calculate either Petitioner Trombley's income or her reasonable and necessary living expenses. Evidence is required for me to determine whether Petitioner Trombley's disposable pay supports garnishment without creating hardship. 31 C.F.R. § 285.11. (Disposable pay is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.)

10. With no testimony from Petitioner Trombley and no financial information, I cannot calculate Petitioner Trombley's current disposable pay. I cannot evaluate the factors to be considered under 31 C.F.R. § 285.11, so I must assume that Petitioner Trombley can withstand garnishment, up to 15% of her disposable pay, without financial hardship.

11. Petitioner Trombley is responsible and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

12. I encourage **Petitioner Trombley and the Treasury's collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Trombley, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Trombley, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

13. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Trombley and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

14. Petitioner Trombley owes the debt described in paragraphs 3, 4 and 5.

15. **Garnishment is authorized, up to 15% of Petitioner Trombley's disposable pay**. 31 C.F.R. § 285.11.

16. Repayment of the debt may also occur through ***offset*** of Petitioner Trombley's **income tax refunds** or other **Federal monies** payable to the order of Ms. Trombley. [Petitioner Trombley, if you file a joint tax return and a part of the refund belongs to your husband, call the Treasury toll-free number to inquire about the "injured spouse." *See* paragraph 12.]

Order

17. Until the debt is repaid, Petitioner Trombley shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

18. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment, up to 15% of Petitioner Trombley's disposable pay. 31 C.F.R. § 285.11.

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

Done at Washington, D.C.

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BRENDA HUFF.
AWG Docket No. 11-0284.
Decision and Order.
Filed August 29, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Hearing Officer James P. Hurt.

Decision and Order

This matter is before me upon the request of Brenda Huff, Petitioner, for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On June 16, 2011, I issued a Prehearing Order to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The Rural Development Agency (RD), Respondent, complied with the Discovery Order and a Narrative was filed, together with supporting documentation RX-1 through RX-7 on June 23, 2011. After the hearing and as a result of Ms. Huff's challenge of the remaining balance, RD filed the loan payment history as RX-8 on August 19, 2011. The Petitioner filed her Narrative, and her financial statement on July 5, 2011 labeled as PX-1 thru PX-8. On July 22, 2011, she filed her bi-weekly pay stub which I now re-label as PX–9.

On July 21, 2011, at the time set for the hearing, both parties were available for the hearing. Ms. Kimball of RD represented RD. Ms. Huff represented herself. The parties were sworn.

Petitioner is married, but separated, and her estranged husband is unemployed. She is the caretaker of her grandchild. Petitioner has been

employed for more than one year. She sometimes receives the opportunity for overtime hours with premium pay. Ms. Huff raised the issue financial hardship. I prepared a Financial Hardship Calculation using the information supplied by Petitioner. Using her bi-weekly payroll stub and her straight time hourly pay rate, I re-calculated her gross bi-weekly income for 80 hours straight time. I proportioned all taxes from the payroll stub as if she worked 80 hours without any overtime. I retained the same deductions for medical and dental insurance per pay period. Ms. Huff has submitted a very modest monthly expense statement. Ms. Huff has not made any showing that RD's loan payment history (RX-8) is or was incorrect..

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On July 26, 1999, Petitioner obtained a loan for the purchase of a primary home mortgage loan in the amount of $44,950.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) to purchase her home on a property located in 8## 2#th St., Cario, IL 629##[1].

RX-1, RX-2.

2. The borrower became in default and a Notice of Acceleration was mailed on May 11, 2006. RX-4.

3. A short sale was scheduled for June 3, 2008, but the property burned on May 8, 2008. Narrative.

4. RD received net $52,900.33 from the Insurance proceeds. Narrative, RX-5.

5. The principal loan balance for the RD loan prior to the fire was $39,532.45, plus $6,762.36 for accrued interest, plus $7,074.42 for fees, plus $847.00 for escrow and $56.70 in late fees for a total of $54,272.93. Narrative, RX-6.

6. After the insurance proceeds were applied, borrower owed $1,372.60 plus $3,000 in pre-foreclosure fees for a total of $4,372.60. Narrative, RX-6.

7. The U.S. Treasury has received $2,353.84 leaving a balance due of $2,018.76. Narrative, RX-6.

[1] The complete address is maintained in USDA files.

8. The remaining unpaid debt is in the amount of $2,018.76 - exclusive of potential Treasury fees. RX-6, RX-7.

9. The remaining potential fees from Treasury are $605.63. RX-7.

10. Ms. Huff states that she has been gainfully employed for more than one year.

PX-1.

11. She is the custodian of a minor grandchild.

12. I performed a Financial Hardship calculation using the financial statements she provided[2].

Conclusions of Law

Petitioner is indebted to USDA Rural Development in the amount of $2,018.76 exclusive of potential Treasury fees for the mortgage loan extended to her.

In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $605.63.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is not entitled to administratively garnish the wages of the Petitioner at this time.

Order

For the foregoing reasons, the wages of Petitioner shall NOT be subjected to administrative wage garnishment at this time. After one year, RD may re-assess the Petitioner's financial position.

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

[2] The Financial Hardship calculation is not posted on the OALJ website.

_____

GRISELDA ZUNIGA.
AWG Docket No. 11-0291.
Decision and Order.
Filed August 29, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was held as scheduled on August 23, 2011. Ms. Griselda Zuniga ("Petitioner Zuniga"), did not participate. (Petitioner Zuniga did not participate by telephone: when we telephoned the number she provided in her Hearing Request, through several attempts during the 10 minutes following the hearing start time, and again 40 minutes later, we received a busy signal. Petitioner Zuniga did not provide any other phone number where she could be reached.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Zuniga owes to USDA Rural Development a balance of **$32,498.80** (as of July 14, 2011) in repayment of a United States Department of Agriculture Farmers Home Administration loan made in 1999, for a home in Texas. The balance is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed August 5, 2011), which are admitted into evidence, together with the testimony of Mary Kimball.

4. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$32,498.80** would increase the current balance by $9,099.66, to $41,598.46. *See* USDA Rural Development Exhibits, esp. RX 7.

5. The amount Petitioner Zuniga borrowed in 1999 was $62,900.00. [Petitioner Zuniga was **not** a minor in 1999. *See* Petitioner Zuniga's Hearing Request.] By the time of the foreclosure sale in 2003, the debt had grown to $93,259.24:

$ 58,485.21	Principal Balance prior to foreclosure sale
$ 7,606.04	Interest Balance prior to foreclosure sale
$ 18,085.74	Payoff to first lien holder
$ 7,928.07	Remaining Fees Balance prior to foreclosure sale
$ 1,154.18	Negative Escrow Balance prior to foreclosure sale
$ 93,259.24	Total Amount Due prior to foreclosure sale
=========	
- $ 36,501.00	Proceeds from foreclosure sale
$ 56,758.24	Unpaid in 2003

RX 6 and USDA Rural Development Narrative.

Another $24,259.44 applied to the debt since then leaves **$32,498.80** unpaid now (excluding the potential remaining collection fees). *See* RX 6, esp. p. 2, and USDA Rural Development Narrative.

6. Petitioner Zuniga's Hearing Request was late (more than a year late), so as of July 14, 2011, she had already experienced garnishment, for more than a year, and ***offset*** of **income tax refunds**. Petitioner

Zuniga's progress in repaying the debt is detailed on RX 6, p. 2, plus Narrative.

7. Even though Petitioner Zuniga failed to file a Consumer Debtor Financial Statement, or anything, in response to my Order dated August 5, 2011, her Hearing Request letter dated May 27, 2011, states that she supports all five of her children that she had with her co-borrower, Buddy Vasquez. Based on roughly $134.00 per month garnishment through the first half of 2011, I calculate Petitioner Zuniga's current disposable pay to be roughly $** per month. **Petitioner Zuniga should not be garnished when her disposable pay is $217.50 per week or less**. (Disposable pay is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.)

8. Taking into account the factors to be considered under 31 C.F.R. § 285.11, I find that potential garnishment to repay "the debt" (*see* paragraph 3) should be and will be limited to the following amounts of Petitioner Zuniga's disposable pay:

(a) through February 2012, zero per cent (0%);

(b) beginning March 2012, through February 2014, up to 5%; and

(c) beginning no sooner than March 2014, following review of Petitioner Zuniga's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, up to 10%.

USDA Rural Development **is required to return** any amounts garnished in violation of 29 C.F.R. § 870.10, currently $217.50 per week or less.

9. Petitioner Zuniga is responsible and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

10. NO garnishment is authorized through February 2012. Thereafter, garnishment of Petitioner Zuniga's disposable pay is authorized as shown in paragraph 8. I encourage **Petitioner Zuniga and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Zuniga, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Zuniga, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. You may ask that the debt be apportioned between you and your co-borrower.

Findings, Analysis and Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Zuniga and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

12. Petitioner Zuniga owes the debt described in paragraphs 3, 4 and 5.

13. **NO garnishment is authorized through February 2012**. Beginning March 2012 through February 2014, **garnishment up to 5% of Petitioner Zuniga's disposable pay** is authorized. Beginning no sooner than March 2014, following review of Petitioner Zuniga's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, **garnishment up to 10% of Petitioner Zuniga's disposable pay** is authorized. 31 C.F.R. § 285.11.

14. **NO refund** to Petitioner Zuniga of monies already collected is appropriate, and no refund is authorized, **UNLESS** Petitioner Zuniga has been garnished when her disposable pay did not exceed "an amount equivalent to thirty times the minimum (hourly) wage" for a week, currently $217.50 per week (30 x $7.25).[1] USDA Rural Development **is required to return** any amounts garnished in violation of 29 C.F.R. § 870.10, currently $217.50 per week or less.

[1] The regulation at 31 C.F.R. § 285.11 includes the following restriction on garnishment: "The amount set forth at 15 U.S.C. 1673(a)(2) is the amount by which a debtor's disposable pay (for that week) exceeds an amount equivalent to thirty times the minimum (hourly) wage. See 29 CFR 870.10."

15. Repayment of the debt may also occur through **offset** of Petitioner Zuniga's **income tax refunds** or other **Federal monies** payable to the order of Ms. Zuniga.

Order

16. Until the debt is repaid, Petitioner Zuniga shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

17. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment through February 2012. Beginning March 2012 through February 2014, **garnishment up to 5% of Petitioner Zuniga's disposable pay** is authorized. Beginning no sooner than March 2014, following review of Petitioner Zuniga's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, **garnishment up to 10% of Petitioner Zuniga's disposable pay** is authorized. 31 C.F.R. § 285.11.

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

Done at Washington, D.C.

DANNY BARFIELD.
AWG Docket No. 11-0255.
Decision and Order.
Filed August 30, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Hearing Officer James P. Hurt.

Decision and Order

This matter is before me upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On August 5, 2011, I issued a Prehearing Order to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The Rural Development Agency (RD), Respondent, complied with the Discovery Order and a Narrative was filed, together with supporting documentation RX-1 through RX-7 on August 5, 2011. The Petitioner filed his financial statement on August 16, 2011 (which I now label as PX-1) and his Narrative (which I now label as PX-2).

On August 17, 2011, at the time set for the hearing, both parties were available for the hearing. Ms. Kimball of RD was representing RD and was present for the telephone conference. Mr. Barfield was available and represented himself. The parties were sworn.

Petitioner has been employed for more than one year, but his work is as a part-time contract worker and has only worked limited hours in the past year. Petitioner lives with his parents. He is now divorced and has custody of his minor child.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On June 13, 1994, Petitioner and his ex-wife obtained a loan for the purchase of a primary home mortgage loan in the amount of $33,570.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) to purchase their home on a property located in 16## 1* Street, Southport, FL 324##[1]. RX-1, RX-2.

2. Borrowers re-amortized their account on May 13, 1999 bringing the principal amount due to $38,796.35. Narrative.

3. The borrowers became in default and a Notice of Acceleration was mailed on April 25, 2000. RX-4.

[1] The complete address is maintained in USDA files.

4. The certified mail receipt was signed for by Petitioner's ex-wife. RD was not required to use "Addressee only" on certified mail. (RX-4). Petitioner testified that he did not actually receive notice of the default.

5. After constructive notice of the foreclosure in a paper of general circulation in the locality of the property, the property was sold in a foreclosure sale. A Judgment of Foreclosure was issued on May 1, 2001. RX-5.

6. RD received a net $28,538.37 from the sale. Narrative, RX-6.

7. The principal loan balance for the RD loan prior to the foreclosure was $38,644.59, plus $5,463.17 for accrued interest, plus $1,710.52 for fees. In addition, $282.92 in additional interest was owned for a total of $46,101.20. Narrative, RX-6.

8. After the sale proceeds were applied, borrowed owed $17,562.83. Narrative,

RX-6.

9. Since the sale, U.S. Treasury has received $5,646.80 bringing the current amount due to $11,916.03 - exclusive of potential Treasury fees. RX-6.

10. The remaining potential fees from Treasury are $3,336.49. RX-7.

11. Mr. Barfield does not have full time employment and his employment is sporadic. PX-1.

Conclusions of Law

Petitioner is jointly and severally indebted to USDA Rural Development in the amount of $11,916.03 exclusive of potential Treasury fees for the mortgage loan extended to him.

In addition, Petitioner is jointly and severally indebted for potential fees to the US Treasury in the amount of $3,336.49.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is not entitled to administratively garnish the wages of the Petitioner at this time.

Order

For the foregoing reasons, the wages of Petitioner shall NOT be subjected to administrative wage garnishment at this time. After twelve months, RD may re-assess the Petitioner's financial position.

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

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JOSUE RODRIGUEZ.
AWG Docket No. 11-0320.
Decision and Order.
Filed August 31, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Victor W. Palmer.

Decision and Order

Pursuant to a Hearing Notice, I held a hearing by telephone, on August 30, 2011, at 2:30 PM Eastern Time, in consideration of a Petition seeking to dispute Petitioner's present obligation to pay a debt that Petitioner incurred on April 4, 2006, when he obtained a single family housing loan guarantee from USDA in respect to a $70,000.00 mortgage loan from ometown bank ithe Hometown Bank, and signed RD Form 1980-21, promising to reimburse USDA for any losses it sustained (RX1, RX-2 and RX-3). The loan was not paid, and on March 30, 2010, USDA paid the lender net sum of $26,588.43 after deducting the sale price of the home less principal, interest and fees owed. The present debt is $26,588.43 plus $7,444.76 in fees to Treasury, or $34, 033.19 total (RX-9). At the hearing, Petitioner was assisted by an interpreter, Joan Jaimes. Mary Kimball, represented Respondent. Both Petitioner and Ms. Kimball were sworn.

Petitioner is single. He supports a three year old child. He is employed by the ABC Company as a tree cutterealth Care AideH earning a gross weekly salary of $**, or $** net after the deduction of withholding taxes. His net monthly income is $***. er husband, Stephen FoffHHis monthly expenses are: rent-$**; child support payments-$**; gasoline-$**; electricity-$*; cable TV-$*; food-$**; and clothing (self and child)-$*. Total monthly expenses are: $***. Based on his income less expenses, the maximum amount that may be deducted each month

from his wages is $50.00. Petitioner is interested in arranging a settlement of this debt and shall inquire into the possibility of obtaining a loan and discussing settlement with Treasury. For that reason no amount shall be garnished from his wages during the next 90 days while he undertakes to contact Treasury and achieve a settlement of the debt. At the end of 90 days no more than $50.00 per month shall be garnished from his wages in repayment of this debt.

The garnishment of Petitioner's wages is hereby suspended and shall not be

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RACHEL AINSWORTH f/k/a RACHEL NUNEZ.
AWG Docket No. 11-0331.
Decision and Order.
Filed August 31, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Victor W. Palmer.

Decision and Order

Pursuant to a Hearing Notice, I held a hearing by telephone, on August 30, 2011, at 11:00 AM Eastern Time, in consideration of a Petition seeking to dispute Petitioner's present obligation to pay a debt that Petitioner and her former husband, Emilio Nunez, incurred on April 24, 1986, when they obtained a single family mortgage loan in the amount of $38,400.00 from USDA, and signed a promissory note and a deed of trust on property at 1306 Tracey St., George West, Texas (RX-1, and RX-2). Petitioner and Mr. Nunez divorced as per a Divorce Decree rendered in open court on September 20, 1995 and signed on May 13, 1996 in Cause L-95-0062CV-C by the 343rd District Court for Live Oak County, Texas. Under the terms of the decree, Emilio Nunez was awarded the house and ordered to pay the mortgage loan. The decree was recorded at Vol. 58, Page 182 Live Oak County District Court Minutes. However, the loan was not paid, and a foreclosure sale of the mortgaged house was held on July 6, 1999. USDA received $20,500.00 from the

sale proceeds. Prior to the application of the sale proceeds, $46,729.97 in principal, interest and fees was owed on the debt. Since the sale, an additional $5,520.64 of the debt has been collected by Treasury through $375.16 monthly garnishments from the salary Petitioner receives. The present debt is $20,254.17 plus $5,671.17 in fees to Treasury, or $25,925.34 total (RX-7). At the hearing, Petitioner was represented by R. Bellows, Attorney at Law, 601 C. N. Harborth Avenue, P.O. Box 1047, Three Rivers, Texas 78071. Mary Kimball, represented Respondent. Both Petitioner and Ms. Kimball were sworn.

Petitioner is married and has three adult children by her first marriage to Mr. Nunez. She is employed by the Texas Department of Justice as a Correctional Officerealth Care AideH earning a gross monthly income of $*** plus hazardous duty pay of $*, or $*** net after the deduction of withholding taxes. er husband, Stephen FoffHHer monthly expenses are: rent/mortgage payments-$**; car payments-$***; electricity-$**; cable TV-$*; medical expenses-$*; loans-$**; University costs-$**; life insurance premium-$*; and other expenses-$**. Total monthly expenses are: $***. Respondent's representative, Mary Kimball, Accountant for the New Initiatives Branch, USDA Rural Development, filed supporting documents and gave testimony showing that the debt owed to it has a present balance of $20,254.17 plus $5,671.17 in fees to Treasury, or $25,925.34 total.

Under these circumstances, there are issues to be resolved respecting Mr. Nunez's ultimate liability for the debt and/or the establishment of an equitable payment plan with Treasury. The garnishment of Petitioner's wages are hereby suspended and shall not be resumed for six (6) months from the date of this Order.

MYRTLE S. HATCHER f/k/a MYRTLE S. ROLAND.
AWG Docket No. 11-0319.
Decision and Order.
Filed September 2, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was held as scheduled on August 31, 2011. Ms. Myrtle S. Hatcher, formerly known as Myrtle S. Carter Roland ("Petitioner Hatcher"), participated, representing herself (appeared *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Hatcher owes to USDA Rural Development a balance of **$16,323.91** in repayment of two United States Department of Agriculture Farmers Home Administration loans made in 1991, for a home in Louisiana. The balance is now unsecured ("the debt"), and is calculated as of July 28, 2011. *See* USDA Rural Development Exhibits, esp. RX 6, pp. 1, 2, plus Narrative, Witness & Exhibit List (filed August 12, 2011), which are admitted into evidence, together with the testimony of Mary Kimball.

4. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$16,323.91** would increase the current balance by $4,897.17, to $21,221.08. [This includes both loans.] *See* USDA Rural Development Exhibits, esp. RX 6, pp. 1, 2.

5. The amount Petitioner Hatcher (then Roland) borrowed in 1991 was $31,360.00 ($22,000.00 on one loan, $9,360.00 on the other loan).

By the time of the short sale (to Leavines Properties) in 1999, the debt had grown to $31,568.95:

$ 29,831.18	Principal Balance prior to short sale (both loans)
$ 1,737.77	Interest Balance prior to short sale (both loans)
$31,568.95	Total Amount Due prior to short sale (both loans)
=========	
- $8,200.00	Proceeds from short sale
$23,368.95	Unpaid after short sale in 1999

RX 5 and USDA Rural Development Narrative.

6. Petitioner Hatcher's testimony is admitted into evidence. Petitioner Hatcher testified that she took care to keep the USDA Rural Development debt current, and that her payments were current when she moved out and delivered the keys to USDA Rural Development. I agree with Petitioner Hatcher that she acted responsibly under the circumstances she described. Nevertheless, a significant amount of interest did accrue before the short sale happened. Also, the large amount of debt remaining after the short sale can be attributed also to the sale price ($8,200.00) Petitioner Hatcher received from Leavines Properties.

7. Since the short sale, no additional interest has accrued, and another $7,045.04 has been applied toward paying the debt, taken from monies due to Petitioner Hatcher such as Federal income tax refunds, Social Security payments, and other payments, leaving **$16,323.91** unpaid now (excluding the potential remaining collection fees). *See* RX 5, and USDA Rural Development Narrative. The last collection shown was in 2009. RX 5, p. 3. Petitioner Hatcher's Social Security payments have apparently not been **offset** since 2009.

8. Petitioner Hatcher filed a completed "Consumer Debtor Financial Statement" on August 22, 2011, which is admitted into evidence. Petitioner Hatcher's part-time job as a direct care worker requires her to be on-call, to respond to people's needs such as being bathed at home. The amount of money she makes is too small to be

garnished. [**Petitioner Hatcher should not be garnished when her disposable pay is $** per week or less**.][1] USDA Rural Development does not garnish in violation of 29 C.F.R. § 870.10, where disposable pay does not exceed "an amount equivalent to thirty times the minimum (hourly) wage" for a week, currently $217.50 per week (30 x $7.25).

9. Petitioner Hatcher's reasonable and necessary living expenses consume her part-time pay plus her Social Security payments plus other sources of income, including her husband's. No amount of Petitioner Hatcher's disposable pay could be garnished without creating hardship. 31 C.F.R. § 285.11. (Disposable pay is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.)

10. Petitioner Hatcher did not have with her during the hearing, the USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List. So, Petitioner Hatcher, if you want explanation of those documents, after you have studied them with this Decision at hand, you may request a follow-up telephone conference with Ms. Kimball and me. To do so, you would contact Legal Secretary Marilyn ("Nita") Kennedy, whose phone is

202-720-8423, and whose fax is ***202-720-8424,*** and whose e-mail address is Marilyn.Kennedy@dm.usda.gov [the "dm" stands for Departmental Management].

11. Petitioner Hatcher is responsible and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

12. **Petitioner Hatcher, you may choose to call Treasury's collection agency** to negotiate the repayment of the debt. If a portion of your Social Security retirement payments is taken again, you may choose to ask that a **smaller amount** of your Social Security retirement

[1] The regulation at 31 C.F.R. § 285.11 includes the following restriction on garnishment: "The amount set forth at 15 U.S.C. 1673(a)(2) is the amount by which a debtor's disposable pay (for that week) exceeds an amount equivalent to thirty times the minimum (hourly) wage. See 29 CFR 870.10."

payments be **offset** (taken). Petitioner Hatcher, you may choose to offer to Treasury's collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. Petitioner Hatcher, this will require **you** to telephone Treasury's collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**.

Findings, Analysis and Conclusions

13. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Hatcher and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

14. Petitioner Hatcher owes the debt described in paragraphs 3, 4, 5, 6 and 7.

15. **No garnishment is authorized**. 31 C.F.R. § 285.11.

16. Repayment of the debt may occur through **offset** of Petitioner Hatcher's **income tax refunds** or other **Federal monies** payable to the order of Ms. Hatcher. [Petitioner Hatcher, if you file a joint tax return and a part of the refund belongs to your husband, call the Treasury toll-free number to inquire about the "injured spouse." *See* paragraph 12.]

Order

17. Until the debt is repaid, Petitioner Hatcher shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

18. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment. 31 C.F.R. § 285.11.

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

Done at Washington, D.C.

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BILLY PITTS.
AWG Docket No. 11-0330.
Decision and Order.
Filed September 8, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Victor W. Palmer.

Decision and Order

Pursuant to a Hearing Notice, I held a hearing by telephone, on August 31, 2011, at 12:00 PM Eastern Time, in consideration of a Petition seeking to dispute Petitioner's present obligation to pay a debt that Petitioner incurred on April 1, 2005, when he obtained a single family housing loan from USDA in the amount of $78,075.00.ometown ban The loan was not paid, and on May 6, 2008, a foreclosure sale was held and Mr. Pitts received a credit of $62,434.00 which, when deducted from $93,221.59 that Mr. Pitts owed for principal, accrued interest and fees, resulted in Mr. Pitts still owing $30,059.23 . Treasury has since collected $4,419.60. The present debt is $25,832.63 plus $7,177.89 in fees to Treasury, or $32,813.19 total. At the hearing Mr. Pitts represented himself and Mary Kimball, represented Respondent. Both Petitioner and Ms. Kimball were sworn.

Petitioner is married. His wife is unemployed and she and two daughters are attending classes at a University. Mr. Pitts is employed by the Irwin County Detention Center as a transportation workerealth Care AideH earning a gross bi-weekly salary of $***, or $*** net after the deduction of withholding taxes. His net monthly income is $***. er husband, Stephen FoffHHis monthly expenses are: rent-$**; gasoline-$**; electricity-$**; trash/water-$*; auto insurance $**; car payments $**; furniture-$**; and security system-$*. Total monthly expenses are: $***. Based on his income less expenses, Mr. Pitts will suffer financial hardship if any amount of his wages are garnished for one (1) year from the date of this order. Petitioner is interested in arranging a settlement of

this debt and shall inquire into the possibility of obtaining a loan and discussing settlement with Treasury within the next 12 months.

The garnishment of Petitioner's wages is hereby suspended and shall not be resumed for one (1) year from the date of this Order.

REBECCA MOTTICE.
AWG Docket No.11-0238.
Decision and Order.
Filed September 8, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Victor W. Palmer.

DECISION AND ORDER

This matter is before me upon the request of the Petitioner, Rebecca Mottice, for a hearing to contest the efforts of the Respondent, USDA/Rural Development, to garnish her wages in order to collect rental assistance it provided her. A Notice of Hearing was issued that a hearing would be conducted by telephone on August 4, 2011, at 2:30 P.M. Eastern Time. Esther McQuaid and M. Christine Fisher, representing the Respondent, USDA, were available at the time of the sheduled hearing but Ms. Mottice was not. Attempts to contact her by telephone were unsuccessful. Respondent had filed exhibits, and was available to give testimony in their support, that showed Ms. Mottice had received $612.00 more in rental assistance from USDA, Rural Development, than she was entitled to receive. She presently owes this amount plus $171.36 for collection fees to Treasury, or $783.36 total.

Accordingly, the petition is hereby dismissed, and Respondent is entitled to administratively garnish the wages of the Petitioner subject to the limitations set forth in 31 C.F.R. § 285.11 (i).

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

_____

NORMA VELASQUEZ.
AWG Docket No. 11-0343.
Decision and Order.
September 20, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was held as scheduled on September 14, 2011, and resumed on September 20, 2011. Norma Velasquez, the Petitioner ("Petitioner Norma Velasquez"), who represents herself (appears *pro se*), failed to appear. [She failed to appear by telephone: (a) the phone number Petitioner Norma Velasquez provided on her Hearing Request was called and messages requesting a return call and giving my office phone number were left on a recording, but the calls were not returned; and (b) Petitioner Norma Velasquez failed to respond to my Order filed August 12, 2011, which, among other things, instructed her to provide a telephone number for the hearing.]

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
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St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

3. I encourage **Petitioner Norma Velasquez and Treasury's collection agency** to work together to **establish a repayment schedule** rather than proceeding with garnishment, even though this Decision authorizes garnishment in a limited amount beginning April 2012. Petitioner Norma Velasquez, obviously, will have to make herself available to Treasury's collection agency if she wants to negotiate. *See* paragraph 12.

Summary of the Facts Presented

4. USDA Rural Development's Exhibits, plus Narrative, Witness & Exhibit List, were filed on August 26, 2011, and are admitted into evidence, together with the testimony of Ms. Kimball.

5. Petitioner Norma Velasquez owes to USDA Rural Development **$7,004.58** in repayment of a USDA Farmers Home Administration loan borrowed in 1989 for a home in Texas, the balance of which is now unsecured ("the debt").

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$7,004.58**, would increase the current balance by $1,961.28, to $8,965.86. *See* USDA Rural Development Exhibits, esp. RX 5.

7. Both Petitioner Norma Velasquez and her husband Armando Velasquez stated on their Hearing Requests that they do not own the house, and that they should not have to pay for something they do not own. Their theory is not legally correct and is not mathematically correct. The amount they borrowed from USDA Rural Development was $38,000.00 in 1989. By the time of the short sale on May 29, 1997, Petitioner Norma Velasquez's debt had grown to $42,708.63.

$35,306.29	unpaid principal
4,089.24	unpaid interest, and
3,313.10	unpaid fees and fee interest, likely mostly real estate taxes
$42,708.63	
========	

RX 4, page 1.

From the sale of the home (for $26,000.00), $23,455.80 was applied to reduce the balance. Collections since then ($12,248.25) have further reduced the balance, to **$7,004.58**, as of August 23, 2011. RX 4, and RX 5.

8. The amount of Petitioner Norma Velasquez's disposable income is not available in the evidence before me. [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.] Numerous ***offsets*** during the past 10 years, probably mostly Federal income tax refunds, have reduced the balance substantially (by $12,248.25). In addition to ***offsets***, garnishment up to 15% of Petitioner Norma Velasquez's disposable pay can occur unless she cannot withstand garnishment in that amount without hardship. 31 C.F.R. § 285.11. The only indication I have of hardship is her statement in her Hearing Request that she makes little money to pay medicine.

9. This is Petitioner Norma Velasquez's case (she filed the Petition), and in addition to failing to be available for the hearing, Petitioner Norma Velasquez failed to file with the Hearing Clerk any information, such as a completed Consumer Debtor Financial Statement. Petitioner Norma Velasquez's deadline for filing was September 2, 2011 (*see* my Order filed August 12, 2011). Petitioner Norma Velasquez failed to file anything; she has provided no information about her income and expenses and no indication of hardship. I have no way of evaluating the factors to be considered under 31 C.F.R. § 285.11; normally I would presume that Petitioner Norma Velasquez can withstand garnishment up to 15% of her disposable pay. [Petitioner Norma Velasquez's husband Armando Velasquez also failed to file with the Hearing Clerk any information, such as a completed "Consumer Debtor Financial Statement," and he also failed to appear to testify.]

10. Based on Petitioner Norma Velasquez's statement in her Hearing Request that she makes little money to pay medicine, to prevent hardship, garnishment to repay "the debt" (*see* paragraph 6) will be

limited to **0%** of Petitioner Norma Velasquez's disposable pay through March 2012; then **up to 7%** of Petitioner Norma Velasquez's disposable pay beginning April 2012 through March 2013; then **up to 15%** of Petitioner Norma Velasquez's disposable pay thereafter. 31 C.F.R. § 285.11.

11. Petitioner Norma Velasquez is responsible and able to negotiate the disposition of the debt with Treasury's collection agency. Both Mr. and Mrs. Velasquez could be on the phone together when they call Treasury's collection agency, if they would like.

Discussion

12. Through March 2012, **no** garnishment is authorized. Beginning April 2012 through March 2013, garnishment **up to 7%** of Petitioner Norma Velasquez's disposable pay is authorized; and thereafter, garnishment **up to 15%** of Petitioner Norma Velasquez's disposable pay is authorized. *See* paragraphs 9, 10 and 11. I encourage **Petitioner Norma Velasquez and Treasury's collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Norma Velasquez, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Norma Velasquez, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

13. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Norma Velasquez and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

14. Petitioner Norma Velasquez owes the debt described in paragraphs 5, 6 and 7.

15. **Garnishment is authorized**, as follows: through March 2012, **no** garnishment. Beginning April 2012 through March 2013, garnishment **up to 7%** of Petitioner Norma Velasquez's disposable pay; and

thereafter, garnishment **up to 15%** of Petitioner Norma Velasquez's disposable pay. 31 C.F.R. § 285.11.

16. Repayment of the debt may also occur through ***offset*** of Petitioner Norma Velasquez's **income tax refunds** or other **Federal monies** payable to the order of Ms. Velasquez.

Order

17. Until the debt is repaid, Petitioner Norma Velasquez shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

18. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through March 2012. Beginning April 2012 through March 2013, garnishment up to 7% of Petitioner Norma Velasquez's disposable pay is authorized; and garnishment up to 15% of Petitioner Norma Velasquez's disposable pay thereafter. 31 C.F.R. § 285.11.

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

Done at Washington, D.C.

ARMANDO VELASQUEZ.
AWG Docket No. 11-0355.
Decision and Order.
Filed September 20, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

1. The hearing by telephone was held as scheduled on September 20, 2011. Armando Velasquez, the Petitioner ("Petitioner Armando Velasquez"), who represents himself (appears *pro se*), failed to appear. [He failed to appear by telephone: (a) the phone number Petitioner Armando Velasquez provided on his Hearing Request was called and a message requesting a return call and giving my office phone number was left on a recording, but the call was not returned; and (b) Petitioner Armando Velasquez failed to respond to my Order filed August 30, 2011, which, among other things, instructed him to provide a telephone number for the hearing.]

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

3. I encourage **Petitioner Armando Velasquez and Treasury's collection agency** to work together to **establish a repayment schedule** rather than proceeding with garnishment, even though this Decision authorizes garnishment in a limited amount beginning April 2012. Petitioner Armando Velasquez, obviously, will have to make himself available to Treasury's collection agency if he wants to negotiate. *See* paragraph 12.

Summary of the Facts Presented

4. USDA Rural Development's Exhibits, plus Narrative, Witness & Exhibit List, were filed on August 26, 2011, and are admitted into evidence, together with the testimony of Ms. Kimball.

5. Petitioner Armando Velasquez owes to USDA Rural Development **$7,004.58** in repayment of a USDA Farmers Home Administration loan borrowed in 1989 for a home in Texas, the balance of which is now unsecured ("the debt").

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$7,004.58**, would increase the current balance by $1,961.28, to $8,965.86. *See* USDA Rural Development Exhibits, esp. RX 5.

7. Both Petitioner Armando Velasquez and his wife Norma Velasquez stated on their Hearing Requests that they do not own the house, and that they should not have to pay for something they do not own. Their theory is not legally correct and is not mathematically correct. The amount they borrowed from USDA Rural Development was $38,000.00 in 1989. By the time of the short sale on May 29, 1997, Petitioner Armando Velasquez's debt had grown to $42,708.63.

$35,306.29	unpaid principal
4,089.24	unpaid interest, and
3,313.10	unpaid fees and fee interest, likely mostly real estate taxes
$42,708.63	

RX 4, page 1.

From the sale of the home (for $26,000.00), $23,455.80 was applied to reduce the balance. Collections since then ($12,248.25) have further reduced the balance, to **$7,004.58**, as of August 23, 2011. RX 4, and RX 5.

8. The amount of Petitioner Armando Velasquez's disposable income is not available in the evidence before me. [Disposable income

is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.] Numerous ***offsets*** during the past 10 years, probably mostly Federal income tax refunds, have reduced the balance substantially (by $12,248.25). In addition to ***offsets***, garnishment up to 15% of Petitioner Armando Velasquez's disposable pay can occur unless he cannot withstand garnishment in that amount without hardship. 31 C.F.R. § 285.11. The only indication I have of hardship is his wife's statement in her Hearing Request that she makes little money to pay medicine.

9. This is Petitioner Armando Velasquez's case (he filed the Petition), and in addition to failing to be available for the hearing, Petitioner Armando Velasquez failed to file with the Hearing Clerk any information, such as a completed Consumer Debtor Financial Statement. Petitioner Armando Velasquez's deadline for filing was September 16, 2011 (*see* my Order filed August 30, 2011). Petitioner Armando Velasquez failed to file anything; he has provided no information about his income and expenses and no indication of hardship. I have no way of evaluating the factors to be considered under 31 C.F.R. § 285.11; normally I would presume that Petitioner Armando Velasquez can withstand garnishment up to 15% of his disposable pay. [Petitioner Armando Velasquez's wife Norma Velasquez also failed to file with the Hearing Clerk any information, such as a completed "Consumer Debtor Financial Statement," and she also failed to appear to testify. She did state in her Hearing Request that she makes little money to pay medicine.]

10. Based on Petitioner Armando Velasquez's wife's statement in her Hearing Request that she makes little money to pay medicine, to prevent hardship, garnishment to repay "the debt" (*see* paragraph 6) will be limited to **0%** of Petitioner Armando Velasquez's disposable pay through March 2012; then **up to 7%** of Petitioner Armando Velasquez's disposable pay beginning April 2012 through March 2013; then **up to 15%** of Petitioner Armando Velasquez's disposable pay thereafter. 31 C.F.R. § 285.11.

11. Petitioner Armando Velasquez is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

Both Mr. and Mrs. Velasquez could be on the phone together when they call Treasury's collection agency, if they would like.

Discussion

12. Through March 2012, **no** garnishment is authorized. Beginning April 2012 through March 2013, garnishment **up to 7%** of Petitioner Armando Velasquez's disposable pay is authorized; and thereafter, garnishment **up to 15%** of Petitioner Armando Velasquez's disposable pay is authorized. *See* paragraphs 9, 10 and 11. I encourage **Petitioner Armando Velasquez and Treasury's collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Armando Velasquez, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Armando Velasquez, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

13. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Armando Velasquez and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

14. Petitioner Armando Velasquez owes the debt described in paragraphs 5, 6 and 7.

15. **Garnishment is authorized**, as follows: through March 2012, **no** garnishment. Beginning April 2012 through March 2013, garnishment **up to 7%** of Petitioner Armando Velasquez's disposable pay; and thereafter, garnishment **up to 15%** of Petitioner Armando Velasquez's disposable pay. 31 C.F.R. § 285.11.

16. Repayment of the debt may also occur through ***offset*** of Petitioner Armando Velasquez's **income tax refunds** or other **Federal monies** payable to the order of Mr. Velasquez.

17. Until the debt is repaid, Petitioner Armando Velasquez shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

18. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through March 2012. Beginning April 2012 through March 2013, garnishment up to 7% of Petitioner Armando Velasquez's disposable pay is authorized; and garnishment up to 15% of Petitioner Armando Velasquez's disposable pay thereafter. 31 C.F.R. § 285.11.

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

Done at Washington, D.C.

THOMAS GRIFFIN.
AWG Docket No. 11-0344.
Decision and Order.
September 21, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Victor W. Palmer.

Decision and Order

On September 21, 2011, I held a hearing by telephone on a Petition to Dismiss an administrative wage garnishment proceeding to collect a debt allegedly owed to Respondent, USDA, Rural Development for losses it incurred under two loans it gave to Petitioner, Thomas Griffin. Petitioner was not represented by an attorney, and represented himself pro se. Respondent, USDA Rural Development, was represented by Mary

Kimball. Petitioner, Thomas Griffin, and Mary Kimball who testified for Respondent, were each duly sworn.

Respondent proved the existence of the debt owed by Petitioner for payment of losses Respondent sustained on loans given to Petitioner, Thomas Griffin, to purchase a home located at 419 Pony Greer Rd., Rayville, LA. The loans are evidenced by a Promissory Note in the amount of $21, 000.00 and $11,580.00, dated September 18, 1991 (RX-1). Payments were not made on the loans and a short sale was held on August 9, 1999. USDA, Rural Development received $24,000.00 from the sale. Prior to the sale, the combined amount Petitioner owed on the assumed loan and the additional mortgage loan to Respondent, USDA, Rural Development, was $43,224.70 for principal, accrued interest and fees. After the sale proceeds were posted, Petitioner owed $6,039.24 on one loan and $12,870.46 on the other loan. Since the sale, $3,046.87 has been collected by the U. S. Treasury Department. A compromise was made in respect to the smaller loan and after a $3,046.87 payment by Petitioner, that loan was cancelled. The amount that is presently owed on the remaining debt is $8,986.25 plus potential fees to Treasury of $2,695.88, or $11,682.13 total (RX-6). Petitioner is employed as a "hired hand" by a well drilling company a net monthly income of $***. Petitioner has monthly expenses of: mortgage-$**; gasoline-$**; electricity-$**; water-$*; food-$**; IRS garnishment-$**; and car insurance-$*.er monthly expenses Petitioner wants to reduce and eventually pay off this debt. The maximum that may be garnished for this debt is $50.00 per month in order that excessive financial hardship is not imposed upon him.

USDA, Rural Development has met its burden under 31 C.F.R. §285.11(f)(8) that governs administrative wage garnishment hearings, and has proved the existence and the amount of the debt owed by the Petitioner. On the other hand, Petitioner showed that he has very little disposable income. Under these circumstances, I have decided and hereby order that no more than $50.00 per month may be garnished from his wages.

_____

HEATHER TRACEY.
AWG Docket No. 11-0293.
Decision and Order.
Filed September 23, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing was held by telephone on September 21, 2011. Ms. Heather M. Tracey, the Petitioner ("Petitioner Tracey") participated, representing herself (appeared "*pro se*").

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Ms. Mary Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

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314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Tracey owes to USDA Rural Development a balance of **$35,316.48** (as of July 15, 2011, *see* RX 10), in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX 2, esp. p. 2) for a loan made in 2004, the balance of which is now unsecured ("the debt"). Petitioner Tracey borrowed, with the co-borrower, her then-husband, to buy a home in Michigan. *See* USDA Rural Development Exhibits RX 1 through RX 10

together with the Narrative, Witness & Exhibit List (filed August 5, 2011); and the testimony of Mary Kimball, all of which I admit into evidence.

4. I admit into evidence Petitioner Tracey's testimony, together with Petitioner Tracey's "Consumer Debtor Financial Statement" filed September 21, 2011, together with Petitioner Tracey's Hearing Request including accompanying documentation.

5. The ***Guarantee*** (RX 2) establishes an **independent** obligation of Petitioner Tracey, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 2, p. 2.

6. Petitioner Tracey's co-borrower, her former husband, was required to and failed to pay the debt on the home. *See* Petitioner Tracey's Hearing Request. Petitioner Tracey's divorce from the co-borrower was in 2008, but she had moved out of the home with her two children into her parents' home in March 2007. Petitioner Tracey's testimony. The "Due Date of Last Payment Made" was October 1, 2007. RX 6, p. 3. Although Petitioner Tracey may pursue the co-borrower for monies collected from her on the debt, that does not prevent USDA Rural Development from collecting from her under the ***Guarantee***. RX 2.

7. Petitioner Tracey's legal recourse against her co-borrower for monies collected from her on the debt does seem inadequate. But once she had entered into the borrowing transaction with her co-borrower, certain responsibilities were fixed that were addressed but not erased by the divorce orders. Thus, I conclude that Petitioner Tracey still owes the balance of **$35,316.48** (excluding potential collection fees), as of July 15, 2011, and that USDA Rural Development may collect that amount from

her, pursuant to the ***Guarantee***. [The debt is her co-borrower's and her joint-and-several obligation.]

8. At the foreclosure sale on April 11, 2008, the lender was not outbid, so the "Sheriff's Deed on Mortgage Sale" was issued to JP Morgan Chase Bank, N.A. USDA Rural Development's evaluation of the lender's claim is summarized in RX 6. USDA Rural Development evaluated, among other things, timeliness at various stages of the proceeding; and the appraised values of the security: $60,000.00 "As Is" Appraised Value; $35,900.00 "As Is" BPO [broker price opinion]; and $44,000.00 RHS Liquidation Appraised Value. RX 6, esp. p. 4. USDA Rural Development's payment to JP Morgan Chase Bank, N.A. was based on the Liquidation Appraisal valuing the home at $44,000.00. RX 5. [The lender did not sell the home within the time allowed.]

9. USDA Rural Development paid $43,267.37 on January 19, 2010 to JP Morgan Chase Bank, N.A., under the ***Guarantee***. RX 6, p. 7. No interest has accrued since January 19, 2010. [The lender eventually sold the home for $31,000.00 on June 18, 2010, but the difference between the Liquidation Appraisal value and the sales price was a loss borne by the lender.]

10. USDA Rural Development's review of the lender's claim determined the lender's loss to be $43,267.37 (RX 6, p. 7), which is the amount USDA Rural Development paid the lender and then began to collect from Petitioner Tracey and her co-borrower. USDA has since received two payments from Treasury netting $7,950.89, *see* RX 9, which leaves the balance of **$35,316.48**.

11. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$35,316.48** would increase the current balance by $9,888.61, to $45,205.09. RX 10.

12. Petitioner Tracey supports two young children in addition to herself, with the help of her parents. She is currently not employed. If she were employed, I would be determining whether she can withstand garnishment in the amount of 15% of her disposable pay without financial hardship. [Disposable pay is gross pay minus income tax,

Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.] 31 C.F.R. § 285.11. Since she is not employed and will need considerable time to stabilize financially, **NO garnishment is authorized through October 2012.**

13. Petitioner Tracey may choose to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

14. **NO garnishment is authorized through October 2012.** Petitioner Tracey, you may choose to negotiate the repayment of the debt with Treasury's collection agency. Petitioner Tracey, this will require **you** to telephone Treasury's collection agency. The toll-free number for you to call is **1-888-826-3127**. You may want to request apportionment of debt between you and the co-borrower. You may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

15. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Tracey and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

16. Petitioner Tracey owes the debt described in paragraph 3 and paragraphs 5 - 11.

17. **NO garnishment is authorized through October 2012**, because garnishment would create financial hardship. 31 C.F.R. § 285.11.

18. **Beginning no sooner than November 2012**, following review of Petitioner Tracey's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, **garnishment up to 15% of Petitioner Tracey's disposable pay is authorized**. 31 C.F.R. § 285.11.

19. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Tracey's **income tax refunds** or other **Federal monies** payable to the order of Ms. Tracey.

Order

20. Until the debt is fully paid, Petitioner Tracey shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

21. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment through **October 2012**. **Beginning no sooner than November 2012**, following review of Petitioner Tracey's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, **garnishment up to 15% of Petitioner Tracey's disposable pay is authorized**. 31 C.F.R. § 285.11.

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

Done at Washington, D.C.

_____

JESSICA SCHRAUTH.
AWG Docket No. 11-0310.
Decision and Order.
September 23, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Victor W. Palmer.

Decision and Order

Pursuant to a Hearing Notice, I held a hearing in this proceeding by telephone, on August 25, 2011, at 2:30 PM Eastern Time. Petitioner, Jessica Schrauth, was represented by her attorney, Douglas K. Marone, Oshkosh, Wisconsin. Respondent, United States Department of Agriculture, Rural Development (USDA-RD), was represented by Mary E. Kimball. Both Petitioner, Jessica Schrauth, and Ms. Kimball gave sworn testimony. USDA-RD introduced documents pertaining to a home loan mortgage JP Morgan Chase Bank gave to Petitioner, on July 15, 2005, for $91,000.00 to purchase a home at 310 Hall Street, Ripon,WI 54971 (RX-1). Prior to signing this loan, Petitioner, Jessica Schrauth, signed a Request for Single Family Housing Loan Guarantee, on May 31, 2005, under which USDA-RD guaranteed to pay any loss on the mortgage loan that was subsequently obtained (RX-2).

The mortgage loan was not paid as required. On April 17, 2009, USDA-RD paid JP Morgan Chase Bank $60,354.03 on the losses it sustained when the home was sold, on March 12, 2009, for $44,000.00 at a foreclosure sale by JP Morgan Chase Bank pursuant to Wis.Stat.§846.101(RX-3, RX-4 and RX-5). Since then, Treasury has collected $5,063.95 through offsets against federal income tax refunds otherwise due to Ms. Schrauth. At present, $55,290.08 is owed on the debt plus "Remaining potential fees" to Treasury of $15,481.22, or $70,771.30 total (RX-9).

Ms. Schrauth testified that she is married but her husband, Richard Schrauth, is not on the loan or the guarantee. She is employed as a safety dispatcher by a trucking company earning a net weekly salary of $**, or $*** net per month. Her husband is employed part time as a sorter by UPS earning $** per week. Their monthly expenses are: $***-rent; $**-food; $*-satellite TV; $**-electricity; $**-heat; $**-telephone; $**-auto insurance; and $**-car payments, or $*** total.

Petitioner's attorney filed a copy of the January 31, 2008, Findings of Fact, Conclusions of Law and Judgment under the foreclosure proceeding by JP Morgan Chase Bank pursuant to Wis.Stat.§846.101. Paragraph 12 states: "That no deficiency judgment may be obtained against any defendant." He argued that under Wisconsin law, USDA-RD is thereby precluded from pursuing the debt on the loss it sustained.

Case law on the subject shows that USDA-RD would be foreclosed from pursuing collection of the debt if it had sought to do so by way of subrogation, ie., substituting itself for JP Morgan Chase Bank that had elected to use the expedited foreclosure proceeding of Wis.Stat.§846.101

that precludes further pursuit of the debt, instead of the slower foreclosure provided under Wis.Stat.§846.04 that allows for deficiency judgments. But USDA-RD has elected instead to seek indemnity for its losses under the Request for Single Family Housing Loan Guarantee that Petitioner, Jessica Schrauth, signed, on May 31, 2005 in which she did:

…certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender.

In reviewing an action to collect losses sustained in guaranteeing a mortgage to a veteran by the United States Veterans Administration, the Seventh Circuit analyzed Wisconsin law and federal law. The Court held that because the VA sought recovery directly under its federal indemnity rights, rather than under the subrogated rights of the lender, it was still entitled to direct indemnification of its loss from the borrower. *United States v. Davis*, 961 F.2d 603 (7th Cir.1992); and 34 F.3d 417 (7th Cir.1993). This precedent is controlling and consistent with the Supreme Court's decision that had compared Pennsylvania and federal law in *United States v. Shimer*, 367 U.S. 374, 81 S.Ct.1554 (1961).

I therefore have decided that Petitioner still owes USDA-RD for the losses it sustained on guaranteeing the bank's loan to her. However, I am impressed that collection of this loan during the next six months would cause Petitioner great financial hardship.

Under the circumstances, I have concluded that administrative garnishment of any part of Ms. Schrauth's wages during the next six months "would cause a financial hardship to the debtor" within the meaning of the controlling regulation (31 CFR § 285.11(f)(8) (ii)). The evidence shows that Petitioner presently has limited monthly disposable income. Accordingly, administrative wage garnishment may not be pursued for the next six months. During that time, Petitioner is encouraged to undertake to come to settlement terms with the representatives of Treasury.

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

_____

RONALD L. WALLACE.
AWG Docket No. 11-0347.
Decision and Order.
Filed September 23, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was held on September 22, 2011. Mr. Ronald L. Wallace, the Petitioner ("Petitioner Wallace"), participated, representing himself (appearing *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Wallace owes to USDA Rural Development **$4,404.52** in repayment of a loan made in 1995 by the United States Department of Agriculture Farmers Home Administration, now known as USDA Rural Development. Petitioner Wallace borrowed to buy a home in Missouri. The **$4,404.52** balance is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed September 2, 2011), which are admitted into evidence, together with the testimony of Mary Kimball.

4. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$4,404.52** would increase the current balance by $1,233.27, to $5,637.79. *See* USDA Rural Development Exhibits, esp. RX 6.

5. The loan Petitioner Wallace borrowed in 1995 from USDA Farmers Home Administration was $29,530.00. By the time of the foreclosure sale in 1998, that debt had grown to $31,335.70:

$ 29,081.73 Principal Balance prior to foreclosure sale
$ 2,253.97 Interest Balance prior to foreclosure sale

$ 31,335.70 Total Amount Due prior to foreclosure sale
=========
- $17,001.00 Proceeds from foreclosure sale

$14,334.70

+ $ 162.10 Pre foreclosure fees

$14,496.80 Unpaid in 1998
=========
RX 5.

So the foreclosure sale left $14,496.80 unpaid in 1998.

6. Since the foreclosure sale, no additional interest has accrued, and numerous ***offsets*** during 2000 through 2007, mostly Federal income tax refunds, have reduced the balance substantially, by another $10,092.28 applied to the debt, leaving **$4,404.52** unpaid now (excluding the

potential remaining collection fees). *See* RX 5 and RX 6. The last collection shown was in 2007. RX 5, p. 2.

7. Petitioner Wallace's testimony and his Hearing Request (including his letter dated August 1, 2011) are admitted into evidence, together with the documents he filed during September 2011, including his Consumer Debtor Financial Statement. Petitioner Wallace and his wife support 6 children in addition to themselves. Although Petitioner Wallace has the support of his wife, she is **not** liable to repay the debt at issue here. Petitioner Wallace's current reasonable and necessary living expenses consume his disposable pay (within the meaning of 31 C.F.R. § 285.11). [Disposable pay is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.]

8. Petitioner Wallace points out that the debt would have long since been paid in full, if his income tax refunds had been ***offset*** since 2007, OR if his payment plan had not been rejected. Petitioner Wallace's disposable pay (within the meaning of 31 C.F.R. § 285.11) does **not** currently support garnishment and **no** garnishment is authorized through **October 2012**.

9. To prevent hardship, potential garnishment to repay "the debt" (*see* paragraph 3) must be limited to **0%** of Petitioner Wallace's disposable pay through **October 2012**; then, beginning no sooner than November 2012, following review of Petitioner Wallace's financial circumstances to determine what amount of garnishment he can withstand without financial hardship, garnishment up to 15% of Petitioner Wallace's disposable pay is authorized. 31 C.F.R. § 285.11.

10. Petitioner Wallace, you may want to negotiate the disposition of the debt with Treasury's collection agency. *See* paragraph 11.

Discussion

11. NO garnishment is authorized (*see* paragraph 9). Petitioner Wallace, you may want to **negotiate** the disposition of the debt. Petitioner Wallace, this will require **you** to telephone Treasury's

collection agency. The toll-free number for you to call is **1-888-826-3127**.

Findings, Analysis and Conclusions

12. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Wallace and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

13. Petitioner Wallace owes the debt described in paragraph/s 3, 4, 5 and 6.

14. **NO garnishment is authorized** through **October 2012**. Petitioner Wallace cannot withstand garnishment in any amount without creating financial hardship. Beginning no sooner than November 2012, following review of Petitioner Wallace's financial circumstances to determine what amount of garnishment he can withstand without financial hardship, garnishment up to 15% of Petitioner Wallace's disposable pay is authorized. 31 C.F.R. § 285.11.

15. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Wallace's **income tax refunds** or other **Federal monies** payable to the order of Mr. Wallace.

Order

16. Until the debt is repaid, Petitioner Wallace shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

17. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment through **October 2012**. Beginning no sooner than November 2012, following review of Petitioner Wallace's financial circumstances to determine what amount of garnishment he can withstand without financial hardship, garnishment up to 15% of Petitioner Wallace's disposable pay is authorized. 31 C.F.R. § 285.11.

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

Done at Washington, D.C.

_____

MARSHA J. TICKEL n/k/a MARSHA J. VAN BUREN.
AWG Docket No. 11-0346.
Decision and Order.
Filed September 26, 2011.

AWG -

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was held as scheduled on September 14, 2011. Marsha J. Van Buren, the Petitioner, formerly known as Marsha J. Tickel ("Petitioner Van Buren"), participated, representing herself (appeared *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. USDA Rural Development's Exhibits, plus Narrative, Witness & Exhibit List, were filed on August 26, 2011, and are admitted into evidence, together with the testimony of Ms. Kimball.

4. Petitioner Van Buren's completed "Consumer Debtor Financial Statement" plus the accompanying documents filed on August 31 and again on September 7, 2011; plus Petitioner Van Buren's Hearing Request including all accompanying documents, are admitted into evidence, together with the testimony of Petitioner Van Buren.

5. Petitioner Van Buren owes to USDA Rural Development **$15,585.83** (as of August 22, 2011, *see* RX 7) in repayment of a USDA Farmers Home Administration loan borrowed in 1990 for a home in Oklahoma, the balance of which is now unsecured ("the debt").

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$15,585.83**, would increase the current balance by $4,364.03, to $19,949.86. *See* USDA Rural Development Exhibits, esp. RX 7.

7. The amount Petitioner Van Buren borrowed with her then-husband, Bert Tickel, from USDA Farmers Home Administration in 1990 was $38,000.00. Petitioner Van Buren explained in her Hearing Request and her testimony that Bert Tickel, her former husband, her co-borrower, was awarded the home and is responsible for the debt. The copy of the Divorce Decree from 1997, which Petitioner Van Buren filed on August 31, 2011, also proves that she is correct. Her former husband was ordered to pay the debt ("any mortgage indebtedness on the real property") and ordered to hold her harmless from all liability for the debt, including all attorney fees and costs incurred in defense of creditors' suits or in prosecution of any action to enforce the order. Petitioner Van Buren's former husband has failed to meet his obligations regarding the debt.

8. In 2000, Petitioner Van Buren's former husband re-amortized the account, by adding the amount that was delinquent to the principal. The principal amount due on the account became $42,522.90. This re-amortization did not change the amount owed, but merely allowed the

debt to become current. By the time of the short sale on May 18, 2001, the debt had grown to $47,737.77.

$42,437.22	unpaid principal
4,562.27	unpaid interest, and
738.28	unpaid fees
$47,737.77	

RX 6, page 1.

From the sale of the home (for $19,000.00), $18,215.00 was applied to reduce the balance, leaving a balance owed after the sale of $29,522.77. Since the short sale, no additional interest has accrued, and numerous collections since then ($13,936.94 net) have further reduced the balance, to **$15,585.83** as of August 22, 2011. RX 6 and Narrative. Even though Petitioner Van Buren's former husband was ordered to pay the debt, this remains Petitioner Van Buren's debt also. USDA Rural Development is still entitled to collect from Petitioner Van Buren.

9. When Petitioner Van Buren entered into the borrowing transaction with her co-borrower Bert Tickel, in 1990, certain responsibilities were fixed, as to each of them, that were addressed but not erased by the Divorce Decree. Although Petitioner Van Buren may pursue the co-borrower for monies collected from her on the debt, that does not prevent USDA Rural Development from collecting from her. Thus, I conclude that Petitioner Van Buren still owes the balance of **$15,585.83** (excluding potential collection fees), as of August 22, 2011, and that USDA Rural Development may collect that amount from her. [The debt is her co-borrower's and her joint-and-several obligation.]

10. Petitioner Van Buren works in management and is very responsible. Petitioner Van Buren's gross pay averages about $1,200.00 per month; her disposable pay (within the meaning of 31 C.F.R. § 285.11) is roughly $1,000.00 per month. [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.]

11. Numerous ***offsets*** and wage garnishments during the past 9 to 10 years have reduced the balance substantially (by $13,936.94). In addition to ***offsets***, wage garnishment up to 15% of Petitioner Van Buren's disposable pay can occur unless she cannot withstand garnishment in that amount without hardship. 31 C.F.R. § 285.11. Although garnishment at 15% of Petitioner Van Buren's disposable pay could yield roughly $150.00 per month in repayment of the debt, she cannot currently withstand garnishment in that amount without financial hardship. Petitioner Van Buren's reasonable and necessary living expenses consume most of her disposable pay, even before her monthly payments on her other debts (about $600.00 per month, not including her mortgage) are considered. *See* Consumer Debtor Financial Statement. Although Petitioner Van Buren has the support of her husband, he is **not** liable to repay the debt at issue here.

12. Petitioner Van Buren's disposable pay (within the meaning of 31 C.F.R. § 285.11) does **not** currently support garnishment and **no** garnishment is authorized through **October 2013**. To prevent hardship, potential garnishment to repay "the debt" (*see* paragraph 5) must be limited to **0%** of Petitioner Van Buren's disposable pay through **October 2013**; then, beginning no sooner than November 2013, following review of Petitioner Van Buren's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, garnishment up to 15% of Petitioner Van Buren's disposable pay is authorized. 31 C.F.R. § 285.11.

13. Petitioner Van Buren is responsible and willing and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

14. Through **October 2013**, **no** garnishment is authorized. Then, beginning no sooner than November 2013, following review of Petitioner Van Buren's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, garnishment up to 15% of Petitioner Van Buren's disposable pay is authorized. *See* paragraphs 10, 11 and 12. I encourage **Petitioner Van Buren and Treasury's collection agency** to **negotiate** the repayment of the debt.

Petitioner Van Buren, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. You may want to request apportionment of debt between you and the co-borrower. You may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

15. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Van Buren and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

16. Petitioner Van Buren owes the debt described in paragraphs 5 through 9.

17. **Garnishment is authorized**, as follows: **through October 2013**, **no** garnishment. Then, beginning no sooner than November 2013, following review of Petitioner Van Buren's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, garnishment up to 15% of Petitioner Van Buren's disposable pay. 31 C.F.R. § 285.11.

18. Repayment of the debt may also occur through ***offset*** of Petitioner Van Buren's **income tax refunds** or other **Federal monies** payable to the order of Ms. Van Buren.

Order

19. Until the debt is repaid, Petitioner Van Buren shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

20. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through October 2013. Beginning no sooner than November 2013, following review of Petitioner Van Buren's financial circumstances to determine what

amount of garnishment she can withstand without financial hardship, garnishment up to 15% of Petitioner Van Buren's disposable pay is authorized. 31 C.F.R. § 285.11.

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

Done at Washington, D.C.

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RHONDA K. BOWENS.
AWG Docket No. 11-0357.
Decision and Order.
Filed September 27, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was held as scheduled on September 20, 2011. Ms. Rhonda K. Bowens, formerly known as Rhonda K. Trice ("Petitioner Bowens"), did not participate. (Petitioner Bowens did not participate by telephone: she did not provide a phone number in her Hearing Request; she did not provide a phone number as instructed by my Order filed August 30, 2011.)

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Bowens owes to USDA Rural Development a balance of **$9,146.43** (as of August 27, 2011) in repayment of a United States Department of Agriculture Farmers Home Administration loan made in 1978, for a home in Oklahoma. The balance is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed September 2, 2011), which are admitted into evidence, together with the testimony of Mary Kimball.

4. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$9,146.43** would increase the current balance by $2,561.00, to $11,707.43. *See* USDA Rural Development Exhibits, esp. RX 7.

5. The amount Petitioner Bowens (then Trice) borrowed in 1978 was $13,000.00. By the time of the short sale in 2001, that debt was $10,058.62:

$ 8,954.16 Principal Balance prior to short sale
$ 1,104.46 Fees Balance prior to short sale

$ 10,058.62 Total Amount Due prior to short sale
=========
- $ -0- Proceeds from short sale [the lien was declared valueless]

$ 10,058.62 Unpaid in 2001

RX 6 and USDA Rural Development Narrative.

Another $ 48.39 applied to the debt from an insurance refund in 2002, plus $ 863.80 net collection applied to the debt also in 2002, leaves **$9,146.43** unpaid now (excluding the potential remaining collection fees). *See* RX 6 and USDA Rural Development Narrative.

6. Evidence is required for me to determine whether Petitioner Bowens' disposable pay supports garnishment without creating hardship. 31 C.F.R. § 285.11. Petitioner Bowens failed to file a completed "Consumer Debtor Financial Statement" or anything in response to my Order filed August 30, 2011, so I cannot calculate either Petitioner Bowens' income or her reasonable and necessary living expenses.

7. With no testimony from Petitioner Bowens and no financial information, I cannot calculate Petitioner Bowens' current disposable pay (after subtracting Federal income tax, social security, Medicare, health insurance, and any other "eligible" withholding from her gross pay). I cannot evaluate the factors to be considered under 31 C.F.R. § 285.11, so I must assume that Petitioner Bowens can withstand garnishment without financial hardship.

8. Garnishment up to 15% of Petitioner Bowens' disposable pay is authorized. 31 C.F.R. § 285.11.

9. Petitioner Bowens is responsible and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

10. Garnishment up to 15% of Petitioner Bowens' disposable pay is authorized. *See* paragraphs 6, 7 and 8. I encourage **Petitioner Bowens and Treasury's collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Bowens, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Bowens, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Bowens and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

12. Petitioner Bowens owes the debt described in paragraphs 3, 4 and 5.

13. Garnishment up to 15% of Petitioner Bowens' disposable pay is authorized. 31 C.F.R. § 285.11.

14. Repayment of the debt may also occur through ***offset*** of Petitioner Bowens' **income tax refunds** or other **Federal monies** payable to the order of Ms. Bowens.

Order

15. Until the debt is repaid, Petitioner Bowens shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

16. Garnishment up to 15% of Petitioner Bowens's disposable pay is authorized. 31 C.F.R. § 285.11.

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

Done at Washington, D.C.

_____

DAVID FARKAS.
AWG Docket No. 11-0185.
Decision and Order.
Filed September 28, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

1. The hearing by telephone was held on August 16, 2011. Mr. David Farkas, also known as David A. Farkas, the Petitioner ("Petitioner Farkas"), participated, represented by Kassandra McQuillen, Esq. Present with Petitioner Farkas in addition was his wife Kim Farkas.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Mary E. Kimball. Also participating on behalf of USDA Rural Development was Mr. Gene Elkin.
The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
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4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Issues

3. The principal issue is whether Petitioner Farkas owes to USDA Rural Development a balance of **$93,448.41** (as of April 13, 2011) in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** for a loan made on August 3, 2004, by Wells Fargo Bank, N.A., for a home in California, the balance of which is now unsecured ("the debt"). A further issue is whether USDA Rural Development will be required to re-pay to Petitioner Farkas, monies already collected ($9,379.00, which yielded $9,362.00 net) based on the ***Guarantee***.

Summary of the Facts Presented

4. USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List, were filed March 21, 2011 and are admitted into evidence, together with the Additional Narrative & Exhibits filed June 17, 2011,

together with the testimony of Mr. Gene Elkin and Ms. Mary Kimball. Both parties filed post-hearing briefs: *see also* Respondent's Reply filed September 6, 2011, which also included Exhibits, which are also admitted into evidence.

5. Petitioner Farkas' Consumer Debtor Financial Statement and pay stub(s) were filed on August 16, 2011 and are admitted into evidence, together with his testimony, together with his Hearing Request with the attached letter over the signature of his attorney, Kassandra McQuillen, Esq., dated December 3, 2010. *See also* Kassandra McQuillen's letter and brief entitled "Opposition to Wage Garnishment Order" both dated and filed June 15, 2011; and Petitioner's Brief Opposing Validity of Debt after Wage Garnishment Hearing, filed August 30, 2011 (post-hearing brief).

6. The amount Petitioner Farkas borrowed from Wells Fargo Bank, N.A., was $167,999.00 on August 3, 2004. RX 1. The due date of the last payment made was July 1, 2008. RX 3, p. 3. Foreclosure was initiated on November 24, 2008. By the time principal and interest and protective advances and lender expenses and the like were added together, Wells Fargo Bank, N.A. was seeking more than $187,000.00, less the proceeds from sale of the home. RX 3, RX 4. The home sold for $76,000.00 on November 17, 2009. RX 4, RX 5, RX 6. USDA Rural Development paid Wells Fargo Bank, N.A. $102,810.41 on February 10, 2010. RX 3, p. 7, RX 4, Narrative. Thus $102,810.41, the amount USDA Rural Development paid to Wells Fargo Bank, N.A., is the amount USDA Rural Development seeks to recover from Petitioner Farkas under the ***Guarantee***. RX 2, esp. p. 2.

7. No additional interest has accrued since February 10, 2010. A payment of $9,362.00 made in 2011 (from a $9,379.00 Federal income tax refund) reduced the balance sought by USDA Rural Development to **$93,448.41**. RX 8, Narrative.

8. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$93,448.41** would increase the current balance by $26,165.55, to $119,613.96. *See* USDA Rural Development Exhibits, esp. RX 8.

9. The ***Guarantee***, when Petitioner Farkas signed the ***Guarantee*** on June 17, 2004, identified Mountain Mortgage as the lender. RX 2. The ***Guarantee*** was signed by the "Lender's Authorized Representative," Lawrence Law, also on June 17, 2004. [Lawrence Law worked for Mountain Mortgage.]

10. The ***Guarantee*** establishes an **independent** obligation of Petitioner Farkas, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 2, p. 2.

11. Petitioner Farkas signed the ***Guarantee***, and he is responsible under the language of the foregoing paragraph, despite his testimony that he did not know he would be personally liable; that his obligations under the ***Guarantee*** were not adequately explained to him.

12. About six weeks after Petitioner Farkas signed the ***Guarantee***, numerous alterations were made to the ***Guarantee*** that were not initialed by Petitioner Farkas and were likely not brought to the attention of Petitioner Farkas. These changes were likely made on July 29, 2004, in preparation for Wells Fargo Bank, N.A. making the $167,999.00 loan on August 3, 2004. RX 1. From my examination of the photocopy of the document (RX 2), I find that "D Williams" added "7-29-04" and her signature to the right of the Lender's Authorized Representative Signature line (where Lawrence Law had previously signed). Some of the other changes made, in what is probably D Williams' handwriting, include:

Lender ID No.
Wells Fargo
Lender Name ~~Mountain Mortgage~~

Lender Contact Person ~~Becca~~ **Diane Williams**

Lender Phone Number ~~661-822-1122~~ **559-436-6660**

Lender Fax Number ~~661-822-1175~~ **559-431-5963**

13. USDA Rural Development states that changing the name and contact information on the ***Guarantee*** (Form RD 1980-21) was not a material alteration, and that Petitioner Farkas was not adversely affected. Brief filed September 6, 2011, p. 2. More importantly, USDA Rural Development states:

The Request for a Single Family Housing Loan Guarantee, Form RD 1980-21, was between David and Kim Farkas and USDA. David and Kim Farkas signed a promise to reimburse USDA if a loss claim was paid. When David and Kim Farkas signed a note with Wells Fargo it was guaranteed by USDA in case of default.

14. I agree that the language of the ***Guarantee*** recited in paragraph 10 of this Decision was a contract between Petitioner Farkas and USDA.

15. The ***Guarantee*** was also USDA Rural Development's inducement to the lender to make the loan; the ***Guarantee*** was a contract between the lender and USDA. I agree that Wells Fargo Bank, N.A. could accept applications filed through its agents; perhaps Mountain Mortgage was the agent of Wells Fargo Bank, N.A.[1] Perhaps Lawrence Law was the Lender's Authorized Representative when he signed the ***Guarantee*** on June 17, 2004.[2]

16. The contract between the lender and USDA here, was between Wells Fargo Bank, N.A. and USDA, as confirmed by RX-15. The ***Guarantee*** contained numerous alterations of which Petitioner Farkas was likely not apprised; else I would expect to see his initials on the changes, or some other acknowledgment.

---

[1] If so, Wells Fargo's information would likely have been placed on the ***Guarantee*** in the first place, would it not?

[2] If so, why was the signature of D Williams added on July 29, 2004, together with all the alterations to the Lender's Name and contact information? The Lender ID No. never was completed.

17. Other alterations not initialed by Petitioner Farkas, in addition to those alterations detailed in paragraph 12 of this Decision, include:

6. The current annual income for the household is: $ ~~57,504~~ **66876**

7. The current adjusted income for the household is: $ [$**65916** inserted]

8. TOTAL DEBT ratio ~~43.304~~ PITI ratio ~~26.756~~ **38.75 / 24.34**

9. We propose to loan $_____ [$**167,999** inserted[3]] for 30 years at 6.75 % per annum with payments of $1089.64 per month.

18. USDA Rural Development states that the changes to the ***Guarantee*** (Form RD 1980-21) were minor and to the benefit of the borrower, and that his Form W-2 Wage and Tax Statement for 2003 showed he earned $66,661.81 which showed he earned more than originally stated on the form. RX 16.

19. I agree that the 2003 W-2 from GE Wind Energy, LLC shows Petitioner Farkas' wages to be $66,661.81. I do not know just how the $66,876 figure and the $65,916 figure (which were likely added to the ***Guarantee*** on July 29, 2004), were calculated.

20. The final alterations to the ***Guarantee*** not initialed by Petitioner Farkas, in addition to those alterations detailed in paragraphs 12 and 17 of this Decision, include:

Purpose	Amount
Purchase of home	$ 162,000
closing costs (partial)	$ ~~6,000~~ 5999
Total Loan = ~~168,000~~ 167,999	

21. The alterations to the ***Guarantee*** would not matter to a typical borrower, and I am not persuaded that the alterations made any difference to Petitioner Farkas. The closing costs went down one dollar, making the loan amount go down one dollar. The interest rate stayed the

[3] This number looks like it was inserted over white-out; it's difficult to tell from the photocopy in the record file. This was **only a one dollar change**, though.

same (6.75%); the monthly payment amount stayed the same ($1,089.64). Clearly Petitioner Farkas was not harmed in any way by the alterations. The lender, Wells Fargo Bank, N.A., made the loan on those terms: $167,999.00 loan amount, interest at 6.750%, monthly payments of $1,089.64. RX 1. When Petitioner Farkas signed the Fixed Rate Note on August 3, 2004, he was clearly aware of exactly those terms. Those terms are exactly what Petitioner Farkas had agreed to on June 17, 2004, except that the loan is for one dollar less, and the lender is Wells Fargo instead of Mountain Mortgage. I am not persuaded that that makes any practical difference to Petitioner Farkas. There certainly is no evidence of fraud or misleading or of any detriment to Petitioner Farkas. The ***Guarantee*** was altered, but it was not falsified. There is no evidence of negligent servicing.

22. Petitioner Farkas, through counsel, initially maintained that Wells Fargo's loss claim was invalid because Wells Fargo never serviced the loan. *See* Hearing Request and counsel's letter, both dated December 3, 2010, and Opposition to Wage Garnishment Order and counsel's letter, both filed June 15, 2011. Upon review of the Additional Narrative and Exhibits filed June 17, 2011, however, Petitioner Farkas, through counsel, indicated during the hearing that this theory was no longer being pursued.

23. Petitioner Farkas can withstand garnishment at 15% of his current disposable pay without financial hardship. 31 C.F.R. § 285.11. *See* the Consumer Debtor Financial Statement and accompanying documents filed August 16, 2011. Nevertheless, to permit Petitioner Farkas with counsel ample time to pursue his appeal to U.S. District Court, if he so decides; or to consult with a lawyer with bankruptcy expertise, if he so chooses, **no** garnishment is authorized through **October 2012**.

24. Beginning **November 2012**, garnishment up to 15% of Petitioner Farkas' disposable pay is authorized. 31 C.F.R. § 285.11.

Discussion

25. Petitioner Farkas, you may want to negotiate the disposition of the debt with Treasury's collection agency. Petitioner Farkas, this will

require **you** to telephone Treasury's collection agency after you receive this Decision. Petitioner Farkas, you may request that you be permitted to compromise the debt for an amount you are able to pay, to settle the claim for less. The toll-free number for you to call is **1-888-826-3127**. You may wish to include your attorney (and your wife) in the telephone call.

Findings, Analysis and Conclusions

26. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Farkas and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

27. Petitioner Farkas owes the debt described in paragraphs 6 through 22.

28. **No** garnishment is authorized through **October 2012**. Beginning **November 2012**, garnishment up to 15% of Petitioner Farkas' disposable pay is authorized. 31 C.F.R. § 285.11.

29. Repayment of the debt may also occur through ***offset*** of Petitioner Farkas' **income tax refunds** or other **Federal monies** payable to the order of Mr. Farkas.

Order

30. Until the debt is repaid, Petitioner Farkas shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

31. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through **October 2012**; beginning **November 2012**, garnishment up to 15% of Petitioner Farkas' disposable pay is authorized. 31 C.F.R. § 285.11.

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

Done at Washington, D.C.

_____

DEBORAH A. CROSBY.
AWG Docket No. 11-0294.
Decision and Order.
Filed September 29, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was held on September 1, 2011. Deborah A. Crosby, the Petitioner ("Petitioner Crosby"), participated, represented by Thomas F. Donahue, Esq.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed August 5, 2011), plus Mary Kimball's testimony, are admitted into evidence.

4. Petitioner Crosby's Hearing Request and attached statements (including Mr. Donahue's letters dated April 8, 2011 and May 12, 2011 and June 3, 2011), plus Petitioner Crosby's Consumer Debtor Financial Statement, plus Narrative, Witness List and Exhibit List, including legal authority (filed August 18 and August 19, 2011), plus Petitioner Crosby's testimony, are admitted into evidence.

5. Petitioner Crosby owes to USDA Rural Development a balance of **$6,858.66** (as of July 14, 2011), in repayment of a $33,000.00 United States Department of Agriculture Farmers Home Administration loan[1] made in 1993 for a home in Texas, the balance of which is now unsecured ("the debt"). *See* especially RX 6 and RX 7 for the loan balance.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$6,858.66** would increase the current balance by $1,920.42, to $8,779.08.

7. About four years after the loan was made, the loan was reamortized, in 1997. RX 4. The loan had become delinquent, and reamortization made the loan current, by adding the delinquent amount to the principal balance. The principal amount due on the account became $33,136.53. The reamortization did not change the amounts owed.[2] Petitioner Crosby was not able to keep the loan current; a Notice of Default was sent to her on June 26, 1999. RX 5.

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[1] Petitioner Crosby through counsel challenges the copy of the Promissory Note in evidence (RX 1), because it is not the original and does not bear Petitioner Crosby's signature. The argument is not persuasive, particularly in light of the reamortization (*see* "Reamortized" written across the face of it); the Real Estate Deed of Trust for Texas (RX 2) evidencing the Promissory Note; and the Reamortization document signed by Petitioner Crosby in March 1997 (RX 4).

[2] Petitioner Crosby through counsel challenges the reamortization for permitting interest to accrue on what had previously been interest. I find the reamortization to have benefitted Petitioner Crosby by permitting her to remain in her home longer, and further, there was no restriction on such a modification.

8. In July 1999, Petitioner Crosby would have been able to stop the foreclosure sale by paying the $1,307.00 in arrears. RX 5, p. 1. Petitioner Crosby failed to do so. The foreclosure sale was held on January 4, 2000. By the time of the foreclosure sale, $2,123.94 in interest had accrued, and $3,593.49 in fees. The $38,691.78 due prior to the foreclosure sale included:

$ 32,974.35	principal
2,123.94	accrued interest
3,593.49	fees (*ie*, real estate taxes, insurance)
$ 38,691.78	

=========
RX 6.

9. The foreclosure sale on January 4, 2000 yielded $29,500.00, which reduced the $38,691.78 amount owed, to $9,191.78. No interest has accrued since the foreclosure sale on January 4, 2000, and collections since then (Treasury ***offsets*** in 2007 and 2008,[3] plus garnishments in 2011) have paid down the debt by $2,333.12, reducing the balance to **$6,858.66**. *See* RX 6, esp. p. 2.

10. Petitioner Crosby testified that she is unemployed; that the security company she had been working for, changed her assignment to a job that she could not do. She lost her medical insurance, and her $*-per-hour wage was reduced by $*.00 per hour. She testified that she needs a hip replacement, uses a cane, has a difficult time walking, and could not do a driving job. She testified that her reasonable and necessary living expenses ($*** per month) are paid by a friend. Petitioner Crosby indicated that she needs to pay delinquent taxes from 2009. Garnishment at this time would result in **financial hardship** to Petitioner Crosby and is NOT currently authorized, through October

[3] Petitioner Crosby through her attorney emphasizes that no collection occurred between 2000 and 2007, arguing that the six-year statute of limitations set out in 28 U.S.C. § 2415(a) bars collection here, citing United States v. Alvarado, 5 F.3d 1425 (11 Cir. 1993). The argument is not persuasive, because an agency of the United States government collecting administratively has rules that differ from those that may have applied to judicial proceedings. The ten-year statute of limitations was eliminated in 2008. *See* amendment to 31 U.S.C. § 3716(e) made by section 14219 of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110-246 (122 Stat. 1651) that became effective on June 18, 2008.

2012. Beginning no sooner than November 2012, following review of Petitioner Crosby's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, garnishment up to 15% of Petitioner Crosby's disposable pay is authorized. 31 C.F.R. § 285.11.

11. Petitioner Crosby is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

12. Garnishment is not currently authorized. *See* paragraph 10. Petitioner Crosby, as your attorney indicated during the hearing, you may want to appeal this Decision in U.S. District Court. You may want to consult a lawyer with bankruptcy expertise. You may want to negotiate with Treasury's collection agency regarding disposition of the debt. Petitioner Crosby, such negotiation would require **you** to telephone Treasury's collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Crosby, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. You may want to have your attorney or anyone else with you on the line if you call.

Findings, Analysis and Conclusions

13. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Crosby and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

14. Petitioner Crosby owes the debt described in paragraphs 5 through 9.

15. Garnishment at this time would result in **financial hardship** to Petitioner Crosby and is NOT authorized, through October 2012. 31 C.F.R. § 285.11. I am NOT, however, ordering any amounts already collected through garnishment of Petitioner Crosby's pay prior to implementation of this Decision to be returned to Petitioner Crosby.

16. Beginning no sooner than November 2012, following review of Petitioner Crosby's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, garnishment up to 15% of Petitioner Crosby's disposable pay is authorized. 31 C.F.R. § 285.11.

17. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Crosby's **income tax refunds** or other **Federal monies** payable to the order of Ms. Crosby.

Order

18. Until the debt is repaid, Petitioner Crosby shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

19. USDA Rural Development, and those collecting on its behalf, had already begun garnishing Petitioner Crosby's pay in mid-2011, but upon implementation of this Decision, no further garnishment is authorized, through October 2012. Then, beginning no sooner than November 2012, following review of Petitioner Crosby's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, garnishment up to 15% of Petitioner Crosby's disposable pay is authorized. 31 C.F.R. § 285.11.

20. USDA Rural Development, and those collecting on its behalf, will NOT be required to return to Petitioner Crosby any amounts already collected through garnishment of Petitioner Crosby's pay, prior to implementation of this Decision.

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

Done at Washington, D.C.

_____

BETTY HEATON.
AWG Docket No. 11-0341.
Decision and Order.
Filed September 29, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Janice K. Bullard.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the request of Betty Heaton ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due, and if established, the propriety of imposing administrative wage garnishment. By Order issued on August 12, 2011, the parties were directed to provide information and documentation concerning the existence of the debt. In addition, the matter was set for a telephonic hearing to commence on September 28, 2011 and deadlines for filing documents with the Hearing Clerk's Office were established.

The Respondent filed a Narrative, together with supporting documentation[1] on September 15, 2011. Petitioner did not submit documentation. The hearing commenced as scheduled. At the hearing, Petitioner represented herself and testified on her own behalf. Testimony was received from Mary E. Kimball, Accountant for the New Program Initiatives Branch of Rural Development, USDA Rural Development ("USDA RD"), located in Saint Louis, Missouri.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered:

FINDINGS OF FACT

On February 3, 1995, the Petitioner and her then husband assumed a loan from another borrower of the United States Department of

[1] References to Respondent's exhibits herein shall be denoted as "RX-#".

Agriculture's RD in the amount of $29,300.00 for the purchase of real property in Chillicothe, Missouri. RX-1; RX-2.

On that date, Petitioner and her then husband also received a home mortgage loan in the amount of $10,480.00. RX-1; RX 2.

Petitioner and her then husband executed a Promissory Note and a Real Estate Deed of Trust as evidence of their indebtedness. RX-1; RX 2.

RD established the two loans in two separate accounts, #97889 and #97876 for the purposes of loan servicing. RX-3.

Petitioner and her husband subsequently defaulted on the loans and Notice of Acceleration was issued by RD on September 24, 1997, which action was upheld upon appeal to USDA's Appeal Division. RX 4; RX 5.

Foreclosure action was taken, and at the time of foreclosure sale, the debt owed on account #97889 was $42,364.94 ($38,802.30 in principal and $2,562.64 in interest); and the debt owed on account #97876 was $10,349.87 ($10,185.87 in principal and $164.00 in interest) for a total indebtedness of $52,714.81. RX-5; RX 6.

The real property was sold on June 22, 1998 for $18,500.00. RX 6.

After the proceeds of the sale were applied, the remaining debt was $34,214.81 ($23,864.94 on account #97880 and $10,349.87 on account # 97876). RX 5; RX 6.

An additional $10,036.45 through offset has since been applied against the debt, which was referred to the U.S. Department of Treasury ("Treasury") and is currently documented as $24,178.36, plus potential fees of $6,769.94 for a total of $30,948.30. RX-7.

In July, 2011, Treasury, through its agent, issued a notice to Petitioner of intent to garnish her wages.

Petitioner timely requested a hearing, which was held by telephone on September 28, 2011.

After hearing an explanation for how the debt arose, Petitioner did not contest the validity of the debt.

Petitioner credibly testified that she believed that her ex-husband was not being subjected to tax refund offset or wage garnishment.

Petitioner credibly testified that she is unemployed and has no income.

Petitioner's two adult children live with her and pay the expenses of the household, including rent and utilities, out of wages from their minimum wage jobs.

Petitioner is facing eviction from her landlord and the cost of rent at alternate housing will exceed her current rent of $**.

Despite the contributions of Petitioner's daughters, the family income exceeds the family monthly expenses, and Petitioner is unable to liquidate the debt owed at this time.

Petitioner has no expectation of improvement in her financial situation for the foreseeable future.

CONCLUSIONS OF LAW

The Secretary has jurisdiction in this matter.

Petitioner (jointly and severally with her ex-husband) is indebted to USDA RD in the amount of $24,178.36, exclusive of potential Treasury fees for the mortgage loans extended to her.

All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met.

The Petitioner is under a financial hardship at this time.

The Respondent is entitled to administratively garnish the wages of the Petitioner when the financial hardship is anticipated to ease.

All wage garnishment actions shall be suspended for a period of at least two years.

Treasury shall remain authorized to undertake any and all other appropriate collection action.

ORDER

For the foregoing reasons, the wages of Petitioner shall **NOT** be subjected to administrative wage garnishment at this time. Treasury may re-evaluate Petitioner's financial capacity to withstand wage garnishment not less than two (2) years from the date of this Order. Petitioner is encouraged in the interim to negotiate and discuss the liability for the debt with the representatives of Treasury. The toll free number for Treasury's agent is **1-888-826-3127**.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. See, 31 C.F.R. § 285.13.

Until the debt is satisfied, Petitioner shall give to USDA RD or those collecting on its behalf, notice of any change in her address, phone numbers, or other means of contact.

Petitioner may direct questions to RD's representative Mary Kimball, c/o:

USDA New Program Initiatives Branch
Rural Development Centralized Servicing Center
4300 Goodfellow Blvd. F-22
St. Louis, MO 63120
314-457-5592
314-457-4426 (facsimile)

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

So Ordered this _____day of September, 2011 in Washington, D.C.

_____

SHEILA P. RICHARDSON n/k/a SHEILA P. WOOD.
AWG Docket No. 11-0354.
Decision and Order.
Filed September 29, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was held as scheduled on September 20, 2011. Sheila P. Wood, the Petitioner, formerly known as Sheila P. Richardson ("Petitioner Wood"), represents herself (appears *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development")

and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. USDA Rural Development's Exhibits, plus Narrative, Witness & Exhibit List, were filed on September 2, 2011, and are admitted into evidence, together with the testimony of Ms. Kimball, and together with RX 8 and the Additional Narrative and Exhibits filed September 29, 2011.

4. Petitioner Wood's completed "Consumer Debtor Financial Statement" plus the accompanying documents filed on September 15, 2011; plus Petitioner Wood's Hearing Request including all accompanying documents, are admitted into evidence, together with the testimony of Petitioner Wood.

5. Petitioner Wood owes to USDA Rural Development **$11,158.70** in repayment of a USDA Farmers Home Administration loan borrowed in 1990 for a home in Kentucky, the balance of which is now unsecured ("the debt").

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$11,158.70**, would increase the current balance by $3,124.44, to $14,283.14. *See* USDA Rural Development Exhibits, esp. RX 5.

7. The amount Petitioner Wood borrowed from USDA Farmers Home Administration in 1990 was $42,000.00. By the time of the short

sale on September 3, 1998, Petitioner Wood's debt had grown to $55,064.28.

$40,679.70	unpaid principal
9,319.55	unpaid interest, and
5,065.03	unpaid fees (real estate taxes and insurance)
$55,064.28	

RX 4, page 1.

From the sale of the home (for $41,500.00), $38,494.11 was applied to reduce the balance.[1] Since the short sale (1998), no additional interest has accrued, and collections since then ($5,411.47 net) have further reduced the balance, to **$11,158.70** as of August 31, 2011. RX 4 and RX 5.

8. Petitioner Wood works as a part-time cook, making $* per hour 30-32 hours per week on average. Petitioner Wood's gross pay averages less than $*** per month; her disposable pay (within the meaning of 31 C.F.R. § 285.11) is roughly $*** per month. [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.]

9. Numerous ***offsets*** during the past 10 years, probably mostly Federal income tax refunds, have reduced the balance substantially (by $5,411.47). In addition to ***offsets***, garnishment up to 15% of Petitioner Wood's disposable pay can occur unless she cannot withstand garnishment in that amount without hardship. 31 C.F.R. § 285.11. Although garnishment at 15% of Petitioner Wood's disposable pay could yield roughly $** per month in repayment of the debt, she cannot withstand garnishment in that amount without financial hardship.

[1] RX 8 shows that "Net Proceeds of 38715.11 were sent through the US Attorney; RX 8 shows also that 38494.11 was the amount received by USDA Rural Development. The Additional Narrative states that the $221.00 difference between $38,715.11 and $38,494.11 can only be explained by saying the funds were routed through the US Attorney's Office and they deducted a fee.

Petitioner Wood has a child still in high school to support, her 18 year-old daughter, in addition to herself. Although she is supposed to receive child support, the child support is not being paid. Petitioner Wood's reasonable and necessary living expenses exceed her disposable pay, even before her monthly payments on her other debts are considered. *See* Consumer Debtor Financial Statement. Although Petitioner Wood has the support of her husband, he is **not** liable to repay the debt at issue here. Petitioner Wood's disposable pay (within the meaning of 31 C.F.R. § 285.11) does **not** currently support garnishment and **no** garnishment is authorized through **October 2013**. To prevent hardship, potential garnishment to repay "the debt" (*see* paragraph 5) must be limited to **0%** of Petitioner Wood's disposable pay through **October 2013**; then, beginning no sooner than November 2013, following review of Petitioner Wood's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, garnishment up to 15% of Petitioner Wood's disposable pay is authorized. 31 C.F.R. § 285.11.

10. Petitioner Wood is responsible and willing and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

11. Through **October 2013**, **no** garnishment is authorized. Then, beginning no sooner than November 2013, following review of Petitioner Wood's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, garnishment up to 15% of Petitioner Wood's disposable pay is authorized. *See* paragraphs 8, 9 and 10. I encourage **Petitioner Wood and Treasury's collection agency** to **negotiate** the repayment of the debt. Petitioner Wood, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. You may want to request apportionment of debt between you and the co-borrower. You may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

12. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Wood and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

13. Petitioner Wood owes the debt described in paragraphs 5, 6 and 7.

14. **Garnishment is authorized**, as follows: **through October 2013**, **no** garnishment. Then, beginning no sooner than November 2013, following review of Petitioner Wood's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, garnishment up to 15% of Petitioner Wood's disposable pay. 31 C.F.R. § 285.11.

15. Repayment of the debt may also occur through ***offset*** of Petitioner Wood's **income tax refunds** or other **Federal monies** payable to the order of Ms. Wood.

Order

16. Until the debt is repaid, Petitioner Wood shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

17. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through October 2013. Beginning no sooner than November 2013, following review of Petitioner Wood's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, garnishment up to 15% of Petitioner Wood's disposable pay is authorized. 31 C.F.R. § 285.11.

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

Done at Washington, D.C.

_____

GREGORY HOLMES.
AWA Docket No. 11-0342.
Decision and Order.
Filed September 30, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Janice K. Bullard.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the request of Gregory Holmes ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due, and if established, the propriety of imposing administrative wage garnishment. By Order issued on August 30, 2011, the parties were directed to provide information and documentation concerning the existence of the debt. In addition, the matter was set for a telephonic hearing to commence on September 29, 2011 and deadlines for filing documents with the Hearing Clerk's Office were established.

The Respondent filed a Narrative, together with supporting documentation[1] on September 16, 2011. Petitioner did not file any submissions. The hearing commenced as scheduled. At the hearing, Petitioner represented himself and testified on his own behalf. Testimony was received from Mary E. Kimball, Accountant for the New Program Initiatives Branch of Rural Development, USDA Rural Development ("USDA RD"), located in Saint Louis, Missouri.

On the basis of the entire record before me, the following Findings of Fact and Conclusions of Law and Order shall be entered:

FINDINGS OF FACT

On February 15, 2000, the Petitioner assumed a loan from another borrower of the United States Department of Agriculture's RD in the amount of $43,000.00 for the purchase of real property in Natchez,

[1] References to Respondent's exhibits herein shall be denoted as "RX-#".

Mississippi, and signed an Assumption Agreement that recognized the loan. RX-1; RX-2.

Petitioner's account became delinquent, and on August 20, 2000, the delinquent balances were added to the principal of his loan, thereby reamortizing Petitioner's loan. RX 3.

Petitioner subsequently defaulted on the loan and Notice of Acceleration was issued by RD on March 24, 2001. RX 4.

A short sale was held on December 19, 2001 which yielded $28,000.00, of which $27,891.50 was applied against the balance of Petitioner's loan. RX 3.

At the time of the sale Petitioner owed $52,180.30 on the account ($48,583.12 for principal and $3,245.21 in interest). RX 5.

After the proceeds from the sale and other credits were applied, Petitioner's account balance was $23,999.99. RX 5; RX-6.

Petitioner was unwilling to settle the remaining debt with USDA-RD because he did not want to voluntarily agree to offset any income tax refunds that he might be due in the future.

A total of $9,642.72 has been applied against the debt through offset since Petitioner's account was referred to the U.S. Department of Treasury ("Treasury"). RX 4.

Petitioner's debt is currently documented as $14,357.27, plus potential fees of $4,020.04 for a total of $18,377.31. RX-6.

In July, 2011, Treasury, through its agent, issued a notice to Petitioner of intent to garnish his wages.

Petitioner timely requested a hearing, which was held by telephone on September 29, 2011.

After hearing an explanation for how the debt arose, Petitioner did not contest the validity of the debt.

Petitioner credibly testified that he is currently unemployed and has no income.

Petitioner has no expectation of improvement in his financial situation for the foreseeable future.

CONCLUSIONS OF LAW

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA RD in the amount of $14,357.27, exclusive of potential Treasury fees for the loan he assumed to purchase real property.

All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met[2].

The Petitioner is under a financial hardship at this time.

The Respondent is entitled to administratively garnish the wages of the Petitioner when the financial hardship is anticipated to ease.

All wage garnishment actions shall be suspended for a period of at least one year.

Treasury shall remain authorized to undertake any and all other appropriate collection action.

ORDER

For the foregoing reasons, the wages of Petitioner shall NOT be subjected to administrative wage garnishment at this time. Treasury may re-evaluate Petitioner's financial capacity to withstand wage garnishment not less than one (1) year from the date of this Order. Petitioner is advised that if he acquires the ability to negotiate a lump sum payment, he may be able to enter into a compromise settlement of the debt with the representatives of Treasury. The toll free number for Treasury's agent is 1-888-826-3127.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. See, 31 C.F.R. § 285.13.

Until the debt is satisfied, Petitioner shall give to USDA RD or those collecting on its behalf, notice of any change in his address, phone numbers, or other means of contact.

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

So Ordered this _____day of September, 2011 in Washington, D.C.

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[2] Although Petitioner testified that he has not worked for some time, he also testified that he has occasionally worked since being laid off from his primary trade of oil driller. Accordingly, I am unable to determine whether he is entitled to the exclusion from garnishment set forth at 31 C.F.R. §285.11(j).

PAULA MOORE.
AWG Docket No. 11-0353.
Decision and Order.
Filed September 30. 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Janice K. Bullard.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the request of Paula Moore ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due, and if established, the propriety of imposing administrative wage garnishment. By Order issued on August 30, 2011, the parties were directed to provide information and documentation concerning the existence of the debt. In addition, the matter was set for a telephonic hearing to commence on September 29, 2011 and deadlines for filing documents with the Hearing Clerk's Office were established.

The Respondent filed a Narrative, together with supporting documentation[1] on September 1, 2011. Petitioner filed a Consumer Debtor Financial Statement on September 15, 2011. The hearing commenced as scheduled. At the hearing, Petitioner represented herself and testified on her own behalf. Testimony was received from Mary E. Kimball, Accountant for the New Program Initiatives Branch of Rural Development, USDA Rural Development ("USDA RD"), located in Saint Louis, Missouri.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered:

---

[1] References to Respondent's exhibits herein shall be denoted as "RX-#".

FINDINGS OF FACT

Petitioner borrowed $51,000.00 for the purchase of real estate in Charleston, Arkansas from the United States Department of Agriculture's RD and executed a Promissory Note and a Real Estate Mortgage on July 22, 1996. RX-1; RX 2.

RD established the two loans in two separate accounts, #97889 and #97876 for the purposes of loan servicing. RX-3.

On March 22, 2000, Petitioner's account was reamortized with a balance due of $53,636.46. RX 5.

Petitioner received a monthly payment supplement from RD. RX 5.

Petitioner failed to make monthly payments, was considered in default on the loan, and Notice of Acceleration was issued by RD on August 23, 2000, which action was upheld upon appeal to USDA's Appeal Division. RX 4; RX 5.

The property sold at short sale on April 2, 2002, at which time Petitioner owed $63,034.19 ($53,636.46 in principal and $7,979.70 in interest, plus $1,418.03 in fees. RX-6; RX 7.

The real property sold for $57,000.00; USDA-RD received $52,545.75. RX 7.

After the proceeds of the sale were applied, the remaining debt was $10,488.44. RX 7.

The debt was referred by law to the U.S. Department of Treasury ("Treasury") and is currently documented as $10,488.44, plus potential fees of $2,936.76 for a total of $13,425.20. RX-7.

Treasury, through its agent, issued a notice to Petitioner of intent to garnish her wages.

Petitioner timely requested a hearing, which was held by telephone on September 29, 2011.

After hearing an explanation for how the debt arose, Petitioner did not contest the validity of the debt.

Petitioner credibly testified that she believed that there was no balance on the debt to USDA RD.

Petitioner credibly testified that she did not receive any information from USDA RD regarding debt settlement despite advising the agency of her new address, and filing a forwarding mail order with the United States Postal Service.

Petitioner lives with her adult daughter, who works and attends nursing school.

Petitioner was collecting disability payments (SSI) and did not work until five months ago.

Because Petitioner had not worked, she was unaware of the status of the instant debt at the Department of the Treasury.

CONCLUSIONS OF LAW

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA RD in the amount of $10,488.44, exclusive of potential Treasury fees for the mortgage loans extended to her.

Garnishment of Petitioner's wages is excluded pursuant to 31 C.F.R. §285.11(j) because Petitioner has not been continuously employed for at least twelve (12) months.

The Respondent is not entitled to administratively garnish the wages of the Petitioner.

Treasury shall remain authorized to undertake any and all other appropriate collection action.

ORDER

For the foregoing reasons, the wages of Petitioner shall NOT be subjected to administrative wage garnishment at this time.

Petitioner is encouraged in the interim to negotiate and discuss the liability for the debt with the representatives of Treasury. The toll free number for Treasury's agent is 1-888-826-3127.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. See, 31 C.F.R. § 285.13.

Until the debt is satisfied, Petitioner shall give to USDA RD or those collecting on its behalf, notice of any change in her address, phone numbers, or other means of contact.

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

So Ordered this _____day of September, 2011 in Washington, D.C.

_____

WILLIE DODD SHARP.
AWG Docket No. 11-0358.
Decision and Order.
Filed September 30, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Janice K. Bullard.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the request of Willie Dodd Sharp ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due, and if established, the propriety of imposing administrative wage garnishment. By Order issued on August 30, 2011, the parties were directed to provide information and documentation concerning the existence of the debt. In addition, the matter was set for a telephonic hearing to commence on September 29, 2011 and deadlines for filing documents with the Hearing Clerk's Office were established.

The Respondent filed a Narrative, together with supporting documentation[1] on September 8, 2011. Petitioner filed a Consumer Debtor Financial Statement on September 27, 2011. The hearing commenced as scheduled. At the hearing, Petitioner represented herself and testified on her own behalf. Testimony was received from Mary E. Kimball, Accountant for the New Program Initiatives Branch of Rural Development, USDA Rural Development ("USDA RD"), located in Saint Louis, Missouri.

On the basis of the entire record before me, the following Findings of Fact and Conclusions of Law and Order shall be entered:

[1] References to Respondent's exhibits herein shall be denoted as "RX-#".

FINDINGS OF FACT

On February 27, 1996, the Petitioner obtained a loan from the USDA RD in the amount of $55,500.00 for the purchase of real property in Cleveland, Tennessee and signed a Promissory Note and Deed of Trust for Tennessee as evidence of the loan. RX-1; RX-2.

Petitioner's account became delinquent, and on August 27, 2000, the delinquent balances were added to the principal of her loan, thereby reamortizing Petitioner's loan. RX 3.

Petitioner subsequently defaulted on the loan and Notice of Acceleration was issued by RD on June 21, 2001. RX 4.

A foreclosure sale was held on December 1, 2001 which yielded $41,256.00 that was applied against the balance of Petitioner's loan. RX 5.

At the time of the sale Petitioner owed $63,673.88, comprised of principal, interest, escrow and fees. RX 5.

After the proceeds from the sale and other credits were applied, Petitioner's account balance was $22,429.00. RX 5; RX-6.

A total of $4,658.76 has been applied against the debt through offset since Petitioner's account was referred to the U.S. Department of Treasury ("Treasury"). RX 4.

Petitioner's debt is currently documented as $17,771.12,, plus potential fees of $4,975.91 for a total of $22,747.03. RX-6.

In July, 2011, Treasury, through its agent, issued a notice to Petitioner of intent to garnish her wages.

Petitioner timely requested a hearing, which was held by telephone on September 29, 2011.

After hearing an explanation for how the debt arose, Petitioner did not contest the validity of the debt.

Petitioner credibly testified that she is currently employed part-time, earning $* per hour.

Petitioner has no expectation of improvement in her financial situation for the foreseeable future.

CONCLUSIONS OF LAW

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA RD in the amount of $14,357.27, exclusive of potential Treasury fees for a loan to purchase real property.

All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have not been met because Petitioner's wages are excluded from garnishment, pursuant to 5 U.S.C. § 1673(a)(2).

Respondent is not entitled to administratively garnish the wages of the Petitioner.

Treasury shall remain authorized to undertake any and all other appropriate collection action.

ORDER

For the foregoing reasons, the wages of Petitioner shall **NOT** be subjected to administrative wage garnishment at this time.

Petitioner is advised that if she acquires the ability to negotiate a lump sum payment, she may be able to enter into a compromise settlement of the debt with the representatives of Treasury. The toll free number for Treasury's agent is **1-888-826-3127**.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. See, 31 C.F.R. § 285.13.

Until the debt is satisfied, Petitioner shall give to USDA RD or those collecting on its behalf, notice of any change in her address, phone numbers, or other means of contact.

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

So Ordered this day of September, 2011 in Washington, D.C.

RATTHAN JONES.
AWG Docket No. 11-0286.
Decision and Order.
Filed October 4, 2011.

AWG –

Robert Epperson, Esq. for Petitioner.
Mary Kimball and Gene Elkin, Esq. for RD.

Decision and Order by Hearing Officer James P. Hurt.

Decision and Order

This matter is before me upon the request of Ratthan Jones, Petitioner, for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On June 16, 2011, I issued a Prehearing Order to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The Rural Development Agency (RD), Respondent, complied with the Discovery Order and a Narrative was filed, together with supporting documentation RX-1 through RX-6 on July 5, 2011. After the hearing and as a result of Mr. Jones's challenge of the procedural notice of the pending foreclosure on his property, RD filed an additional Narrative and exhibits RX-7 through RX-12 on September 8, 2011. On September 21, 2011, RD filed a third Narrative along with RX-13. The Petitioner filed his Narrative, and his financial statement on August 1, 2011 labeled as PX-1 thru PX-2. On September 14, 2011, he filed an additional Narrative and bi-weekly pay stub which I now re-label as PX–3.

On August 17, 2011 (Rescheduled from July 21, 2011 at Petition's request), at the time set for the hearing, both parties were available for the hearing. Gene Elkin, Esq. and Ms. Kimball represented RD. Mr. Jones was present and was represented by Robert Epperson, Esq. The parties were sworn.

Petitioner is divorced from co-debtor Sharon Davis Jones. Mr. Jones had entered into a Divorce Settlement Agreement which was incorporated in the divorce decree in which Mr. Jones transferred his interest and financial responsibility in the residence subject to the RD loan to Ms. Jones. Ms. Jones subsequently filed a Chapter 7 bankruptcy. Mr. Jones does not appear to be listed as a co-debtor on Schedule H, nor as a creditor holding an Executory contract. Mr. Jones thorough his counsel challenged the foreclosure notice procedures by RD, objected to the admissibility of RD's exhibit RX-13, and wanted a second oral hearing with the ability to call persons involved with the filing of RD documents as live witnesses. In my ruling filed on September 15, 2011, I denied his challenge of admissibility but allowed him until September 25, 2011 to "show the contrary" (5 USC 556(e)). Also in my September

15, 2011 ruling, I requested RD to respond to Mr. Jones's argument that he was not given proper notice of the pending foreclosure and/or acceleration of the debt. RD's exhibit RX-13 recites that the notice of foreclosure was filed in the *Baldwin Times* (a legal notice newspaper of general circulation) which stated the time, place, and terms of the foreclosure sale. RD's exhibit RX-7 is a signed Certified Mail receipt # 7-295-180-075 addressed to Mr. Jones on April 14, 2000 (four months before the foreclosure sale). RD states that the April 14, 2000 letter contained the standard Notice of Acceleration form to the debtors. I take Administrative Notice that this form is a repeated exhibit for all or nearly all of the 574 cases (and counting) filed by RD with the Office of Administrative Law Judges. RD contends that it only has to use reasonable efforts to give the debtors actual notice. In this instance, RD has produced documents keep in the ordinary course of business that tends to indicate that a certified letter was sent and received by Ratthan Jones. In any event, the legal notice in the *Baldwin Times* is satisfactory legal notice to the world that a foreclosure sale was to take place. RX-13. Lastly, Petitioner raised the issue of latches. I find RD's exhibit RX-9 through RX-12 as being persuasive that Petitioner's defense of laches must fail.

Petitioner has been employed for more than one year. Mr. Jones's bi-weekly pay stub indicates that he has less than full time employment. Mr. Jones raised the issue of financial hardship. I prepared a Financial Hardship Calculation using the information supplied by Petitioner. Using his bi-weekly payroll stub and his straight-time hourly pay rate, I re-calculated his gross bi-weekly income for 80 hours straight-time. I proportioned all taxes from the payroll stub as if he worked 80 hours without any overtime. I calculated Medicare at 1.45% of gross wages. I retained the same deductions for medical and dental insurance per pay-period. Ms. Jones has submitted a very modest monthly expense statement.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On October 18, 1993, Petitioner obtained a loan for the purchase of a primary home mortgage loan in the amount of $51,280.00 from Farmers Home Administration (FmHA), United States Department of Agriculture

(USDA), now Rural Development (RD) to purchase their home on a property located in 1### Candle***** Ct., Foley, AL 365##[1]. RX-1, RX-2.

2. The borrowers re-amortized their account on April 18, 1998. Narrative.

3. The borrowers became in default and a Notice of Acceleration was mailed on/about April 14, 2000. RX-7.

4. A foreclosure sale was held on October 12, 2000. Narrative, RX-13.

5. RD received net $39,438.00 from the foreclosure sale. Narrative, RX-4.

6. The principal loan balance for the RD loan prior to the foreclosure was $53,628.56, plus $5,464.62 for accrued interest, less $546.51 escrow balance for a total due of $58,546.67 RX-4.

7. The total amount due after the sale is $19,108.67. RX-4.

8. Post sale activities increased the amount due to $19,401.05. RX-4.

9. The U.S. Treasury has received $8,546.95 and $200.08 (pending transfer to RD) leaving a balance due of $10,654.02. Narrative, RX-4, RX-5.

10. The remaining potential Treasury fees due are $3,196.21. RX-5.

11. Mr. Jones states that he has been gainfully employed for more than one year.

PX-3.

12. He lives with Mary F. Jones.

13. I performed a Financial Hardship calculation using the financial statements she provided[2].

Conclusions of Law

Petitioner is indebted to USDA Rural Development in the amount of $10,654.02 exclusive of potential Treasury fees for the mortgage loan extended to him.

In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $3,196.21.

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[1] The complete address is maintained in USDA files.

[2] The Financial Hardship calculation is not posted on the OALJ website.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is not entitled to administratively garnish the wages of the Petitioner at this time.

Order

For the foregoing reasons, the wages of Petitioner shall NOT be subjected to administrative wage garnishment at this time. After one year, RD may re-assess the Petitioner's financial position.

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

_____

NANCY F. TALLMAN f/k/a NANCY F. FELAND.
AWG Docket No. 11-0345.
Decision and Order.
Filed October 4, 2011.

AWG –

Gregory Selbo, Esq. for Petitioner.
Mary Kimball and Gene Elkin, Esq. for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was held on September 15, 2011. Ms. Nancy F. Tallman, formerly known as Nancy F. Feland ("Petitioner Tallman"), participated, represented by Gregory B. Selbo, Esq. Petitioner Tallman's husband, Tim Tallman was also present.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Mary E. Kimball. Also participating on behalf of USDA Rural Development was Mr. Gene Elkin. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant

USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Issues

3. The principal issue is whether Petitioner Tallman owes to USDA Rural Development a balance of **$7,607.42** in repayment of two United States Department of Agriculture Farmers Home Administration loans, made to her and her former husband in 1978 and in 1983, for a home in North Dakota. That balance is now unsecured ("the debt"), and is calculated as of September 7, 2011. *See* USDA Rural Development Exhibits, esp. RX 6, pp. 1, 2.

Summary of the Facts Presented

4. USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed September 8, 2011) are admitted into evidence, together with the testimony of Mr. Gene Elkin and Ms. Mary Kimball.

5. Petitioner Tallman's Exhibits (PX-1 through PX-6), plus Mr. Selbo's letter dated September 7, 2011 (filed on September 7, 2011) are admitted into evidence, together with the testimony of Petitioner Tallman, together with Petitioner Tallman's Hearing Request (including Mr. Selbo's letter dated July 27, 2011 and all accompanying documents).

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$7,607.42** would increase the current balance by $2,130.08, to $9,737.50. [This includes both loans.] *See* USDA Rural Development Exhibits, esp. RX 6, pp. 1, 2.

7. The amount Petitioner Tallman (then Feland) borrowed, together with her former husband, in 1978 was $35,620.00; the amount they borrowed in 1983 was $2,800.00 ($38,420.00 all together). RX 1, RX 2.

8. Petitioner Tallman testified that she has been divorced from the co-borrower, Mr. Feland, since 1993. *See* PX-5, especially Mr. Selbo's letter dated July 23, 2008, which includes, "As part of the divorce, Deane (Feland) was deeded the house, and he was to assume all obligations on the house." Petitioner Tallman and her husband Timothy Tallman, whom she married in 1994, quitclaimed the home to Mr. Feland 6 years after the divorce, in 1999. PX-5.

9. Reamortizations in 1995 and in 1997 were for Mr. Feland's benefit, not Petitioner Tallman's benefit, in that they occurred AFTER the divorce, when Mr. Feland had sole enjoyment of the house. These reamortizations added the delinquent amounts to principal, thereby making the accounts current. *See* USDA Rural Development Narrative. By the time of the short sale in 2000 (7 years after the divorce), the debt had grown to $56,014.26:

$ 52,614.95	Principal Balance prior to short sale (both loans)
$ 2,598.14	Interest Balance prior to short sale (both loans)
$ 801.17	Fee Balance prior to short sale (both loans)
$ 56,014.26	Total Amount Due prior to short sale (both loans)
=========	
- $ 32,466.61	Proceeds from short sale
$ 23,547.65	Unpaid after short sale in 2000 (both loans)

RX 5 and USDA Rural Development Narrative.

10. From Mr. Feland's sale of the home in 2000, $32,466.61 was applied to reduce the balance, leaving a balance owed after the sale of $23,547.65. Since the short sale, no additional interest has accrued. An escrow refund ($344.31) was applied in 2001, reducing the balance to $23,203.34. Numerous collections, from Mr. Feland and also from Petitioner Tallman, have further reduced the balance. Mr. Feland died in 2007. Petitioner Tallman identified monies already collected from her to include (a) tax refund and rebate taken in 2008 applied on the small loan; (b) monies applied on the small loan in 2010 ($2,031.00, which yielded

$1,577.50 net), and (c) monies applied on the large loan in 2011 ($470.00, which yielded $453.00 net).

11. When the $2,000.00 check was presented to USDA Rural Development in 2010 on Petitioner Tallman's behalf, to pay the loan in full, $437.50 was taken out of the $2,000.00 to pay collection fees; $1,562.50 net was applied to reduce the balance; and $724.55 of the debt was canceled. RX 5, p. 4. Petitioner Tallman thought the debt was paid in full, and the paperwork does not indicate otherwise. *See*, Payment Agreement, part of the Hearing Request documents. But only the smaller of the 2 loans was paid in full. There was still $8,060.42 remaining to be paid on the larger loan. The tax refund ($453.00 net) taken in 2011 reduced the balance to **$7,607.42**. RX 5, p. 3.

12. When Petitioner Tallman entered into the borrowing transactions with her co-borrower Mr. Feland, in 1978 and 1983, certain responsibilities were fixed, as to each of them, that were addressed but not erased by the divorce. Even though Petitioner Tallman's former husband Mr. Feland may have been ordered to pay the debt, this remains Petitioner Tallman's debt also. USDA Rural Development is entitled, legally, to collect from Petitioner Tallman. I conclude that this is true, despite the fact that the debt grew larger and larger after the divorce, due to Mr. Feland's delinquency. Although Petitioner Tallman could have pursued the co-borrower Mr. Feland for monies collected from her on the debt, Mr. Feland's death in 2007 may preclude any such recovery. That does not prevent USDA Rural Development from collecting from her. Thus, I conclude that Petitioner Tallman owes the balance of **$7,607.42** (excluding the remaining potential collection fees), as of September 7, 2011, and that USDA Rural Development may collect that amount from her. [The debt is her co-borrower's and her joint-and-several obligation.]

13. Petitioner Tallman's Financial Statement signed on March 30, 2010 (PX-3), and her wage stub showing her current earnings working part-time (PX-4), and the information provided during the hearing persuade me that the amount of money Petitioner Tallman makes is too small to be garnished. [**Petitioner Tallman should not be garnished when her disposable pay is $217.50 per week or less**.][1] USDA Rural

[1] The regulation at 31 C.F.R. § 285.11 includes the following restriction on garnishment: "The amount set forth at 15 U.S.C. 1673(a)(2) is the amount by which a

Development does not garnish in violation of 29 C.F.R. § 870.10, where disposable pay does not exceed "an amount equivalent to thirty times the minimum (hourly) wage" for a week, currently $217.50 per week (30 x $7.25).

14. Petitioner Tallman's reasonable and necessary living expenses consume her part-time pay. No amount of Petitioner Tallman's disposable pay could be garnished without creating hardship. 31 C.F.R. § 285.11. (Disposable pay is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.) Petitioner Tallman and her husband earn about $20,000.00 per year; they do not own a house: a trust owns the house. Petitioner Tallman is 61 years of age. Although Petitioner Tallman has the support of her husband, he is **not** liable to repay the debt at issue here.

15. Petitioner Tallman's attorney Mr. Selbo asks for fairness, particularly since Petitioner Tallman and everyone involved on her behalf thought that paying the $2,000.00 in 2010 settled the full amount of the debt. Mr. Selbo pleads waiver and laches. Mr. Selbo articulated the lack of notice to Petitioner Tallman in his letter dated July 23, 2008, after ***offset*** of federal tax rebate and refund:

Realizing that under a strict reading of the United States Code and the Congressional Federal Register an offset may be legally available under these circumstances, we submit that such an offset is unjust. Nancy and Timothy (Petitioner Tallman and her husband) have never received a notice of delinquency from the Department of Agriculture. Tim, in fact, has no liability but apparently because he and Nancy filed a joint tax return, the monies (refund and rebate) were taken. They have never received notification either was liable for a debt held by the Department of Agriculture. The notice from the Department of the Treasury was the first indication of an outstanding obligation, some six years after the debt was turned over to the Financial Management Service. It has been eight years since the account became delinquent. It

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debtor's disposable pay (for that week) exceeds an amount equivalent to thirty times the minimum (hourly) wage. See 29 CFR 870.10."

has been nearly fifteen years since her divorce, the point in time when she should have been free from any obligation on the house. If she had received notice while Deane (Feland) was alive, she may have been able to execute the appropriate documents to release her from this obligation. Instead, she is faced with the prospect of being liable for a debt she should never have been obligated to pay and was never notified about until now. Without notification, she lost the opportunity to contest this matter.

In light of these circumstances, we respectfully ask that you release her from this obligation.

PX-5.

Mr. Selbo's letter from 2008 is applicable to Petitioner Tallman's circumstances still, and I urge Treasury's collection agency to take these circumstances into account. Paragraph 14 of the Deed of Trust (RX 2) authorizes reamortizations and release of the property from the lien. Mr. Selbo cautions, however, that Petitioner Tallman was unaware of and did not agree to (a) the reamortizations, (b) the continuing delinquency, (c) the short sale, or (d) the releasing of the collateral.

16. Petitioner Tallman is responsible and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

17. **Petitioner Tallman, you may choose to call Treasury's collection agency** to negotiate the repayment of the debt. Petitioner Tallman, this will require **you** to telephone Treasury's collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. You may wish to include your attorney (and your husband) in the telephone call. Petitioner Tallman, you may choose to offer to Treasury's collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. You may choose to emphasize the unfairness of you being required to pay for the increase in indebtedness after the divorce (1993), when you were not involved and not given notice of the reamortizations (1995, 1997) and continued delinquency by your former husband, and his short sale (2000) and the

releasing of the collateral. You may choose to emphasize the settlement in 2010 that resulted in a $2,000.00 payment made on your behalf, which you thought was payment in full.

Findings, Analysis and Conclusions

18. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Tallman and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

19. Petitioner Tallman owes the debt described in paragraphs 6 through 12.

20. **No garnishment is authorized**. No amount of Petitioner Tallman's disposable pay could be garnished without creating hardship. 31 C.F.R. § 285.11.

21. Repayment of the debt may occur through ***offset*** of Petitioner Tallman's **income tax refunds** or other **Federal monies** payable to the order of Ms. Tallman. [Petitioner Tallman, if you file a joint tax return and a part of the refund belongs to your husband, you may call the Treasury toll-free number regarding refunding the portion for the "injured spouse." *See* paragraph 17. Also, if in the future a portion of your social security payments is ***offset***, you may choose to call the Treasury toll-free number to ask that a smaller portion be ***offset***.]

Order

22. Until the debt is repaid, Petitioner Tallman shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

23. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment. 31 C.F.R. § 285.11.

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

Done at Washington, D.C.

_____

BARBARA J. GREEN n/k/a BARBARA J. PITT
AWG Docket No. 11-0391.
Decision and Order.
Filed October 6, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was held as scheduled on October 5, 2011. Barbara J. Pitt, formerly known as Barbara J. Green, the Petitioner ("Petitioner Pitt"), participated, representing herself (appearing *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. USDA Rural Development's Exhibits, plus Narrative, Witness & Exhibit List (filed September 19, 2011), plus Mary Kimball's testimony, are all admitted into evidence.

4. Petitioner Pitt's Hearing Request with all enclosures; plus Petitioner Pitt's testimony; plus Petitioner Pitt's Consumer Debtor Financial Statement dated September 30, 2011 and letter dated September 29, 2011, are all admitted into evidence.

5. Petitioner Pitt owes to USDA Rural Development a balance of **$5,041.41** (as of September 13, 2011), in repayment of a $49,500.00 United States Department of Agriculture Farmers Home Administration loan made in 1995 for a home in Tennessee, the balance of which is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List. *See* especially RX 5 for the loan balance, plus Mary Kimball's testimony that another $57.09 from garnishment has been applied to the debt since RX 5 was prepared ($73.08 was taken; $15.99 was kept by Treasury for collection fees; and $57.09 was applied to reduce the balance). [The loan balance will change, because garnishment is ongoing; the balance may have been reduced by the time I sign this Decision.]

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$5,041.41** would increase the current balance by $1,411.59, to $6,453.00. *See* RX 6.

7. About 4-1/2 years after the loan was made, the loan was reamortized, in 1999. *See* Narrative. The loan had become delinquent, and the reamortization made the loan current, by adding the amount delinquent to the principal balance. The principal amount due became $51,705.94. The reamortization did not change the amount owed. *See* Narrative. Petitioner Pitt was not able to keep the loan current. A USDA Notice of Acceleration dated May 20, 2000 demanded payment in full of the entire debt.

8. The foreclosure sale was held on December 1, 2000. By the time of the foreclosure sale, $4,569.01 in interest had accrued, and $1,372.35 in fees. The $57,413.11 due prior to the foreclosure sale included:

$ 51,471.75	principal
4,569.01	accrued interest
1,372.35	"fee" balance

$ 57,413.11
=========
RX 5.

9. The foreclosure sale on December 1, 2000 yielded $46,000.00, which reduced the $57,413.11 amount owed to $11,413.11. Additional pre-foreclosure fees ($795.35) increased the debt to $12,208.46. No interest has accrued since the foreclosure sale on December 1, 2000. More than 10 years of Treasury ***offsets***, minus the collection fees, have paid down the debt by $7,109.96 since the foreclosure sale, reducing the balance to $5,098.50. RX 5, p. 2. Recent garnishments minus collection fees have paid down the debt further, by $57.09 as of September 13, 2011, reducing the balance to **$5,041.41**. *See* RX 6; and *see* paragraph 5 above.

10. Petitioner Pitt's evidence (described in paragraph 4) shows that Petitioner Pitt works as a senior care giver (home health care giver), so that people can continue to live at home. Petitioner Pitt earns $* per hour gross, and she works part-time, typically 30 hours per week. [**Petitioner Pitt should not be garnished when her disposable pay is $217.50 per week or less**.][1] USDA Rural Development does not garnish in violation of 29 C.F.R. § 870.10, where disposable pay does not exceed "an amount equivalent to thirty times the minimum (hourly) wage" for a week, currently $217.50 per week (30 x $7.25). [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.]

11. Petitioner Pitt is paid twice a month. Garnishment is ongoing, due to her Hearing Request having been late. Petitioner Pitt is 57 years of age, and she is diabetic, requiring insulin and syringes which she must pay for, and she has no health insurance coverage. It is unlikely that her earnings will increase, in part because her health does not permit her to work more hours. Petitioner Pitt's disposable pay is about $** to $***

[1] The regulation at 31 C.F.R. § 285.11 includes the following restriction on garnishment: "The amount set forth at 15 U.S.C. 1673(a)(2) is the amount by which a debtor's disposable pay (for that week) exceeds an amount equivalent to thirty times the minimum (hourly) wage. See 29 CFR 870.10."

per month, and her reasonable and necessary expenses exceed $*** per month. Any garnishment results in **financial hardship** to Petitioner Pitt and is NOT authorized. 31 C.F.R. § 285.11.

12. Petitioner Pitt is responsible and willing and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

13. Garnishment in any amount would result in **financial hardship** to Petitioner Pitt and is NOT authorized. 31 C.F.R. § 285.11. *See* paragraphs 10 and 11. I encourage **Petitioner Pitt and Treasury's collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Pitt, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Pitt, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

14. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Pitt and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

15. Petitioner Pitt owes the debt described in paragraphs 5 through 9.

16. Garnishment in any amount would result in **financial hardship** to Petitioner Pitt and is NOT authorized. 31 C.F.R. § 285.11. I am NOT, however, ordering any amounts already collected through garnishment of Petitioner Pitt's pay prior to implementation of this Decision to be returned to Petitioner Pitt.

17. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Pitt's **income tax refunds** or other **Federal monies** payable to the order of Ms. Pitt.

Order

18. Until the debt is repaid, Petitioner Pitt shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

19. USDA Rural Development, and those collecting on its behalf, are already garnishing Petitioner Pitt's pay, but garnishment in any amount results in **financial hardship** to Petitioner Pitt and is NOT authorized. 31 C.F.R. § 285.11.

20. USDA Rural Development, and those collecting on its behalf, will NOT be required to return to Petitioner Pitt any amounts already collected through garnishment of Petitioner Pitt's pay, prior to implementation of this Decision.

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

Done at Washington, D.C.

_____

MICHELLE D. GROVES.
AWG Docket No. 11-0370.
Decision and Order.
Filed October 7, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was held on October 6, 2011. Michelle D. Groves, the Petitioner ("Petitioner Groves"), participated, representing herself (appeared *pro se*). [Petitioner Groves was not available when the hearing was held at 11:00 a.m.; Petitioner Groves

telephoned later, so the hearing reconvened to include her, at about 3:00 p.m.]

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. USDA Rural Development's Exhibits, plus Narrative, Witness & Exhibit List, were filed on September 21, 2011, and are admitted into evidence, together with the testimony of Ms. Kimball.

4. Petitioner Groves' Hearing Request including all accompanying documents, is admitted into evidence, together with the testimony of Petitioner Groves.

5. Petitioner Groves owes to USDA Rural Development **$12,320.81** (as of September 20, 2011, *see* RX 6) in repayment of a USDA Farmers Home Administration loan borrowed in 1994 for a home in Michigan, the balance of which is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, esp. RX 5.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$12,320.81**, would increase the current balance by $3,449.83, to $15,770.64. *See* USDA Rural Development Exhibits, esp. RX 6.

7. The amount Petitioner Groves borrowed with her then-husband, David M. Groves, from USDA Farmers Home Administration in 1994

was $67,280.00. Petitioner Groves explained in her Hearing Request and her testimony that David Groves, her former husband, her co-borrower, should be required to pay his half:

I respectfully request a hearing so that I may further explain that why I should not be held accountable for David Groves half of the debt.

Petitioner Groves' former husband filed Chapter 7 bankruptcy on 08/15/2000 and the debt was discharged on November 21, 2000. *See* Narrative. Even though Petitioner Groves' former husband did not pay his share, this remains Petitioner Groves' debt. USDA Rural Development is legally entitled to collect the entire amount from Petitioner Groves.

8. At the time of the short sale on November 18, 1998, the debt balance was $66,450.58.

$ 64,935.52	unpaid principal
1,265.06	unpaid interest, and
250.00	unpaid fees
$ 66,450.58	

RX 5, page 1.

From the sale of the home (for $45,000.00), $39,011.54 was applied (leaving a balance owed of $27,439.04); and an additional $145.88 was applied (leaving a balance owed, after the short sale, of $27,293.16). RX 5, p. 1 and p. 2. Since the short sale, no additional interest has accrued, and Treasury ***offsets***, minus the collection fees, have paid down the debt by $14,972.35, reducing the balance to **$12,320.81**, as of September 20, 2011. RX 5, p. 2; RX 6.

9. When Petitioner Groves entered into the borrowing transaction with her co-borrower David Groves, in 1994, certain responsibilities were fixed, as to each of them. David Groves discharged his obligation through bankruptcy, leaving Petitioner Groves the only one paying the debt that had been her co-borrower's and her joint-and-several obligation.

Petitioner Groves still owes the balance of **$12,320.81** (excluding potential collection fees), as of September 20, 2011, and USDA Rural Development may collect that amount from her.

10. Petitioner Groves is very responsible. She has reared her children, and for the last 10 years or longer, she has done so without any child support. Her 18 year old son is in high school and lives with her; she contributes what she can toward the expenses of her 20 year old daughter who is no longer at home. Petitioner Groves testified that largely because of the debt at issue here, she has not been able to afford a house, a car, a t.v., or cable. Petitioner Groves testified that she works as a massage therapist, taking home about $** to $** every two weeks; and that she has never made more than $**** in a year. Petitioner Groves did not prepare a Consumer Debtor Financial Statement or any other income and expense analysis, but based on her testimony, I estimate that her gross pay averages $*** to $*** per month; and I estimate that her disposable pay (within the meaning of 31 C.F.R. § 285.11) averages $*** to $*** per month. [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.] Petitioner Groves' reasonable and necessary living expenses, for herself and her children, consume her disposable pay.

11. It is Petitioner Groves who has made the substantial progress in repaying the debt here, especially through the ***offsets*** in 2007 and 2008. In addition to ***offsets***, wage garnishment up to 15% of Petitioner Groves' disposable pay can occur <u>unless</u> she cannot withstand garnishment in that amount without hardship. 31 C.F.R. § 285.11. Although garnishment at 15% of Petitioner Groves' disposable pay could yield roughly $195.00 to $255.00 per month in repayment of the debt, she cannot currently withstand garnishment in that amount without financial hardship.

12. Petitioner Groves' disposable pay (within the meaning of 31 C.F.R. § 285.11) does **not** currently support garnishment and **no** garnishment is authorized through **October 2013**. To prevent hardship, potential garnishment to repay "the debt" (*see* paragraph 5) must be limited to **0%** of Petitioner Groves' disposable pay through **October 2013**; then, beginning no sooner than November 2013, following review

of Petitioner Groves' financial circumstances to determine what amount of garnishment she can withstand without financial hardship, garnishment up to 15% of Petitioner Groves' disposable pay is authorized. 31 C.F.R. § 285.11.

13. Petitioner Groves is responsible and willing and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

14. Through **October 2013**, **no** garnishment is authorized. Then, beginning no sooner than November 2013, following review of Petitioner Groves' financial circumstances to determine what amount of garnishment she can withstand without financial hardship, garnishment up to 15% of Petitioner Groves' disposable pay is authorized. *See* paragraphs 10, 11 and 12. I encourage **Petitioner Groves and Treasury's collection agency** to **negotiate** the repayment of the debt. Petitioner Groves, this will require **you** to telephone Treasury's collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. You may choose to request consideration of the substantial progress you have already made repaying; and consideration of the unfair burden placed on you by the bankruptcy discharge obtained by your co-borrower. You may choose to offer to compromise the debt for an amount you are able to pay, to settle the claim for less. You may choose to offer to pay through solely ***offset*** of **income tax refunds**, perhaps with a specified amount for a specified number of years. You may have anyone you choose, including your lawyer, with you on the phone when you telephone to negotiate.

Findings, Analysis and Conclusions

15. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Groves and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

16. Petitioner Groves owes the debt described in paragraphs 5 through 9.

17. **Garnishment is authorized**, as follows: **through October 2013**, **no** garnishment. Then, beginning no sooner than November 2013, following review of Petitioner Groves' financial circumstances to determine what amount of garnishment she can withstand without financial hardship, garnishment up to 15% of Petitioner Groves' disposable pay. 31 C.F.R. § 285.11.

18. Repayment of the debt may also occur through ***offset*** of Petitioner Groves' **income tax refunds** or other **Federal monies** payable to the order of Ms. Groves.

Order

19. Until the debt is repaid, Petitioner Groves shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

20. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through October 2013. Beginning no sooner than November 2013, following review of Petitioner Groves' financial circumstances to determine what amount of garnishment she can withstand without financial hardship, garnishment up to 15% of Petitioner Groves' disposable pay is authorized. 31 C.F.R. § 285.11.

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

Done at Washington, D.C.

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CHRISTOPHER WALTERS.
AWG Docket No. 11-0313.
Decision and Order.
Filed October 11, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Victor W. Palmer.

Decision and Order

This matter is before me upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On August 5, 2011, Administrative Law Judge, Victor W. Palmer issued a Prehearing Order to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing. I was then assigned to hear the case.

The Rural Development Agency (RD), Respondent, complied with the Discovery Order and a Narrative was filed, together with supporting documentation RX-1 through RX-7 on August 5, 2011. As a clarification to its prior exhibits, RD submitted an Additional Narrative and RX-7 which I now renumber as RX-8 on August 30, 2011. The Petitioner filed a letter with his original Request for Hearing. During the hearing he was invited to forward his recent pay stubs and completed final statement forms. He gave the address where his son would receive the forms on his behalf. Ms. Kimball re-mailed those financial forms. Nothing has been received from Mr. Walters in the past 30 days. The rules relating to these hearings have time-of-completion requirements and that time has expired. On August 25, 2011, at the time set for the hearing, both parties were available for the hearing. Ms. Kimball represented RD. Mr. Walters was available and represented himself. The parties were sworn.

Petitioner is gainfully employed, but he states that it is a "new job."

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On February 23, 2001, Christopher Walters assumed a loan for the purchase of a primary home mortgage loan in the amount of $36,550.00

from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) to purchase his home on a property located in 4## SCR 35-5, Mize, MS 391##[1]. RX-1, RX-2.

2. Borrower re-amortized their account on August 22, 2006 bringing the principal amount due to $37,412.10. Narrative.

3. The borrower became in default and a Notice of Acceleration was mailed on February 2, 2007. RX-3.

4. A foreclosure sale was held on October 25, 2010. RX-4.

5. RD received a net $17,103.00 from the sale. Narrative, RX-4 @ p. 3 of 9, RX-6.

6. Prior to the foreclosure sale, the principal loan balance for the RD loan prior to the foreclosure was $37,016.01, plus $12,499.90 for accrued interest, plus $3,826.24 for fees and $52.24 in late fees. After the sale, $84.60 in escrow fees were posted and the borrower owes $36,206.79. Narrative, RX-6.

8. RD has received $939.84 from Treasury plus $50.52 (pending transfer to RD bringing the amount owed to $35,216.43 exclusive of potential Treasury fees. Narrative,

9. The remaining potential fees from Treasury are $9,860.60. RX-7.

10. Mr. Walters states that he has recently started full time employment. Oral Testimony.

Conclusions of Law

Petitioner is indebted to USDA Rural Development in the amount of $35,216.43 exclusive of potential Treasury fees for the mortgage loan extended to him.

In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $9,860.60.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is not entitled to administratively garnish the wages of the Petitioner at this time.

[1] The complete address is maintained in USDA files.

Order

For the foregoing reasons, the wages of Petitioner shall NOT be subjected to administrative wage garnishment at this time. After eleven months, RD may re-assess the Petitioner's financial position.

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

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GEORGE H. MACKEY.
AWG Docket No. 11-0390.
Decision and Order.
Filed October 11, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. George H. Mackey, the Petitioner ("Petitioner Mackey"), represents himself (appears *pro se*) and participated in the hearing by telephone held on October 5, 2011.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone

314.457.4426 FAX

Summary of the Facts Presented

3. USDA Rural Development's Exhibits, plus Narrative, Witness & Exhibit List, were filed on September 19, 2010, and are admitted into evidence, together with the testimony of Ms. Kimball.

4. Petitioner Mackey's "Consumer Debtor Financial Statement" was filed on October 4, 2011, and is admitted into evidence, together with the testimony of Petitioner Mackey.

5. Petitioner Mackey owes to USDA Rural Development **$35,083.90** (as of September 14, 2011) in repayment of two Rural Housing Service loans, one assumed in 1996, and the other made in 1996, for a home in Georgia, the balance of which is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, esp. RX 6.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$35,083.90** would increase the current balance by $9,823.49, to $44,907.39. *See* USDA Rural Development Exhibits, esp. RX 7 (both pages).

7. The amount borrowed from USDA Rural Development was $40,320.00 in 1996 ($29,790.00 on the assumed loan, plus $10,530.00). RX 1, RX 2, RX 3. By the time of the short sale in 2003, that debt had grown to $50,583.43.[1] From the sale of the home, $15,350.00 was applied to the debt, reducing the balance to $35,233.43. An escrow adjustment ($149.53) reduced the balance to **$35,083.90**, as of January 14, 2003. RX 6. No interest has accrued since January 14, 2003, and no collections have been applied to that balance since January 14, 2003, except that there may be recent Treasury garnishments that had not yet reached USDA Rural Development.

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[1] In both 1998 and 2000, Petitioner Mackey reamortized his accounts; the amounts delinquent on the accounts were added to principal, making his accounts current. These amortizations did not change the amounts owed and were of benefit to Petitioner Mackey. *See* Narrative.

8. Petitioner Mackey reported that his pay is being garnished to reduce the debt. [His Hearing Request was late.] Petitioner Mackey said that the bookkeeper told him 25% of his pay is coming out (which may include the child support he has deducted to go to his 13 year-old, who is not in his home). Petitioner Mackey reported that he needs the garnishment lowered; he supports his wife and 3 year-old at home, in addition to the 13 year-old, and they are living pay check to pay check. Petitioner Mackey reported that he owes back income taxes for 2010, nearly $2,000.00 (for which he is paying $120.00 per month).

9. Petitioner Mackey makes good money as a welder, and his disposable income is entirely consumed with reasonable and necessary living expenses (*see* "Consumer Debtor Financial Statement") for his children, his wife and himself. [Disposable income is gross pay, minus withholding for such items as income tax, Social Security, Medicare, health insurance, and the like.] Petitioner Mackey's wife is not obligated to repay the debt. Although garnishment at 15% of Petitioner Mackey's disposable pay would yield considerable repayment of the debt, Petitioner Mackey cannot currently withstand garnishment for the debt in any amount without hardship. To prevent hardship, potential garnishment to repay the debt must be limited to **0%** of Petitioner Mackey's disposable pay through October 2013; then **up to 3%** of Petitioner Mackey's disposable pay beginning November 2013 through October 2015; then **up to 15%** of Petitioner Mackey's disposable pay thereafter. 31 C.F.R. § 285.11.

10. Petitioner Mackey is responsible and willing and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

11. Through October 2013, no garnishment is authorized. Beginning November 2013 through October 2015, garnishment up to 3% of Petitioner Mackey's disposable pay is authorized; and thereafter, garnishment up to 15% of Petitioner Mackey's disposable pay is authorized. *See* paragraph 9. **Petitioner Mackey, you may choose to contact Treasury's collection agency** to **negotiate** the repayment of the debt. Petitioner Mackey, this will require **you** to telephone Treasury's collection agency after you receive this Decision. The toll-free number

for you to call is **1-888-826-3127**. You may choose to offer to Treasury's collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

12. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Mackey and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

13. Petitioner Mackey owes the debt described in paragraphs 5, 6 and 7.

14. **Garnishment is authorized**, as follows: through October 2013, **no** garnishment. Beginning November 2013 through October 2015, garnishment **up to 3%** of Petitioner Mackey's disposable pay; and thereafter, garnishment **up to 15%** of Petitioner Mackey's disposable pay. 31 C.F.R. § 285.11. I am NOT, however, ordering any amounts that may have already been collected through garnishment of Petitioner Mackey's pay prior to implementation of this Decision to be returned to Petitioner Mackey.

15. Repayment of the debt may also occur through ***offset*** of Petitioner Mackey's **income tax refunds** or other **Federal monies** payable to the order of Mr. Mackey.

Order

16. Until the debt is repaid, Petitioner Mackey shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

17. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through October 2013. Beginning November 2013 through October 2015, garnishment up to 3% of Petitioner Mackey's disposable pay is authorized; and garnishment up

to 15% of Petitioner Mackey's disposable pay thereafter. 31 C.F.R. § 285.11.

18. USDA Rural Development, and those collecting on its behalf, may already be garnishing Petitioner Mackey's pay; but currently, garnishment in any amount results in **financial hardship** to Petitioner Mackey and is NOT authorized. 31 C.F.R. § 285.11. USDA Rural Development, and those collecting on its behalf, will NOT be required to return to Petitioner Mackey any amounts already collected through garnishment of Petitioner Mackey's pay, prior to implementation of this Decision.

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

Done at Washington, D.C.

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BRANDY AZLIN (ROBERTS).
AWG Docket No. 11-0337.
Decision and Order.
Filed October 13, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Hearing Officer James P. Hurt.

Decision and Order

This matter is before me upon the request of Brandy Azlin, Petitioner, for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On August 10, 2011, Administrative Law Judge Jill S. Clifton issued a Prehearing Order to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the

matter for a telephonic hearing. This case was subsequently assigned to me.

The Rural Development Agency (RD), Respondent represented by Ms. Mary Kimball, complied with the Discovery Order and a Narrative was filed, together with supporting documentation RX-1 through RX-10 on August 12, 2011. As a result of my inquiry during the hearing, on October 5, 2011 RD filed an Additional Narrative and RX-4A. Both parties were available for the telephonic hearing. The parties were sworn. Ms. Azlin was assisted during the hearing by her grandmother. At the conclusion of the hearing, I invited Ms. Azlin to forward recent pay stubs and completed financial forms which were mailed with her notice of this hearing. This information would allow me to perform a Financial Hardship Calculation. On September 26, 2011, I called the same number she provided for the oral hearing and left a message that she was invited to forward the financial documents to me. No further documents have been received from Petitioner. Ms. Azlin's Request for Hearing contained a letter which generally inquired about matters concerning the handling of the foreclosure, her loan guarantee obligations, and the details of the financial matters.

Petitioner lives alone. She has had gainful employment for two years. There are no other garnishments and she has no school loans.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On June 25, 2007, Brandy Azlin, formerly Brandy Roberts obtained a loan for the purchase of a primary home mortgage loan in the amount of $49,470.00 from JP Morgan Chase Bank, N.A. to purchase her home on a property located in 3## N. Balt***** Allen, OK 748##[1]. RX-1, RX-2.

2. Prior to signing for this loan, on April 2, 2007, Petitioner signed RD Form 1980-21 (Single Family Housing Loan Guarantee). RX-2.

3. The borrower became in default and a Notice of Acceleration was mailed on April 4, 2008. RX-3@ p. 3 of 8.

4. The house was acquired by the lender at foreclosure for $32,300.00 on February 13, 2009. RX-3 @ p. 3 of 8.

[1] The complete address is maintained in USDA files.

5. On March 23, 2009, prior to the final sale, the property was appraised "As is" for $12,500. On March 31, 2009, a BPO (Broker's Price Opinion) stated that the property value was $25,000.00. RX-3 @ p. 3 of 8.

6. The property was then listed for final sale on April 14, 2009 for $25,000.

7. The property sold for $22,000.00 on May 15, 2009. Narrative. RX-3 @ p. 4 of 8.

8. Total lender liquidation costs were $4,513.60. Narrative, RX-3 @ p. 5 of 8.

9. Total Property sale costs were $4,087.61. RX-3 @ p. 6 of 8.

10. The principal loan balance for the RD loan was $48,425.87, plus $5,220.14 for accrued interest, plus $1,778.46 for pre-sale advances and additional interest, plus $8,601.21 for fees for a total of $64,025.68. Additional Narrative, RX-4A.

11. Treasury has received $4,017.75. RX-4A.

12. RD has paid $38,007.93 to Lender under the Loan Guarantee provision. Additional Narrative, RX-4A.

13. Ms. Azlin owes RD a balance due of $38,007.93 exclusive of potential Treasury fees. Additional Narrative, RX-4A.

14. Ms. Azlin owes potential Treasury fees of $9,836.91. Additional Narrative,

RX-10.

15. Ms. Azlin states that she has been gainfully employed for more than one year.

Testimony.

16. No Financial Hardship calculation could be undertaken due to a lack of data from Petitioner.

Conclusions of Law

Petitioner is indebted to USDA Rural Development in the amount of $38,007.93, exclusive of potential Treasury fees for the mortgage loan extended to her.

In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $9,836.91.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

RD may administratively garnish the wages of the Petitioner at this time.

Order

For the foregoing reasons, the wages of Petitioner may be subjected to administrative wage garnishment.

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

RICHARD W. ADAMS.
AWG Docket No. 11-0393.
Decision and Order.
Filed October 13, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was held on October 12, 2011. Mr. Richard W. Adams, the Petitioner ("Petitioner Adams"), participated, representing himself (appearing *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. USDA Rural Development's Exhibits, plus Narrative, Witness & Exhibit List (filed September 21, 2011), are admitted into evidence, together with the testimony of Mary Kimball.

4. Petitioner Adams' Consumer Debtor Financial Statement and letter (filed October 5, 2011) are admitted into evidence, together with the testimony of Petitioner Adams, together with his Hearing Request dated August 21, 2011, including attached letter.

5. Petitioner Adams owes to USDA Rural Development **$10,375.83** (as of September 16, 2011) in repayment of a loan made in 1989 by the United States Department of Agriculture Farmers Home Administration (now USDA Rural Development, Rural Housing Service). Petitioner Adams borrowed to buy a home in Florida. The **$10,375.83** balance is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, esp. RX 7.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$10,375.83** would increase the current balance by $2,905.23, to $13,281.06. *See* USDA Rural Development Exhibits, esp. RX 8.

7. Petitioner Adams' former wife Melissa Adams filed Chapter 7 bankruptcy on September 12, 2002, and the debt was discharged as to her on January 2, 2003. *See* Narrative. Even though Petitioner Adams' former wife did not pay her share, this remains Petitioner Adams' debt. USDA Rural Development is legally entitled to collect the entire amount from Petitioner Adams. Petitioner Adams works hard as a tow truck operator, and he intends to pay this debt, although paying more on the debt does not seem fair to him, especially when he considers the 10 years of payments made beginning in 1989. The payments were not kept current, though, so the balance became larger instead of smaller. Even

with the interest subsidy[1] and even with the reamortization, the loan went into default, and as of the end of December 1999, USDA Rural Development sent notice of acceleration and intent to foreclose.

8. The loan Petitioner Adams borrowed in 1989 from USDA Farmers Home Administration was $38,000.00. RX 1. By the time of the foreclosure sale in 2000, that debt had grown to $45,269.49:

$ 39,678.22	Principal Balance[2] prior to foreclosure sale
$ 4,399.39	Unpaid Interest up to Judgment (RX 5, p. 2)
$ 196.21	Unpaid Interest from 08/23/2000 to 10/02/2000
$ 641.00	Unpaid Interest from 10/02/2000 to foreclosure sale
$ 354.67	Fee Balance prior to foreclosure sale
$ 45,269.49	Total Amount Due prior to foreclosure sale
- $ 28,100.63	Proceeds[3] from foreclosure sale
$ 17,168.86	Unpaid in 2000

RX 7.

So the foreclosure sale left $17,168.86 unpaid in 2000.

9. Since the foreclosure sale, no additional interest has accrued, and four ***offsets*** during 2002 through 2007, mostly Federal income tax refunds, have reduced the balance substantially, by another $6,793.03 applied to the debt, leaving **$10,375.83** unpaid now (excluding the potential remaining collection fees). *See* RX 7 and RX 8.

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[1] Petitioner Adams was not required to pay all the interest that accrued; as shown by RX 5, p. 2, there was an interest subsidy of $4,182.83. Although the Judgment shows recapture of the interest subsidy, USDA Rural Development did not recapture the interest subsidy, since the home was sold at a loss.

[2] In 1999, Petitioner Adams reamortized his account; the amounts delinquent on the account were added to principal, making his account current. This amortization did not change the amount owed, which was $39,813.03, and was of benefit to Petitioner Adams. *See* Narrative.

[3] The property sold for $29,390.00 (RX 6), and $28,100.63 is what USDA received from the sale.

10. Petitioner Adams' current gross pay per week is $***; his current disposable pay per week is $**. [Disposable pay (within the meaning of 31 C.F.R. § 285.11) is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.] What is deducted from Petitioner Adams' weekly pay is Federal income tax ($**); Social Security ($*); Medicare ($*); health insurance ($*); and Aflac insurance ($*).

11. Petitioner Adams' monthly living expenses listed on the last page of his Consumer Debtor Financial Statement total $***, but that is incomplete, because it allowed nothing for motor vehicle insurance, which costs him about $** per month, nothing for clothing, nothing for his out-of-pocket medical expenses, and nothing for the contributions he makes toward his 3 children, who are all adults but sometimes stay with him. Petitioner Adams requires medications to keep him from drying out; he is post-multiple surgeries in 2005 (oral, sinuses and nose surgeries) and uses a CPAP machine.

12. As I calculate it, Petitioner Adams makes between $*** and $*** per month gross pay, yielding about $*** per month disposable pay. In addition to ***offsets***, garnishment up to 15% of Petitioner Adams' disposable pay can occur <u>unless</u> he cannot withstand garnishment in that amount without hardship. 31 C.F.R. § 285.11. Although garnishment at 15% of Petitioner Adams' disposable pay could yield roughly $** per month in repayment of the debt, he cannot withstand garnishment in that amount without financial hardship.

13. Petitioner Adams' current reasonable and necessary living expenses consume about $*** per month (this includes the $*** that he shows on his Consumer Debtor Financial Statement, plus $** for motor vehicle insurance, plus $** for clothing, incidentals, and out-of-pocket medical expenses). The $*** per month is bare bones living expenses, including nothing for telephone, cable, or "other." That leaves about $*** per month of his disposable pay to pay indebtedness. Petitioner Adams testified that he just borrowed $*** from his girlfriend to pay a large credit card balance, and besides owing her, he still owes balances on multiple other credit cards. From his Consumer Debtor Financial

Statement, it appears to me that he expects to pay more than $*** per month on credit card balances. In addition, he pays roughly $** per month for his truck and $** per month for his motorcycle. Petitioner Adams testified that he has only $** left over at the end of each week. If Petitioner Adams is making all the payments on all the credit cards shown on his Consumer Debtor Financial Statement, he does not have anything left over; he is actually going deeper in the hole every month. His indebtedness is a crushing weight, even before taking into account the debt described in paragraphs 5 through 8.

14. The credit card balances and motor vehicle loans do not have priority over the debt described in paragraphs 5 through 8; nevertheless, to allow Petitioner Adams some "breathing room" to make arrangements to deal with his indebtedness, **no** garnishment is authorized through **October 2012**. To prevent hardship, potential garnishment to repay the debt described in paragraphs 5 through 8 must be limited to **0%** of Petitioner Adams' disposable pay through **October 2012**; then, beginning no sooner than November 2012, garnishment up to 15% of Petitioner Adams' disposable pay is authorized. 31 C.F.R. § 285.11.

15. Petitioner Adams, you may want to negotiate the disposition of the debt with Treasury's collection agency. *See* paragraph 16.

Discussion

16. NO garnishment is authorized through **October 2012** (*see* paragraph 13). Petitioner Adams, you may want to **negotiate** the disposition of the debt. Petitioner Adams, this will require **you** to telephone Treasury's collection agency. The toll-free number for you to call is **1-888-826-3127**. You may choose to request consideration of the unfair burden placed on you by the bankruptcy discharge obtained by your co-borrower. You may choose to offer to compromise the debt for an amount you are able to pay, to settle the claim for less. You may choose to offer to pay through solely ***offset*** of **income tax refunds**, perhaps with a specified amount for a specified number of years. You may wish to include someone else with you in the telephone call when you call to negotiate.

Findings, Analysis and Conclusions

17. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Adams and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

18. Petitioner Adams owes the debt described in paragraphs 5 through 8.

19. **NO garnishment is authorized** through **October 2012**. Petitioner Adams cannot withstand garnishment in any amount without creating financial hardship. Beginning no sooner than November 2012, garnishment up to 15% of Petitioner Adams' disposable pay is authorized. 31 C.F.R. § 285.11.

20. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Adams' **income tax refunds** or other **Federal monies** payable to the order of Mr. Adams.

Order

21. Until the debt is repaid, Petitioner Adams shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

22. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment through **October 2012**. Thereafter, garnishment up to 15% of Petitioner Adams' disposable pay is authorized. 31 C.F.R. § 285.11.

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

Done at Washington, D.C.

_____

DOROTHY GRIFFIN.
AWG Docket No. 11-0369.
Decision and Order.
Filed October 20, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Janice K. Bullard.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the timely request of Dorothy Griffin ("Petitioner"), filed on August 29, 2011, for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development ("USDA-RD"; "Respondent"), and if established, the propriety of imposing administrative wage garnishment. By Order issued on September 23, 2011, the parties were directed to provide information and documentation concerning the existence of the debt. In addition, the matter was set for a telephonic hearing to commence on October 18, 2011 and deadlines for filing documents with the Hearing Clerk's Office were established.

On September 8, 2011, Respondent, represented by Mary E. Kimball, Accountant for the New Program Initiatives Branch of Rural Development, USDA-RD, located in Saint Louis, Missouri, filed a Narrative together with supporting documentation[1]. Petitioner did not file written submissions. Petitioner also did not provide a telephone number where she could be reached for the hearing. Her petition similarly does not have a telephone number. A search of www.whitepages.com failed to show a listed telephone number at the address noted on Petitioner's petition.

The hearing commenced as scheduled, but Petitioner did not attend. I find it appropriate to make findings on the written record, which Respondent's representative confirmed as the best evidence supporting

[1] References to Respondent's exhibits herein shall be denoted as "RX-1 through RX-8".

the debt. Accordingly, the following Findings of Fact and Conclusions of Law and Order shall be entered:

FINDINGS OF FACT

On April 29, 1987 the Petitioner assumed an existing mortgage held by USDA RD in the amount of $31,860.00 and also directly borrowed the amount of $2,640.00for the purchase of real property in Crosby, Mississippi, evidenced by a Promissory Note and Real Estate Deed of Trust. RX-1; RX-2; RX-3/

USDA-RD established two separate accounts for the debts of Petitioner. RX-4.

The accounts became delinquent and on July 14, 2000, USDA-RD sent a notice of acceleration to the Petitioner. RX-5.

A foreclosure sale of the real property was held on December 11, 2000 and yielded $13,490.00 which was applied against the account balances.

At the time of the sale, the amount due on the assumed mortgage account was $30,640.30, consisting of $28,817.18 principal, $1724.69 interest, and $198.43 fees. RX 5.

At the time of the sale, the amount due on the direct loan was $2,755.92, consisting of $1,825.07 principal, $109.23 interest and $821.62 fees. RX 5.

The balance on the loans after sale proceeds were applied was $18,081.15 on the assumed loan and 41,825.07 on the direct loan. RX 5.

The account was referred to U.S. Department of Treasury ("Treasury") as required by law, and $9,936.29 has been received from Treasury and applied to the balance of the accounts. RX 6.

The direct loan has been satisfied through Treasury collections and a balance of $9,969.94 plus potential fees of $2,990.98 for a total indebtedness of $12,960.92 remains at Treasury for collection. RX 6.

Treasury, through its agent, issued a notice to Petitioner of intent to garnish her wages, and Petitioner timely requested a hearing, which was held by telephone on October 18, 2011.

Petitioner did not attend the hearing, and did not respond to an Order directing her to provide contact information.

Petitioner did not submit any information about her income, expenses, or employment status.

Petitioner has not provided any justification for why her wages, if any, should not be garnished.

CONCLUSIONS OF LAW

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA RD in the amount of $9,969.94, exclusive of potential Treasury fees, for a loan she acquired to purchase real property.

All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met.

Petitioner's wages, if any, are subject to garnishment.

Respondent is entitled to administratively garnish the wages of the Petitioner.

Treasury shall remain authorized to undertake any and all other appropriate collection action.

ORDER

For the foregoing reasons, the wages of Petitioner shall be subjected to administrative wage garnishment if Petitioner is working.

Petitioner is advised that if she acquires the ability to negotiate a lump sum payment, she may be able to enter into a compromise settlement of the debt with the representatives of Treasury. Petitioner is further advised that such an agreement may lower anticipated fees for collecting the debt. The toll free number for Treasury's agent is 1-888-826-3127.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. See, 31 C.F.R. § 285.13.

Until the debt is satisfied, Petitioner shall give to USDA RD or those collecting on its behalf, notice of any change in her address, phone numbers, or other means of contact.

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

So Ordered this day of October, 2011 in Washington, D.C.

_____

CAMERON SIMS.
AWG Docket No. 11-0374.
Decision and Order.
Filed October 20, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Janice K. Bullard.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the timely request of Cameron Sims ("Petitioner"), filed on August 29, 2011, for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development ("USDA-RD"; "Respondent"), and if established, the propriety of imposing administrative wage garnishment. By Order issued on September 22, 2011, the parties were directed to provide information and documentation concerning the existence of the debt. In addition, the matter was set for a telephonic hearing to commence on October 18, 2011 and deadlines for filing documents with the Hearing Clerk's Office were established.

On September 8, 2011, Respondent represented by Mary E. Kimball, Accountant for the New Program Initiatives Branch of Rural Development, USDA-RD, located in Saint Louis, Missouri, filed a Narrative, together with supporting documentation[1]. Petitioner filed a Consumer Debtor Financial Statement on October 11, 2011..

The hearing commenced as scheduled, and Ms. Kimball and Petitioner testified. Petitioner contested the indebtedness, as he had believed that he had an agreement with USDA-RD to compromise the debt. After hearing how debts were referred by law to the U.S. Department of Treasury, Petitioner understood how the debt remains.

[1] References to Respondent's exhibits herein shall be denoted as "RX-1 through RX-7".

Based upon all of the evidence of record, the following Findings of Fact and Conclusions of Law and Order shall be entered:

FINDINGS OF FACT

On November 13, 1991 the Petitioner and his wife at the time received a direct loan from USDA RD in the amount of $33,000.00 for the purchase of real property in Buckhannon, West Virginia, evidenced by a Promissory Note and Real Estate Deed of Trust. RX-1; RX-2.

USDA-RD established an account for the debt of Petitioner and his ex-wife. RX-3.

The account became delinquent and on March 25, 2000, USDA-RD sent a notice of acceleration to the Petitioner. RX-4.

A short sale was held on July 25, 2000 which yielded $24,578.72 that was applied against the account balance of $33,977.02, consisting of $31,373.14 principal, $2,420.74 interest, and $183.14 fees. RX 5.

The balance on the loan after sale proceeds were applied was $9,398.30.

Petitioner and his ex-wife were offered an opportunity to compromise the debt before it was referred to the U.S. Department of Treasury ("Treasury") for collection as required by law. RX 7.

The account was referred to Treasury, and $4,932.93 was received from Treasury through tax refund offsets and applied to the balance of the account. RX 5.

The uncollected balance of $4,465.37 plus potential fees of $1,250.30 for a total indebtedness of $5,715.67 is at Treasury for collection. RX 6.

Treasury, through its agent, issued a notice to Petitioner of intent to garnish his wages, and Petitioner timely requested a hearing, which was held by telephone on October 18, 2011.

Petitioner did not attend the hearing, but his mother stated that he is not currently working and has a back injury.

Petitioner did not submit any information about his income or expenses.

Petitioner has not provided any justification for why his wages, if any, should not be garnished.

CONCLUSIONS OF LAW

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA RD in the amount of $4,465.37, exclusive of potential Treasury fees, for a loan he acquired to purchase real property.

All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met.

The distribution of property pursuant to Petitioner's divorce does not absolve him from liability for the indebtedness arising from his failure to satisfy his real property loan from USDA RD.

Petitioner's wages, if any, are subject to garnishment.

Respondent is entitled to administratively garnish the wages of the Petitioner.

Treasury shall remain authorized to undertake any and all other appropriate collection action..

ORDER

For the foregoing reasons, the wages of Petitioner shall be subjected to administrative wage garnishment if Petitioner is working.

Petitioner is advised that if he acquires the ability to negotiate a lump sum payment, he may be able to enter into a compromise settlement of the debt with the representatives of Treasury. Petitioner is further advised that such an agreement may lower anticipated fees for collecting the debt. In addition, Petitioner may inquire about whether he can enter into an arrangement with his ex-wife and Treasury to mutually satisfy the debt. The toll free number for Treasury's agent is 1-888-826-3127.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. See, 31 C.F.R. § 285.13.

Until the debt is satisfied, Petitioner shall give to USDA RD or those collecting on its behalf, notice of any change in his address, phone numbers, or other means of contact.

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

So Ordered this _____day of October, 2011 in Washington, D.C.

CARL ROWAN.
AWG Docket No. 11-0371
Decision and Order.
Filed October 20, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Janice K. Bullard.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the timely request of Carl Rowan ("Petitioner"), filed on August 29, 2011, for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development ("USDA-RD"; "Respondent"), and if established, the propriety of imposing administrative wage garnishment. By Order issued on September 22, 2011, the parties were directed to provide information and documentation concerning the existence of the debt. In addition, the matter was set for a telephonic hearing to commence on October 18, 2011 and deadlines for filing documents with the Hearing Clerk's Office were established.

On October 5, 2011, Respondent, represented by Mary E. Kimball, Accountant for the New Program Initiatives Branch of Rural Development, USDA-RD, located in Saint Louis, Missouri, filed a Narrative together with supporting documentation[1]. Petitioner did not file written submissions.

The hearing commenced as scheduled, but Petitioner did not attend. Petitioner's mother answered the phone at the number provided by Petitioner, and Ms. Rowan appeared to be knowledgeable about the substance of the hearing. The Order and notice of hearing that were sent to Petitioner were not returned as undeliverable. Ms. Rowan asserted that Petitioner was not working, but she did not provide a rationale for

[1] References to Respondent's exhibits herein shall be denoted as "RX-1 through RX-7".

Petitioner's absence. Ms. Rowan stated that her son had signed over the real property that is the subject of the alleged debt involved in this matter to his ex-wife as part of divorce proceedings. This assertion was also made by Petitioner in his petition for a hearing. I asked Ms. Rowan to advise her son that the hearing was held in his absence. Ms. Kimball was present on behalf of Respondent, and confirmed that the filed submissions represented the basis for the debt.

Based upon Petitioner's assertions in his petition and Respondent's submissions, in addition to the oral statements made at the hearing, the following Findings of Fact and Conclusions of Law and Order shall be entered:

FINDINGS OF FACT

On November 13, 1991 the Petitioner and his wife at the time received a direct loan from USDA RD in the amount of $33,000.00 for the purchase of real property in Buckhannon, West Virginia, evidenced by a Promissory Note and Real Estate Deed of Trust. RX-1; RX-2.

USDA-RD established an account for the debt of Petitioner and his ex-wife. RX-3.

The account became delinquent and on March 25, 2000, USDA-RD sent a notice of acceleration to the Petitioner. RX-4.

A short sale of the real property was held on July 25, 2000 and yielded $24,578.72, which was applied against the account balance of $33,977.02, consisting of $31,373.14 principal, $2,420.74 interest, and $183.14 fees. RX 5.

The balance on the loan after sale proceeds were applied was $9,398.30.

Petitioner and his ex-wife were offered an opportunity to compromise the debt before it was referred to the U.S. Department of Treasury ("Treasury") for collection as required by law. RX 7.

The account was referred to Treasury, and $4,932.93 was received from Treasury through tax refund offsets and applied to the balance of the account. RX 5.

The uncollected balance of $4,465.37 plus potential fees of $1,250.30 for a total indebtedness of $5,715.67 is at Treasury for collection. RX 6.

Treasury, through its agent, issued a notice to Petitioner of intent to garnish his wages, and Petitioner timely requested a hearing, which was held by telephone on October 18, 2011.

Petitioner did not attend the hearing, but his mother stated that he is not currently working and has a back injury.

Petitioner did not submit any information about his income, expenses, or employment status.

Petitioner has not provided any justification for why his wages, if any, should not be garnished.

CONCLUSIONS OF LAW

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA RD in the amount of $4,465.37, exclusive of potential Treasury fees, for a loan he acquired to purchase real property.

All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met.

The distribution of property pursuant to Petitioner's divorce does not absolve him from liability for the indebtedness arising from his failure to satisfy his real property loan from USDA RD.

Petitioner's wages, if any, are subject to garnishment.

Respondent is entitled to administratively garnish the wages of the Petitioner.

Treasury shall remain authorized to undertake any and all other appropriate collection action.

ORDER

For the foregoing reasons, the wages of Petitioner shall be subjected to administrative wage garnishment if Petitioner is working.

Petitioner is advised that if he acquires the ability to negotiate a lump sum payment, he may be able to enter into a compromise settlement of the debt with the representatives of Treasury. Petitioner is further advised that such an agreement may lower anticipated fees for collecting the debt. In addition, Petitioner may inquire about whether he can enter into an arrangement with his ex-wife and Treasury to mutually satisfy the debt. The toll free number for Treasury's agent is 1-888-826-3127.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. See, 31 C.F.R. § 285.13.

Until the debt is satisfied, Petitioner shall give to USDA RD or those collecting on its behalf, notice of any change in his address, phone numbers, or other means of contact.

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

So Ordered this _____day of October, 2011 in Washington, D.C.

_____

TRACEY JOHNSON.
AWG Docket No. 11-0392.
Decision and Order.
Filed October 20, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Janice K. Bullard.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the request of Tracey Johnson ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due, and if established, the propriety of imposing administrative wage garnishment. By Order issued on September 19, 2011, the parties were directed to provide information and documentation concerning the existence of the debt. In addition, the matter was set for a telephonic hearing to commence on October 17, 2011 and deadlines for filing documents with the Hearing Clerk's Office were established.

On October 4, 2011, U.S. Department of Agriculture Rural Development ("Respondent"; "USDA-RD") filed a Narrative, together

with supporting documentation[1] and Petitioner filed a Consumer Debtor Financial Statement. The hearing commenced as scheduled. At the hearing, Petitioner represented herself and testified on her own behalf. Testimony was received from Mary E. Kimball, Accountant for the New Program Initiatives Branch of Rural Development, USDA RD, located in Saint Louis, Missouri.

On the basis of the entire record before me, the following Findings of Fact and Conclusions of Law and Order shall be entered:

FINDINGS OF FACT

On August 17, 2004 the Petitioner assumed an existing loan from the USDA RD in the amount of $39,000.00 for the purchase of real property in Hazlehurst, Missouri evidenced by an Assumption Agreement. RX-1.

USDA-RD established an account for Petitioner's debt. RX-2.

On January 7, 2005 and again on April 7, 2006, Petitioner reamortized the account to include delinquent amounts in her principal, for an outstanding principal balance of $34,284.90. RX 3.

Petitioner subsequently defaulted on the loan and Notice of Acceleration was issued by RD on January 16, 2009. RX 4.

A short sale of the real property was held on March 29, 2010 and yielded $12,000.00, which was applied against Petitioner's account balance of $36,213.83, consisting of $30,872.73 principal, $4,564.12 interest, $478.89 fees, and $28.09 interest on fees. RX 5.

The balance of Petitioner's account of $24,218.83 plus potential fees of $6,779.87 for a total indebtedness of $30,993.70 is at Treasury for collection. RX 6.

Treasury, through its agent, issued a notice to Petitioner of intent to garnish her wages, and Petitioner timely requested a hearing, which was held by telephone on October 17, 2011.

After hearing an explanation for how the debt arose, Petitioner did not contest the validity of the debt.

Petitioner credibly testified that she is currently employed and earns $* per hour, but does not always work a full week of forty hours.

Petitioner lives with her two minor children for whom she is financially responsible.

Petitioner's monthly expenses exceed or meet her monthly income

[1] References to Respondent's exhibits herein shall be denoted as "RX-1 through RX-6".

Petitioner has no expectation of improvement in her financial situation for the foreseeable future.

CONCLUSIONS OF LAW

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA RD in the amount of $24,213.83, exclusive of potential Treasury fees for a loan to purchase real property.

All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met.

Petitioner's wages are excluded from garnishment, pursuant to 5 U.S.C. § 1673(a)(2).

Respondent is not entitled to administratively garnish the wages of the Petitioner.

Treasury shall remain authorized to undertake any and all other appropriate collection action.

ORDER

For the foregoing reasons, the wages of Petitioner shall NOT be subjected to administrative wage garnishment.

Petitioner is advised that if she acquires the ability to negotiate a lump sum payment, she may be able to enter into a compromise settlement of the debt with the representatives of Treasury. In addition, Petitioner may inquire about whether her circumstances meet Treasury's criteria for a hardship resolution of the debt. The toll free number for Treasury's agent is 1-888-826-3127.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. See, 31 C.F.R. § 285.13.

Until the debt is satisfied, Petitioner shall give to USDA RD or those collecting on its behalf, notice of any change in her address, phone numbers, or other means of contact.

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

So Ordered this day of October, 2011 in Washington, D.C.

_____

JOSEPH KEITH.
AWG Docket No. 11-0282.
Decision and Order.
Filed October 26, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Victor W. Palmer.

Decision and Order

Pursuant to a Hearing Notice, I held a hearing in this proceeding by telephone, on July 27, 2011, at 2:30 PM Eastern Time. Petitioner, Joseph Keith, and Respondent, United States Department of Agriculture, Rural Development (USDA-RD), through its representative, Mary E. Kimball, participated and were sworn. USDA-RD introduced documents pertaining to a home mortgage it gave to Petitioner on March 25, 2002, when he signed a promissory note and a mortgage for a $70,804.00 home mortgage to purchase a home at 100 Wall Street, North East, PA (RX-1 and RX-2).

The mortgage loan was not paid as required, and on November 29, 2010, the house that it was used to purchase, was sold at a short sale in which USDA-RD received $20,000.00 when $109,838.17 was owed by Mr. Keith for principal, accrued interest and fees. Since then, Treasury has collected $507.00 through offsets against federal income tax refunds otherwise due to Mr. Keith. At present, $93,140.92 is owed on the debt plus "Remaining potential fees" to Treasury of $26,014.50, or $118,923.42 total (RX-10).

Mr. Keith testified that he is single and, since last November, has been employed for less than one year as a security guard earning a minimum wage of $* per hour by St. Moritz. He is paid every two weeks earning a monthly net income of $** from which he pays monthly expenses of: $**-rent; $**-food; $**-cable TV; $*-clothing; and $**-cell phone, or $** total. Under these circumstances, I have concluded that administrative garnishment of any part of Mr. Keith's wages "would

cause a financial hardship to the debtor" within the meaning of the controlling regulation (31 CFR § 285.11(f)(8) (ii)). The evidence shows that Petitioner presently has no monthly disposable income. Accordingly, there is no disposable income that may be administratively garnished and therefore administrative wage garnishment may not be pursued.

Order

The relief sought in the petition is hereby granted, and the pending administrative wage garnishment to collect money from Petitioner's disposable pay to satisfy a nontax debt asserted by the Respondent, USDA-RD is hereby barred and dismissed.

This matter is stricken from the active docket.

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

_____

VALERIE RIDGEWAY.
AWG Docket No. 11-0332.
Decision and Order.
Filed October 27, 2011.

AWG –

Michael J. Ridgeway, Esq. for Petitioner.
Nathaniel Shunk and Steven Casey for FS.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing was held, by telephone, on October 26, 2011. Ms. Valerie J. Ridgeway, the Petitioner ("Petitioner Ridgeway"), participated, represented by Michael J. Ridgeway, Esq.

2. The United States Forest Service, an agency of the United States Department of Agriculture (USDA), is the Respondent ("US Forest Service"), and was represented by Nathaniel ("Nate") Shunk and Steven

Casey, each of whom is a US Forest Service employee at the Albuquerque Service Center.

Summary of the Facts Presented

3. Admitted into evidence, together with Petitioner Ridgeway's testimony, are Petitioner Ridgeway's Wage Stubs ("PX-9", filed October 25, 2011); plus Petitioner Ridgeway's numerous exhibits and Exhibit List & Submission of Narrative & Financials (filed September 1, 2, 7 and 8, 2011); plus Petitioner Ridgeway's Hearing Request dated July 11, 2011 and stamped RECEIVED July 17, 2011, plus all documents accompanying the Hearing Request (filed August 1, 2011).

4. Admitted into evidence, together with the testimony of Nathaniel ("Nate") Shunk and Steven Casey, are the documents filed September 13, 2011, which were sent by email simultaneously to the Hearing Clerk and to Michael J. Ridgeway, Esq.

5. The validity of the debt and the amount of the debt are not addressed in this Decision. The Hearing Officer's decision was the final agency determination; consequently, I do not address the issues decided by the Hearing Officer. *See* the letter dated February 17, 2009, over the signature of John Hernandez, Hearing Officer, a copy of which was filed in this case on September 13, 2011.

6. Petitioner Ridgeway stated that she had not seen the Hearing Officer's decision until it was provided to her in this proceeding. Nevertheless, I find that the US Forest Service followed procedures in serving her with the Hearing Officer's decision sufficient to give her notice of that decision. The practice of the US Forest Service, if a certified mailing was not claimed, was to re-send the document to the same address by ordinary mail. The Hearing Officer's decision was sent to the address Petitioner Ridgeway had provided to the US Forest Service, which she testified is the only reliable address she has, the P.O. Box which she has had since 2005 and still has to this day.

7. Petitioner Ridgeway's disposable pay (within the meaning of 31 C.F.R. § 285.11) **does not currently support garnishment in any amount**. The US Forest Service and those collecting on its behalf, **shall**

return any amounts garnished (**until December 2012, when garnishment not to exceed $50.00 per month is authorized**).

8. Petitioner Ridgeway testified she has a severe latex allergy and asthma. She testified that proteins from rubber can cause her to be unable to breathe. She wrote in her July 2011 Hearing Request, in part:

Additionally, I have no means to pay this. My debts are excessive due to no medical insurance and being stuck with an allergy that disabled me from my profession (nursing). Now after being unemployable for more than 10 years, I have begun a job. My latex allergy is severe and I have anaphylaxis within 5 or 10 minutes if my airway is exposed to natural rubber proteins.

Petitioner Ridgeway's reasonable and necessary living expenses and debts are overwhelming, as shown by her Consumer Debtor Financial Statement. Just one example is the nearly $10,000 that she still owes for medical care, including that of a cardiologist, in 2006. Petitioner Ridgeway now has health insurance through her employment, but her portion of her health insurance premium is expensive, and her out-of-pocket expenses can still run $** to $** per month. Her reasonable and necessary living expenses include shelter not only for herself but also for her children. She has been required to move often, and only her P.O. Box is a reliable address. Petitioner Ridgeway is responsible and willing and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

9. **Through November 2012, NO garnishment is authorized**. **Beginning with December 2012, garnishment is authorized, not to exceed $50 per month**. I encourage **Petitioner Ridgeway and Treasury's collection agency** to negotiate the repayment of the debt. Petitioner Ridgeway, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. You may choose to offer to compromise the debt for an amount you are able to pay, to settle the claim for less. You may have anyone you choose with you on the phone when you call.

10. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Ridgeway and the US Forest Service; and over the subject matter, which is administrative wage garnishment.

11. **Through November 2012, NO garnishment is authorized**, because garnishment would create financial hardship (and has created financial hardship). Thereafter, beginning in December 2012, garnishment is authorized, **not to exceed $50.00 per month**. 31 C.F.R. § 285.11.

12. Petitioner Ridgeway **shall be repaid any amounts already garnished** from her pay, and any amounts garnished from her pay before this Decision can be implemented, because of financial hardship. [Garnishment is ongoing because Petitioner Ridgeway's Hearing Request was late; it needed to be received by July 15, 2011; it was marked received July 17, 2011. The Notice from Treasury was not sent to Petitioner Ridgeway's P.O. Box, which is reliable, but to a physical address that she had moved out of in December 2010.]

13. Even though garnishment is limited by this Decision, repayment of the debt may nevertheless occur through ***offset*** of Petitioner Ridgeway's **income tax refunds** or other **Federal monies** payable to the order of Ms. Ridgeway.

Order

14. Until the debt is fully paid, Petitioner Ridgeway shall give notice to The US Forest Service or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

15. The US Forest Service, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment **through November 2012**. Thereafter, beginning in December 2012, the US Forest Service, and those collecting on its behalf, are authorized to proceed with garnishment, **not to exceed $50 per month**. 31 C.F.R. § 285.11.

16. Petitioner Ridgeway **shall be repaid any amounts already garnished** from her pay and any amounts garnished through November 2012.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties, as follows:

(1) Michael J. Ridgeway, Esq., shall be served by email AND at the mailing address shown below;

(2) Petitioner Ridgeway shall be served at the only reliable address she has, which is THE P.O. BOX shown in the letter dated February 17, 2009, over the signature of John Hernandez, Hearing Officer, a copy of which was filed in this case on September 13, 2011; and

(3) the US Forest Service representatives shall be served only by email, as shown below.

Done at Washington, D.C.

JOE K. LEMER.
AWG Docket No. 11-0388.
Decision and Order.
Filed October 28, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was held on October 25, 2011. Mr. Joe K. Lemer, full name Joe Kevin Lemer, the Petitioner ("Petitioner Lemer"), participated, representing himself (appearing *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development")

and was represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. USDA Rural Development's Exhibits, plus Narrative, Witness & Exhibit List (filed September 21, 2011), are admitted into evidence, together with the testimony of Mary Kimball.

4. Petitioner Lemer's summary letter, plus his Consumer Debtor Financial Statement and other exhibits (PX 1 through PX 4) (filed October 19, 2011), are admitted into evidence, together with the testimony of Petitioner Lemer, together with his Hearing Request dated August 12, 2011, including his two-page letter and all accompanying documents.

5. Petitioner Lemer owes to USDA Rural Development **$26,817.57** (as of September 13, 2011) in repayment of a loan made in 1983 by the United States Department of Agriculture Farmers Home Administration (now USDA Rural Development, Rural Housing Service). Petitioner Lemer borrowed to buy a home in Texas. The **$26,817.57** balance is now unsecured ("the debt"). [Garnishment is ongoing; the balance is being reduced week by week.] *See* USDA Rural Development Exhibits, esp. RX 4, RX 5.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$26,817.57** would increase the current balance by $7,508.92, to $34,326.49 (as of September 13, 2011). *See* USDA Rural Development Exhibits, esp. RX 5.

7. Petitioner Lemer's situation is extraordinary. Never before on a Farmers Home Administration (FmHA) loan, have I seen so much interest, **nearly $20,000.00 interest**, associated with a $28,256.38 principal balance ($12,621.11 interest plus $7,368.54 interest, for a total of $19,989.65 interest). All of that interest accrued through the short sale date of March 16, 1998 (**no** interest has accrued since that short sale date).

8. The interest rate was 10-3/4%, but the amount of time that passed was the dominant factor. Petitioner Lemer's two-page letter accompanying his Hearing Request explains. After more than 8 years in the home, in 1991, Petitioner Lemer put the home up for sale. In December 1991 Petitioner Lemer turned the keys over to the Farmers Home Administration and moved out. Petitioner Lemer made no monthly payments after 1991. Petitioner Lemer kept trying to sell the home. It did not sell. Petitioner Lemer wrote: "During the years of 1992 through 1997, I have tried to sell the house to several people, but the FmHA office never closed on the house and refused to let me sell the house."

9. Petitioner Lemer testified that the house remained empty, and in good condition, all those years (more than 6 years). And, of course, the interest kept accruing, all those years. Petitioner Lemer testified that the realtor is to be credited with getting the house sold, in 1998; it sold to a neighbor who had helped Petitioner Lemer keep it in good repair. The loan Petitioner Lemer borrowed in 1983 from USDA Farmers Home Administration was $35,500.00. RX 1. By the time of the short sale in 1998, that debt had grown to $55,919.51:

$ 28,256.38	Principal Balance prior to short sale
$ 12,621.11	Unpaid Interest
$ 7,368.54	Unpaid Interest
$ 7,214.48	Fee Balance prior to short sale (*ie*, real estate taxes and insurance)
$ 459.00	Pre foreclosure Fee
$ 55,919.51	Total Amount Due
$ 55,919.51	Total Amount Due

=========	
- $19,835.59	Proceeds[1] from short sale
$ 36,083.92	Unpaid in 1998
=========	

RX 4, esp. pp. 1 and 2.

So the short sale left $36,083.92 unpaid in 1998.

10. Since the short sale, no additional interest has accrued, and three ***offsets*** during 2001 through 2005, likely Federal income tax refunds, have reduced the balance, as have the garnishments that began in 2010. The ***offsets*** and garnishments applied to the debt (through September 13, 2011) leave **$26,817.57** unpaid (excluding the potential remaining collection fees). *See* RX 4 and RX 5. Garnishment is ongoing, so this balance is being reduced weekly.

11. Petitioner Lemer works hard as a technician for Cargill Meat Solutions, and he is financially successful, but he has responsibilities and he finds the garnishments, which began in 2010, to be too much. Petitioner Lemer's current gross pay per week is roughly $***; his current disposable pay per week is roughly $**. [Disposable pay (within the meaning of 31 C.F.R. § 285.11) is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.]

12. As I calculate it, Petitioner Lemer makes nearly $*** per month gross pay, yielding about $*** per month disposable pay (excluding overtime). In addition to ***offsets***, garnishment up to 15% of Petitioner Lemer's disposable pay can occur unless he cannot withstand garnishment in that amount without hardship. 31 C.F.R. § 285.11. Although garnishment at 15% of Petitioner Lemer's disposable pay yields roughly $** per month in repayment of the debt, he cannot withstand garnishment in that amount without financial hardship.

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[1] The property sold for $23,000.00, and $19,835.59 is what USDA received from the sale.

13. Petitioner Lemer's current reasonable and necessary living expenses consume about $*** per month. [His four children are all grown.] The $*** per month does not include the additional expenditures that he may make for his 7-year old granddaughter and his parents (each of whom is retired; his mother has medical challenges). The $*** per month living expenses leave less than $*** per month to pay for such additional expenditures, and for the occasional non-budgeted expenditures, and for his payments on debt. The garnishment to pay the USDA Rural Development debt appears to have been in excess of $500.00 per month (probably because of occasional overtime). Petitioner Lemer pays every month on a $*** hospital balance for his appendix surgery. He pays on a loan against his retirement fund at work.

14. Petitioner Lemer is responsible and has made progress in repaying the USDA Rural Development debt, but paying 15% of his disposable pay has created hardship. Consequently, to prevent hardship, garnishment shall be limited to **5%** of Petitioner Lemer's disposable pay through **November 2013**; then, beginning no sooner than **December 2013**, garnishment **up to 10%** of Petitioner Lemer's disposable pay is authorized. 31 C.F.R. § 285.11.

15. Petitioner Lemer, you may want to negotiate the disposition of the debt with Treasury's collection agency. *See* paragraph 16.

Discussion

16. Garnishment shall be limited to **5%** of Petitioner Lemer's disposable pay through **November 2013** (*see* paragraph 14). Petitioner Lemer, you may want to **negotiate** the disposition of the debt. Petitioner Lemer, this will require **you** to telephone Treasury's collection agency. The toll-free number for you to call is **1-888-826-3127**. You may choose to offer to compromise the debt for an amount you are able to pay, to settle the claim for less. You may choose to offer to pay through solely ***offset*** of **income tax refunds**, perhaps with a specified amount for a specified number of years. You may wish to include someone else with you in the telephone call when you call to negotiate.

Findings, Analysis and Conclusions

17. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Lemer and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

18. Petitioner Lemer owes the debt described in paragraphs 5 through 9. Petitioner Lemer faults FmHA for the sale taking so long (more than 6 years), and Petitioner Lemer wrote that he believed he had an agreement with Mr. Gilbreath in 1998 that the remaining debt would be written off. *See* Petitioner Lemer's two-page letter accompanying his Hearing Request. *See also* Petitioner Lemer's summary letter and exhibits filed October 19, 2011. Mr. Gilbreath's letter (PX-2) invited Petitioner Lemer to apply (after sale) for a cancellation of any carry over debt. Apparently any negotiation between Petitioner Lemer and USDA Rural Development that happened after the short sale was not completed. There is no documentation that would permit me to find that Petitioner Lemer does not owe the debt. I would need evidence of forgiveness or cancellation of the remaining debt, such as a returned promissory note, a written release of liability, or a 1099-C, none of which is before me. I am indeed sorry that so much interest accrued while the house was empty.

19. Garnishment is authorized, but to prevent financial hardship shall be limited to **5%** of Petitioner Lemer's disposable pay through **November 2013**; then, beginning no sooner than **December 2013**, garnishment **up to 10%** of Petitioner Lemer's disposable pay is authorized. 31 C.F.R. § 285.11. I am NOT, however, ordering any amounts already collected through garnishment of Petitioner Lemer's pay prior to implementation of this Decision to be returned to Petitioner Lemer.

20. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Lemer's **income tax refunds** or other **Federal monies** payable to the order of Mr. Lemer.

Order

21. Until the debt is repaid, Petitioner Lemer shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers

such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

22. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment limited to **5%** of Petitioner Lemer's disposable pay through **November 2013**; then, beginning in December 2013, garnishment up to 10% of Petitioner Lemer's disposable pay is authorized. 31 C.F.R. § 285.11.

23. USDA Rural Development, and those collecting on its behalf, will NOT be required to return to Petitioner Lemer any amounts already collected through garnishment of Petitioner Lemer's pay, prior to implementation of this Decision.

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

Done at Washington, D.C.

DONNA KING.
AWG Docket No. 11-0389.
Decision and Order.
Filed October 31, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Janice K. Bullard.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the timely request of Donna King ("Petitioner") filed on September 9, 2011 for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development ("USDA-RD"; "Respondent"), and if established, the propriety of imposing administrative wage garnishment. By Order

issued on October 5, 2011, the parties were directed to provide information and documentation concerning the existence of the debt. In addition, the matter was set for a telephonic hearing to commence on October 26, 2011 and deadlines for filing documents with the Hearing Clerk's Office were established.

On September 19, 2011, Respondent represented by Mary E. Kimball, Accountant for the New Program Initiatives Branch of Rural Development, USDA-RD, located in Saint Louis, Missouri, filed a Narrative, together with supporting documentation[1]. Petitioner did not file any submissions.

The hearing commenced as scheduled, and Ms. Kimball and Petitioner testified. Petitioner contested the indebtedness, as she had believed that the debt was paid when the property was sold at foreclosure. She was not aware that she would be responsible for the difference between the amount yielded at the sale, and the amount due on her account before the property was foreclosed. In addition, Petitioner did not receive USDA-RD's offer to compromise the debt; she explained that her neighborhood had suffered a problem with mail delivery at about the time of the foreclosure.. After hearing an explanation for how the account remained unpaid despite the foreclosure sale, and hearing how debts are referred by law to the U.S. Department of Treasury ("Treasury"), Petitioner understood how the debt remains. Petitioner expressed interest in working out a resolution with Treasury.

Based upon all of the evidence of record, the following Findings of Fact and Conclusions of Law and Order shall be entered:

FINDINGS OF FACT

On April 16, 1990 Petitioner received a loan from USDA RD in the amount of $35,500.00 for the purchase of real property in Ironton, Missouri, evidenced by a Promissory Note and Real Estate Deed of Trust. RX-1; RX-2.

USDA-RD established an account for the debt of Petitioner.

The account became delinquent and the account was reamortized on September 16, 2000 to incorporate the delinquent amounts into the principal due on the loan.

[1] References to Respondent's exhibits herein shall be denoted as "RX-1 through RX-7".

The account again fell delinquent, and Petitioner filed Bankruptcy petitions that were dismissed; therefore the debt was not discharged.

On June 5, 2001, a notice of acceleration of the account was sent to the Petitioner. RX-4.

A foreclosure sale was held on July 1, 2002 which yielded $32,700.00 that was applied against the account balance of $47,407.80, consisting of $41,319.62 principal, $5,259.78 interest, and $828.40.14. RX 5.

The balance on the loan after sale proceeds were applied was $14,707.80. RX 5.

Petitioner was offered an opportunity to compromise the debt before it was referred to the U.S. Department of Treasury ("Treasury") for collection but she did not get the mailing because of trouble with postal delivery service in her neighborhood. RX 7.

The account was referred to Treasury, and remains uncollected through tax refund offsets because Petitioner dedicated her refunds to the U.S. Department of Education to satisfy a student loan..

The uncollected balance of $14,707.80 plus potential fees of $4,118.18 for a total indebtedness of $18,825.98 is at Treasury for collection. RX 6.

Treasury, through its agent, issued a notice to Petitioner of intent to garnish her wages, and Petitioner timely requested a hearing, which was held by telephone on October 26, 2011.

Petitioner testified that she was working, and she described her income and expenses.

Petitioner's income exceeds her expenses, and could withstand wage garnishment.

Petitioner expressed interest in resolving the debt with Treasury.

CONCLUSIONS OF LAW

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA RD in the amount of $14,707.80, exclusive of potential Treasury fees, for a loan she acquired to purchase real property.

All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met.

Petitioner is entitled to some time to resolve her debt with Treasury.

Petitioner's wages are thereafter subject to garnishment.

Respondent is entitled to administratively garnish the wages of the Petitioner as of April 30, 2012.

Treasury shall remain authorized to undertake any and all other appropriate collection action.

ORDER

For the foregoing reasons, the wages of Petitioner shall be subjected to administrative wage garnishment if Petitioner is unable to work out a resolution with Treasury.

Petitioner is advised that if she acquires the ability to negotiate a lump sum payment, she may be able to enter into a compromise settlement of the debt with the representatives of Treasury. Petitioner is further advised that such an agreement may lower anticipated fees for collecting the debt. In addition, Petitioner may inquire about whether she can enter into an arrangement with Treasury to satisfy the debt through installment payments. The toll free number for Treasury's agent is 1-888-826-3127.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. See, 31 C.F.R. § 285.13.

Until the debt is satisfied, Petitioner shall give to USDA RD or those collecting on its behalf, notice of any change in her address, phone numbers, or other means of contact.

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

So Ordered this 28th day of October, 2011 in Washington, D.C.

_____

MICHELLE ALBERT.
AWG Docket No. 11-0351.
Decision and Order.
Filed November 9, 2011.

AWG –

Petitioner Pro se.

Mary Kimball for RD.
Decision and Order by Administrative Law Judge Victor W. Palmer.

Decision and Order

This matter is before me upon the request of the Petitioner, Michelle Albert, for a hearing to contest the efforts of the Respondent, USDA/Rural Development, to garnish her wages in order to collect a debt remaining from a mortgage loan it provided to her and to her husband, Andrew Albert, Jr., on a house they had purchased together in New Roads, LA. A hearing was held by telephone conference, on September 22, 2011, and both Petitioner, Michelle Albert, and Respondent's representative, Mary Kimball, participated and gave sworn testimony. Respondent's exhibits RX-1 through RX-7 were received in evidence.

The exhibits showed that the mortgage loan was in the amount of $45,260.00 and was secured by a promissory note and a mortgage dated November 13, 1985 (RX-1 and RX-2).

Petitioner and her husband failed to make the mortgage payments and a short sale was held on August 12, 2000 at which time $41,597.98 was owed for principal, interest and various fees. The property was sold for $20,000.00 and after the sale proceeds were posted, $20,711.33 was owed on the debt. Since the sale, Treasury has collected some of the debt so that the current debt is $11,015.28 plus potential fees to Treasury of $3,304.58, or $14, 319.86 total (RX-6). Michelle Albert is employed as a cook by a hospital and her net monthly earnings are $***, and her monthly expenses are $***.

Accordingly, USDA, Rural Development has met its burden under 31 C.F.R. §285.11(f)(8) that governs administrative wage garnishment hearings, and has proved the existence and the amount of the debt owed by the Petitioner. On the other hand, Petitioner has shown that she would suffer undue financial hardship if more than $100.00 per month is garnished from her pay checks.

Under these circumstances, it is hereby Ordered that no more than $100.00 per month may be garnished from Petitioner's wages.

_____

DONNA J. TASH f/k/a DONNA J. EVANS.
AWG Docket No. 11-0443.
Decision and Order.
Filed November 10, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing was held by telephone as scheduled, on November 8, 2011. Ms. Donna J. Tash, formerly known as Donna J. Evans, the Petitioner ("Petitioner Tash") participated, representing herself (appearing *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Ms. Mary Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Issue

3. The issue is whether Petitioner Tash owes to USDA Rural Development a balance of **$18,844.64** (as of October 5, 2011, *see* RX 6), in repayment of a United States Department of Agriculture / Farmers Home Administration loan made in 1988, the balance of which is now

unsecured ("the debt"). Petitioner Tash borrowed to buy a home in New Mexico.

Summary of the Facts Presented

4. USDA Rural Development Exhibits RX 1 through RX 7 are admitted into evidence, together with the Narrative, Witness & Exhibit List (filed October 13, 2011), and the testimony of Mary Kimball.

5. Petitioner Tash's Hearing Request and all accompanying documents (filed September 29, 2011) are admitted into evidence, together with the testimony of Petitioner Tash.

6. The balance of the debt is **$18,844.64**. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on of **$18,844.64** would increase the balance by $5,276.50, to $24,121.14 (as of October 5, 2011). RX 6.

7. Petitioner Tash testified that in 1995 she left the home (she and the co-borrower were divorcing; he kept the home and responsibility to pay the debt). She testified that she thereafter took a copy of the Quitclaim Deed of the home, which conveyed her interest to the co-borrower (included in her Hearing Request documents), to the USDA / Farmers Home Administration County Supervisor in Alamogordo, New Mexico, Dale Woods, requesting a release of liability. Petitioner Tash testified that she made clear to Dale Woods what her new address was, 97 River Front Road, Tularosa NM, to emphasize to him that she had no further connection to the home.

8. Petitioner Tash testified that the loan payments were most likely current when she met with the USDA / County Supervisor in Alamogordo. The loan had originally been $47,000.00, borrowed in 1988. She testified that there was always an interest subsidy on the loan (1% interest), because the co-borrower was quadriplegic on disability and SSI. The home had been built handicapped-accessible specifically for the co-borrower. She testified that repairs and some re-construction due to shoddy building had been costly, but that she and the co-borrower had paid such expenses. Petitioner Tash testified that Dale Woods told

her the only way she could be released from liability on the debt would be if the debt were refinanced.

9. About 3 years later, the co-borrower, Darel W. Evans, reamortized the loan, on October 2, 1998. This was not refinancing. *See* Narrative. The loan had become delinquent, and the reamortization made the loan current, by adding the amount delinquent to the principal balance. The principal amount due became $40,240.71. The reamortization did not change the amount owed. *See* Narrative. The co-borrower, Mr. Evans did not keep the loan current. A USDA Notice of Acceleration dated March 27, 2000 demanded payment in full of the entire debt. RX 4. Petitioner Tash did not receive that Notice. RX 4, p. 4.

10. A foreclosure sale was held on March 15, 2001. RX 5. By then, between $49,000.00 and $50,000.00 was owed. After the sale proceeds were posted, $21,129.21 was still owed. No interest has accrued since the foreclosure sale.

11. USDA Rural Development sent a letter dated June 3, 2002 to the co-borrower and Petitioner Tash, informing them of the remaining balance and the repayment options available. RX 7. The address used was that of the property that had been foreclosed on more than a year before. Petitioner Tash did not receive the letter and thereby lost the opportunity to negotiate.

Discussion

12. Petitioner Tash may choose to encourage the co-borrower to contact the Treasury collection agency to ask to be considered for a ***financial hardship discharge*** of the debt.

The toll-free number for him to call is **1-888-826-3127**. He may wish to include someone with him in the telephone call when he calls to negotiate.

Findings, Analysis and Conclusions

13. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Tash and USDA Rural Development; and over the subject

matter, which is repayment of a USDA / Farmers Home Administration loan made in 1988.

14. Petitioner Tash **does not owe** the debt described in paragraph 6, as I explain in paragraph 15.

15. In the office of the USDA / Farmers Home Administration County Supervisor in Alamogordo, New Mexico, Petitioner Tash, in person, timely provided USDA with her change of address, as she and the co-borrower were divorcing, and she was seeking release from liability and delivered a copy of the Quitclaim Deed. About 6 years later, when USDA Rural Development sent her the letter dated June 3, 2002, containing debt settlement options (RX 7), addressed to the foreclosed property address instead of the address Petitioner Tash had timely provided, USDA Rural Development impaired its opportunity to collect from Petitioner Tash.

16. I am **NOT**, however, ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner Tash's pay, to be returned to Petitioner Tash.

Order

17. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with any further collection of the debt from Petitioner Tash. 31 C.F.R. § 285.11.

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

Done at Washington, D.C.

_____

JULIE D.CRAIG.
AWG Docket No. 11-0446.
Decision and Order.
Filed November 14, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was held on November 8, 2011. Julie D. Craig, the Petitioner, full name Julie Diana Craig ("Petitioner Craig"), participated, representing herself (appears *pro se*). Petitioner Craig is commended for the excellent documentation she provided.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. USDA Rural Development's Exhibits, plus Narrative, Witness & Exhibit List, were filed on October 13, 2011, and are admitted into evidence, together with the testimony of Mary Kimball. Here, too, USDA Rural Development's documentation was excellent.

4. Petitioner Craig's Narrative dated October 27, 2011, plus completed "Consumer Debtor Financial Statement," plus pay stub PX 1, together with accompanying documents, were filed on October 28, 2011; and filed again on November 8, 2011 (because some parts of the first FAX were missing), and are admitted into evidence, together with the testimony of Petitioner Craig, together with her Hearing Request and all accompanying documents (filed September 29, 2011).

5. Petitioner Craig owes to USDA Rural Development **$17,223.35** (as of October 4, 2011), in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX 3, esp. p. 2) for a loan made in 2003, the balance of which is now unsecured ("the debt"). Petitioner Craig borrowed to buy a home in South Carolina. [The loan balance will change, because garnishment is ongoing; the balance will likely have been reduced by the time I sign this Decision.]

6. The ***Guarantee*** (RX 3) establishes an **independent** obligation of Petitioner Craig, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 3, p. 2.

7. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$17,223.35**, would increase the balance by $4,822.54, to $22,045.89. *See* USDA Rural Development Exhibits, esp. RX 11.

8. Petitioner Craig works as a nurse three 12-hour shifts each week, making roughly $*** per month gross. Her disposable pay (within the meaning of 31 C.F.R. § 285.11) is roughly $*** per month (*see* PX 1, pay stub dated October 13, 2011). [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.]

9. Although garnishment at 15% of Petitioner Craig's disposable pay has been ongoing for longer than a year and had yielded substantial repayment of the debt (*see* RX 10), Petitioner Craig has undergone financial hardship as a result. Petitioner Craig has two children to support, her child who is a senior in high school and her 7 month-old

child, in addition to herself. Her 7-month old daughter was born during the year of garnishment, substantially increasing her expenses. Petitioner Craig keeps borrowing to pay her reasonable and necessary living expenses for the two children and herself. Petitioner Craig has no money to pay for needed dental work for herself and her daughter: Petitioner Craig's crown (on a front tooth) broke and needs replacement, and she has no means to pay for that.

10. To prevent hardship, potential garnishment to repay "the debt" (*see* paragraph 5) must be limited to **0%** of Petitioner Craig's disposable pay through December 2012; then **up to 7%** of Petitioner Craig's disposable pay beginning January 2013 through December 2014; then **up to 15%** of Petitioner Craig's disposable pay thereafter. 31 C.F.R. § 285.11.

11. Petitioner Craig is responsible and willing and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

12. Through December 2012, no garnishment is authorized. Beginning January 2013 through December 2014, garnishment up to 7% of Petitioner Craig's disposable pay is authorized; and thereafter, garnishment up to 15% of Petitioner Craig's disposable pay is authorized. *See* paragraphs 8, 9 and 10. I encourage **Petitioner Craig and the collection agency** to **negotiate** the repayment of the debt. Petitioner Craig, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Craig, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

13. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Craig and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

14. Petitioner Craig owes the debt described in paragraphs 5, 6 and 7.

15. **Garnishment is authorized**, as follows: through December 2012, **no** garnishment. Beginning January 2013 through December 2014, garnishment **up to 7%** of Petitioner Craig's disposable pay; and thereafter, garnishment **up to 15%** of Petitioner Craig's disposable pay. 31 C.F.R. § 285.11.

16. I am **NOT**, however, ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner Craig's pay, to be returned to Petitioner Craig.

17. Repayment of the debt may occur through ***offset*** of Petitioner Craig's **income tax refunds** or other **Federal monies** payable to the order of Mrs. Craig (whether or not garnishment is authorized).

Order

18. Until the debt is repaid, Petitioner Craig shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

19. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through December 2012. Beginning January 2013 through December 2014, garnishment **up to 7%** of Petitioner Craig's disposable pay is authorized; and garnishment **up to 15%** of Petitioner Craig's disposable pay thereafter. 31 C.F.R. § 285.11.

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

Done at Washington, D.C.

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TERRI S. SIMPSON n/k/a TERRI GRAHAM.
AWG Docket No. 11-0444.
Decision and Order.
Filed November 15, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was held as scheduled on November 8, 2011. Ms. Terri S. Simpson, now known as Terri Graham ("Petitioner Simpson"), did not participate. (Petitioner Simpson did not participate by telephone: she provided no telephone number where she could be reached for the hearing by telephone. She provided no telephone number in her Hearing Request; then, in response to my Order issued October 4, 2011, she provided no telephone number.)

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Simpson owes to USDA Rural Development a balance of **$12,104.60** (as of October 19, 2011) in repayment of a United States Department of Agriculture Farmers Home Administration loan made in

1993, for a home in Texas. The balance is now unsecured ("the debt"). [The loan balance will change, because garnishment is ongoing; the balance will likely have been reduced by the time I sign this Decision.] *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed October 20, 2011), which are admitted into evidence, together with the testimony of Mary Kimball.

4. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$12,104.60** would increase the current balance by $3,389.29, to $15,493.89. *See* USDA Rural Development Exhibits, esp. RX 8.

5. The amount Petitioner Simpson borrowed in 1993 was $37,000.00. The account was reamortized on December 3, 1998. This meant the amount delinquent on the account was added to principal, making the account current. The principal amount due became $41,411.98. This did not change the amount owed. By the time of the foreclosure sale in November 2003, the debt had grown to $44,805.84:

$ 36,307.33	Principal Balance prior to foreclosure sale
$ 5,120.88	Interest Balance prior to foreclosure sale
$ 3,130.63	Fee Balance prior to foreclosure sale (includes unpaid real estate taxes, unpaid insurance premiums)
$ 247.00	Pre-foreclosure fees
$ 44,805.84	Total Amount Due prior to foreclosure sale
=========	
- $ 23,917.88	Proceeds from foreclosure sale
$20,887.96	Unpaid in 2003

RX 7 and USDA Rural Development Narrative.

Another $8,783.36 applied to the debt since then leaves **$12,104.60** unpaid now (excluding the potential remaining collection fees). *See* RX 7, esp. p. 2, and USDA Rural Development Narrative.

6. Payments on the debt have been made by ***offset***, usually of **income tax refunds**, since 2006. Petitioner Simpson's Hearing Request

was late (by 4 days), so beginning in October 2011, she had already experienced garnishment. The substantial progress in repaying the debt is detailed on RX 7, p. 2, plus Narrative.

7. Even though Petitioner Simpson failed to file a Consumer Debtor Financial Statement, or anything, in response to my Order dated October 4, 2011, RX 6 includes her letter from 2002 trying to stop the foreclosure, which stated that three children lived with her in the home. Based on the two garnishments reported in RX 7, p. 2, plus Narrative, I calculate Petitioner Simpson's current disposable pay to be roughly $*** per month. (Disposable pay is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.)

8. To prevent hardship, taking into account the factors to be considered under 31 C.F.R. § 285.11, I find that potential garnishment to repay "the debt" (*see* paragraph 3) should be and will be limited to the following amounts of Petitioner Simpson's disposable pay:

(a) through December 2012, **up to 5%**;
(b) beginning January 2013, through December 2014, **up to 7%**; and
(c) beginning no sooner than January 2015, **up to 10%**.

9. Petitioner Simpson is responsible and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

10. Garnishment of Petitioner Simpson's disposable pay is authorized as shown in paragraph 8. I encourage **Petitioner Simpson and Treasury's collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Simpson, this will require **you** to telephone Treasury's collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Simpson, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. You may ask that **the debt be apportioned between you and your co-borrower**.

Petitioner Simpson, you may want to have someone else with you on the line if you call.

Findings, Analysis and Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Simpson and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

12. Petitioner Simpson owes the debt described in paragraphs 3, 4 and 5.

13. When Petitioner Simpson entered into the borrowing transaction with her co-borrower Mr. Alfred E. Simpson, Jr., certain responsibilities were fixed, as to each of them. The entire unpaid balance of the debt (**$12,104.60** as of October 19, 2011, excluding the remaining potential collection fees), could be collected, legally, from Petitioner Simpson. [The debt is her co-borrower's and her joint-and-several obligation.]

14. Through December 2012, **garnishment up to 5% of Petitioner Simpson's disposable pay** is authorized. Beginning January 2013, through December 2014, **garnishment up to 7% of Petitioner Simpson's disposable pay** is authorized. Beginning January 2015, **garnishment up to 10% of Petitioner Simpson's disposable pay** is authorized. 31 C.F.R. § 285.11.

15. **NO refund** to Petitioner Simpson of monies already collected or collected prior to implementation of this Decision is appropriate, and no refund is authorized.

16. Repayment of the debt may also occur through ***offset*** of Petitioner Simpson's **income tax refunds** or other **Federal monies** payable to the order of Ms. Simpson.

Order

17. Until the debt is repaid, Petitioner Simpson shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers

such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

18. Through December 2012, USDA Rural Development, and those collecting on its behalf, are authorized to proceed with **garnishment up to 5% of Petitioner Simpson's disposable pay**. Beginning January 2013 through December 2014, **garnishment up to 7% of Petitioner Simpson's disposable pay** is authorized. Beginning January 2015, **garnishment up to 10% of Petitioner Simpson's disposable pay** is authorized. 31 C.F.R. § 285.11.

19. I am **NOT**, however, ordering any amounts already collected prior to implementation of this Decision, whether through ***offset*** or garnishment of Petitioner Simpson's pay, to be returned to Petitioner Simpson.

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

Done at Washington, D.C.

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RENEE BARBROS.
AWG Docket No. 11-0094
Decision and Order.
Filed November 16, 2011.

AWG –

Andrew J. Stunick, Esq. for Petitioner.
Gary Wright, Dewayne Brown, for FS.
Decision and Order by Chief Administrative Law Judge Peter W. Davenport.

Decision and Order

This matter is before the Administrative Law Judge upon the request of Renee Barbros for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment

prior to imposition of an administrative wage garnishment. On March 29, 2011, a telephonic hearing was conducted. At the hearing, the petitioner was represented by Andrew J. Stunich, Esquire of Eureka, California. The Forest Service was represented by Gary Wright, Dewayne Brown, Sofia Chapman, Deedra Fogle and Fola Fashola. Diane Green, Secretary to the Chief Judge was also present. That hearing was adjourned as it appeared that Mr. Stunich did not have the attachments which had been filed with the Hearing Clerk's Office providing the documentary basis for the debt. Petitioner's attorney was also told to file copies of any documents that he intended to introduce as evidence or a Memorandum of Points and Authorities in support of the Petitioner's position. No further filings have been made except for requests from the Forest Service that a resumption of the hearing be scheduled.

The resumed hearing was conducted on November 16, 2011. The Petitioner and her counsel were again present. The Forest Service was again represented by the individuals previously appearing with the exception of Fola Fashola, who was not present.

The record contains 26 Forest Service exhibits, consisting of the Notice of Intent to Offset Salary (Ex-1); Notifications of Personnel Actions from 2000 to 2008 (Ex-2 through Ex-13); a Special Payroll Processing Form (Ex-14); a Computation of amount owed by calendar year (Ex-15); and Statements of Earnings and Leave from 2000 to 2010 (Ex-16 through Ex-26).

The Petitioner concedes that she was overpaid and the correctness of the Forest Service computation, but maintains that she was unaware that AUO was being paid to her, that any fault is that of the Forest Service and that she is financially unable to repay the amount owed and will have to file for bankruptcy if her salary is offset.

On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

Petitioner Renee Barbros was overpaid a total amount of $71,356.80 in AUO compensation between pay period 25 of 2000 through pay period 15 of 2010. Ex-16 through Ex-26.

After deducting amounts for federal taxes ($1,018.59), state taxes ($370.48), Social Security ($4,424.12), Medicare taxes ($1,034.67), and retirement ($938.63), the net amount due is $63,570. 31. Ex-1, 14-15.

Although the Forest Service should have detected the overpayment, Petitioner knew or should have known of the overpayment from information regularly provided to her in the form of Notifications of Personnel Actions and Leave and Earnings Statements.

Insufficient information was presented to establish hardship.

Conclusions of Law

Renee Barbros is indebted to the United States Forest Service in the amount of $63,570.31 as a result of her unauthorized receipt of AUO compensation during the period from 2000 to 2010 after transferring to a non-law enforcement position.

Although the Forest Service should have detected the overpayment, Petitioner had an independent duty to check available information to determine the correctness of her compensation.

Neither laches nor estoppel is applicable in this case.

All procedural requirements for salary offset in 7 C.F.R. §3.70 *et seq.* have been met.

The Respondent is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, the wages of the Renee Barbros shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be specified in 31 C.F.R. § 285.7(g).

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

_____

THOMAS GRIFFIN.
AWG Docket No. 11-0344.
Decision and Order.
Filed November 16, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Victor W. Palmer.
[Editor's Note: This case is duplicated at September 21, 2011]

Decision and Order

On September 21, 2011, I held a hearing by telephone on a Petition to Dismiss an administrative wage garnishment proceeding to collect a debt allegedly owed to Respondent, USDA, Rural Development for losses it incurred under two loans it gave to Petitioner, Thomas Griffin. Petitioner was not represented by an attorney, and represented himself pro se. Respondent, USDA Rural Development, was represented by Mary Kimball. Petitioner, Thomas Griffin, and Mary Kimball who testified for Respondent, were each duly sworn.

Respondent proved the existence of the debt owed by Petitioner for payment of losses Respondent sustained on loans given to Petitioner, Thomas Griffin, to purchase a home located at 419 Pony Greer Rd., Rayville, LA. The loans are evidenced by a Promissory Note in the amount of $21, 000.00 and $11,580.00, dated September 18, 1991 (RX-1). Payments were not made on the loans and a short sale was held on August 9, 1999. USDA, Rural Development received $24,000.00 from the sale. Prior to the sale, the combined amount Petitioner owed on the assumed loan and the additional mortgage loan to Respondent, USDA, Rural Development, was $43,224.70 for principal, accrued interest and fees. After the sale proceeds were posted, Petitioner owed $6,039.24 on one loan and $12,870.46 on the other loan. Since the sale, $3,046.87 has been collected by the U. S. Treasury Department. A compromise was made in respect to the smaller loan and after a $3,046.87 payment by Petitioner, that loan was cancelled. The amount that is presently owed on the remaining debt is $8,986.25 plus potential fees to Treasury of $2,695.88, or $11,682.13 total (RX-6). Petitioner is employed as a "hired hand" by a well drilling company a net monthly income of $***. Petitioner has monthly expenses of: mortgage-$**; gasoline-$**; electricity-$**; water-$*; food-$**; IRS garnishment-$**; and car insurance-$*. Petitioner wants to reduce and eventually pay off this debt.

The maximum that may be garnished for this debt is $50.00 per month in order that excessive financial hardship is not imposed upon him.

USDA, Rural Development has met its burden under 31 C.F.R. §285.11(f)(8) that governs administrative wage garnishment hearings, and has proved the existence and the amount of the debt owed by the Petitioner. On the other hand, Petitioner showed that he has very little disposable income. Under these circumstances, I have decided and hereby order that no more than $50.00 per month may be garnished from his wages.

ARCHIE M. LEWIS.
AWG Docket No. 11-0445.
Decision and Order.
Filed November 16, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1. The hearing by telephone was held on November 8, 2011. Mr. Archie M. Lewis, the Petitioner ("Petitioner Lewis"), participated, representing himself (appearing *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. USDA Rural Development's Additional Narrative and Exhibits (filed November 17, 2011), plus Exhibits, Narrative, Witness & Exhibit List (filed October 13, 2011), are admitted into evidence, together with the testimony of Mary Kimball.

4. Petitioner Lewis's Employment form (Form I-9) with Omni, plus the Steel Dynamics letter documenting his involuntary termination (filed November 9, 2011), plus his Consumer Debtor Financial Statement (filed October 24, 2011), are admitted into evidence, together with the testimony of Petitioner Lewis, together with his Hearing Request dated September 15, 2011, including his Financial Statement of Debtor.

5. Petitioner Lewis owes to USDA Rural Development **$20,978.63** (as of November 16, 2011) in repayment of a loan made in 1988 by the United States Department of Agriculture Farmers Home Administration (now USDA Rural Development, Rural Housing Service). Petitioner Lewis borrowed to buy a home in Texas. The **$20,978.63** balance is now unsecured ("the debt"). [Garnishment is ongoing; the balance is being reduced two or three times each month.] *See* USDA Rural Development Exhibits, esp. RX 10, RX 11, RX 6, RX 7.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$20,978.63** would increase the November 16, 2011 balance by $5,874.02, to $26,852.65. *See* USDA Rural Development Exhibits, esp. RX 11.

7. The loan Petitioner Lewis borrowed, with his then-wife the co-borrower, Donna, in 1988 from USDA Farmers Home Administration was $30,000.00. RX 1. Petitioner Lewis testified that he and the co-borrower divorced in 1989; that he remarried his first wife (Mary). The loan was reamortized in 1991 and again in 1997. Both times the amount delinquent on the account was added to principal, making the account

current. In 1991 the principal amount became $38,707.02 (RX 1, p. 3). In 1997 the principal amount became $50,578.63 (Narrative). The reamortizations did not change the amount owed. The payments were again not kept current. By the time of the foreclosure sale in 1999, the debt had grown to $60,303.51:

$ 50,532.54	Principal Balance prior to foreclosure sale
$ 8,548.98	Unpaid Interest prior to foreclosure sale
$ 1,221.99	Fee Balance prior to foreclosure sale (*ie*, real estate taxes and insurance)
$ 60,303.51	Total Amount Due
- $ 29,500.00	Proceeds from foreclosure sale
- $ 186.27	Unapplied funds
$ 30,617.24	Unpaid in 1999

=========

RX 6.

So the foreclosure sale left $30,617.24 unpaid in 1999.

8. Since the foreclosure sale, no additional interest has accrued, and numerous ***offsets*** during 2001 through 2009, likely Federal income tax refunds, have reduced the balance, as have the garnishments that began in 2011. The ***offsets*** and garnishments applied to the debt (through November 16, 2011) leave **$20,978.63** unpaid (excluding the potential remaining collection fees). *See* RX 10, RX 11, RX 6 and RX 7. Garnishment is ongoing, so this balance is being reduced a few times each month.

9. Petitioner Lewis testified that he has been unable to meet his family responsibilities during about 9 months of 15% garnishments. His four children are all grown, yet Petitioner Lewis helps them financially, as they have special needs, including the needs of Petitioner Lewis's 12 grandchildren and 3 great grandchildren. Petitioner Lewis's current gross pay is $14.00 per hour; more than $2,000.00 per month gross. His current disposable pay per month is $1,600.00 or more. [Disposable pay (within the meaning of 31 C.F.R. § 285.11) is gross pay minus income

tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.]

10. In addition to ***offsets***, garnishment up to 15% of Petitioner Lewis's disposable pay can occur unless he cannot withstand garnishment in that amount without hardship. 31 C.F.R. § 285.11. Although garnishment at 15% of Petitioner Lewis's disposable pay yields roughly $240.00 per month or more in repayment of the debt, he cannot withstand garnishment in that amount without financial hardship.

11. Petitioner Lewis's current reasonable and necessary living expenses, for himself and his family, now consume his entire take-home pay. Petitioner Lewis testified that his wife's osteoarthritis prevents her from working. Petitioner Lewis's wife has no obligation to pay this debt. In addition to this debt, Petitioner Lewis has a few other, relatively small debts. One of his sons is on disability from cancer. Petitioner Lewis has health problems of his own. As he shows on his Consumer Debtor Financial Statement, he is 55 and has had 5 heart attacks and a stroke during the last 6 years. His most recent heart attack was in June 2011 (during garnishment).

12. Petitioner Lewis is responsible and has made progress repaying the USDA Rural Development debt, but paying 15% of his disposable pay has created hardship. Consequently, to prevent hardship, garnishment shall be limited to **5%** of Petitioner Lewis's disposable pay through **November 2013**; then, beginning **December 2013**, garnishment **up to 10%** of Petitioner Lewis's disposable pay is authorized. 31 C.F.R. § 285.11.

13. Petitioner Lewis testified that he had not been employed for a year when the garnishments began, and that he had been fired from his previous job (for misloading trucks, miscalculating the loads - - he testified that he was not very good with the computer). He said that for making 4 loading mistakes in 3 years, he was fired. His documentation filed November 9, 2011, shows that he was terminated involuntarily from Steel Dynamics on September 16, 2010; he was hired by Omni on or about November 8, 2010. The garnishments from Petitioner Lewis's pay that began in February 2011 **through the first year of his working for**

Omni (he was hired by Omni on or about November 8, 2010) will all have to be **refunded to Petitioner Lewis**. [The garnishments AFTER his first year of working for Omni through the implementation of this Decision will NOT have to be refunded to Petitioner Lewis, even though they were taken at 15%.] The refund to Petitioner Lewis will of course increase the balance owed.

14. Petitioner Lewis, you may want to negotiate the disposition of the debt with Treasury's collection agency. *See* paragraph 15.

Discussion

15. Garnishment shall be limited to **5%** of Petitioner Lewis's disposable pay through **November 2013** (*see* paragraph 12). Petitioner Lewis, you may want to **negotiate** the disposition of the debt. Petitioner Lewis, this will require **you** to telephone Treasury's collection agency. The toll-free number for you to call is **1-888-826-3127**. You may choose to offer to compromise the debt for an amount you are able to pay, to settle the claim for less. You may choose to ask that **the debt be apportioned between you and your co-borrower**. You may choose to offer to pay through solely ***offset*** of **income tax refunds**, perhaps with a specified amount for a specified number of years. You may wish to include someone else with you in the telephone call when you call to negotiate.

Findings, Analysis and Conclusions

16. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Lewis and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

17. Petitioner Lewis owes the debt described in paragraphs 5 through 8.

18. Garnishment is authorized, but to prevent financial hardship shall be limited to **5%** of Petitioner Lewis's disposable pay through **November 2013**; then, beginning **December 2013**, garnishment **up to 10%** of Petitioner Lewis's disposable pay is authorized. 31 C.F.R. § 285.11.

19. Any amounts collected through garnishment of Petitioner Lewis's pay prior to his having been in his current job for at least 12 months **shall be returned to Petitioner Lewis**. [He was involuntarily separated from his previous job; *see* paragraph 13.] I am NOT, however, requiring any amounts garnished AFTER Petitioner Lewis had been in his current job for at least 12 months, through the implementation of this Decision, to be returned to him, even though the garnishments were at 15%.

20. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Lewis's **income tax refunds** or other **Federal monies** payable to the order of Mr. Lewis.

Order

21. Until the debt is repaid, Petitioner Lewis shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

22. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment limited to **5%** of Petitioner Lewis's disposable pay through **November 2013**; then, beginning in December 2013, garnishment **up to 10%** of Petitioner Lewis's disposable pay is authorized. 31 C.F.R. § 285.11.

23. USDA Rural Development, and those collecting on its behalf, will be required to **return to Petitioner Lewis** any amounts already collected through garnishment of Petitioner Lewis's pay prior to his having been in his current job for at least 12 months .

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

Done at Washington, D.C.

TONYA SMITH.
AWG Docket No. 11-0299.
Decision and Order.
Filed December 14, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Victor W. Palmer.

Decision and Order

On December 12, 2012, at 2:30 P.M. Eastern Time, a hearing by telephone was conducted to consider the merits of a Petition filed by Petitioner, Tonya Smith, seeking relief from the administrative garnishment of her wages initiated against her on behalf of the United States Department of Agriculture's Rural Development Division (USDA-RD). At the hearing, Petitioner appeared and represented herself without counsel. USDA-RD was represented by Michele Tanner. Both Petitioner and Ms. Tanner were sworn. Ms. Tanner summarized the various exhibits (RX-1 through RX-8) filed on behalf of USDA-RD. Petitioner verified that she had borrowed $77,541.00 from USDA-RD, on February 7, 2003, for the purchase of a residence located in Seagoville, Texas. The loan was secured by a promissory note and a valid Texas Deed of Trust. The house was sold, on November 4, 2008, at a foreclosure sale when Petitioner was unable to make the loan payments. At the time of the foreclosure sale, Petitioner owed $121,497.37 for principal, accrued interest and fees. After the proceeds from the sale were posted and fees applied, Petitioner owed a remaining balance of $65,454.22. Since the sale, USDA-RD has received $6,638.98 and the remaining balance now owed is $58,815.24 plus collection fees to Treasury Department of $16,468.27 for a total of $75,283.51.

Petitioner has two children, ages 18 and 11, who attend school and are dependent upon Petitioner for their sole support. Petitioner has been employed for the past 11 years by AT&T performing clerical work for which she is paid, every two weeks, a net salary of $***. Her monthly expenses are: rent-$**; utilities-$**; water-$**; cell phone (self and 2

children)-$**; automobile payments-$*; gasoline-$**; insurance through employer-$*; car insurance-$*; food-$***. These monthly expenses total $***, and when deducted from her $*** net monthly income, leave Petitioner $** to pay all other bills to support herself and her two children.

USDA-RD has proven the existence of the described debt owed it by Petitioner pursuant to the mortgage loan that was not fully paid. Petitioner on the other hand has shown that she will suffer financial hardship should collection of any portion of the debt be allowed within the next ninety days. During those ninety days, she shall consult an attorney to determine whether she should file proceedings in bankruptcy to extinguish the debt. In the event Petitioner does not so file, after the expiration of ninety days from the date of this decision and order, her financial circumstances are such that to avoid financial hardship to her, no more than $100.00 may then be administratively garnished from any of the paychecks she receives bi-weekly.

It is hereby so ordered.

The Hearing Clerk's Office is directed to serve a copy of this Decision and Order on each of the parties.

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AUDREY A. LUMSFORD.
AWG Docket No. 11-0394.
Decision and Order.
Filed December 14, 2011.

AWG –

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Janice K. Bullard.

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the request of Audrey A. Lumsford ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due, and if established, the propriety of imposing administrative wage garnishment. By Order issued on October 5, 2011, a telephonic hearing

was set and the parties were directed to provide information and documentation concerning the existence of the debt to the Hearing Clerk for the Office of Administrative Law Judges for the United States Department of Agriculture.

The Respondent filed a Narrative, together with supporting documentation[1] and on October 26, 3011, Petitioner asked for additional time to file a Consumer Debtor Financial Statement. Petitioner's motion was granted by Order issued November 23, 2011, and hearing was set to commence on November 29, 2011.

Hearing commenced as scheduled. Petitioner represented herself, and Respondent was represented by Ms. Kimball and Ms. Tanner of the New Program Initiatives Branch of Rural Development, USDA, Saint Louis, Missouri. Petitioner advised that she had not yet completed the Consumer Financial Statement, and I allowed twenty (20) additional days for Petitioner to submit that and any other documentation she cares to admit. In addition, Petitioner expressed concern that the amount shown as due on her account did not reflect the offset of income tax refunds for tax years 1998 and 1999. Because the documentation of Petitioner's account begins with the foreclosure sale in 1999, I directed USDA RD to provide Petitioner with a complete copy of her account history so that she may see credits to her account before foreclosure was effected. I allowed twenty (20) days for that submission, a copy of which must be filed with the Hearing Clerk. I advised Petitioner that if she had additional questions regarding her account, she could file a request for reconsideration within ten (10) days of the receipt of the documentation.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered:

FINDINGS OF FACT

On October 17, 1984, the Petitioner received a home mortgage loan in the amount of $39,000.00 from USDA-RD for residential property located in Vidor, Texas, evidenced by Promissory Note and Deed of Trust. RX 1 and RX 2.

[1] References to Respondent's exhibits herein shall be denoted as "RX-#".

The Petitioner received a discharge under Chapter 13 of the Bankruptcy Code, but had continued to pay her loan to USDA, which debt was not discharged. (Petitioner's testimony)

The Petitioner subsequently defaulted on the loan on September 24, 1998 (RX 4) and was sent a notice of acceleration of the loan on October 19, 1998 (RX 5).

A foreclosure sale was held on March 2, 1999 and proceeds from the sale in the amount of $39,500 were applied against Petitioner's loan balance of $ 50,916.25, consisting of $34,444.6 principal; $12,076.52 interest; and $4,395.06 fees. RX 6

Petitioner's loan balance after sale proceeds, credits and fees were applied was $11,924.22. RX-6.

The loan was forwarded to the U.S. Department of Treasury ("Treasury") for collection, as mandated by law.

After application of additional credits and Treasury refund offset, Petitioner's debt as of the date of the hearing is $6,145.00, with potential additional fees of $1,720.77 for a total of $7,866.35. RX 7.

In August, 2011, Petitioner was advised of intent to garnish her wages to satisfy the indebtedness.

On September 9, 2011, Petitioner timely requested a hearing, which was held on November 29, 2011.

Petitioner did not contest the validity of the debt, but expressed concerns that she received credit for all Treasury offsets.

Petitioner further contended that wage garnishment against her salary would represent a substantial financial hardship.

Petitioner lives alone and is the sole source of income.

Petitioner's income is exhausted by her monthly expenses, except that Petitioner makes voluntary payments to a retirement account.

Petitioner expressed willingness to attempt to resolve the debt.

Petitioner's income can withstand garnishment only by reducing Petitioner's contribution to her retirement account, and even considering that, her income will not withstand garnishment at the level of legal limits.

Petitioner should be able to absorb garnishment at a percentage lower than the maximum, but garnishment should not be imposed until Petitioner has the opportunity to settle the debt with Treasury.

CONCLUSIONS OF LAW

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA Rural Development in the amount of $6,145.60 exclusive of potential Treasury fees for the mortgage loan extended to her.

All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met.

The Petitioner is under a financial hardship at this time that appears to be temporary in nature.

The Respondent is entitled to administratively garnish the wages of the Petitioner when the financial hardship is anticipated to ease in fourth months time; however Respondent shall not be entitled to garnish more than 10% of Petitioner's wage.

Treasury shall remain authorized to undertake any and all other appropriate collection action.

ORDER

For the foregoing reasons, the wages of Petitioner shall NOT be subjected to administrative wage garnishment at this time. As of April 1, 2011, garnishment up to 10% of Petitioner's disposable pay is authorized. 31 C.F.R. §285.11.

Within twenty (20) days of the date of this Order, Respondent shall provide to Petitioner, and file with the Hearing Clerk, a copy of Petitioner's complete account history. Within that same time, Petitioner shall file documents supporting her testimony about income. Petitioner shall have ten (10) days after receipt of Respondent's documents to file a petition for reconsideration of this Order, if Petitioner is inclined.

Petitioner is encouraged in the interim to negotiate repayment of the debt with the representatives of Treasury. The toll free number for Treasury's agent is 1-888-826-3127.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. See, 31 C.F.R. § 285.13.

Until the debt is satisfied, Petitioner shall give to USDA RD or those collecting on its behalf, notice of any change in his address, phone numbers, or other means of contact.

Petitioner may direct questions to RD's representative, c/o:

USDA New Program Initiatives Branch
Rural Development Centralized Servicing Center
4300 Goodfellow Blvd. F-22
St. Louis, MO 63120
314-457-5592
314-457-4426 (facsimile)

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

So Ordered this 30th day of November, 2011 in Washington, D.C.

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ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

MELANIE H. BOYNES.
AWA Docket No. 11-0012.
Decision and Order.
Filed August 4, 2011.

AWA.

Petitioner Pro se.
Colleen A. Carroll, Esq. for APHIS.
Decision and Order by Chief Administrative Law Judge Peter M. Davenport.

Decision and Order

Preliminary Statement

This action was initiated by Melanie H. Boynes seeking review of and requesting a hearing concerning the Administrator's determination that she and Steve Sipek are unfit to be licensed under the Animal Welfare Act ("AWA"). 7 U.S.C. §2131, *et seq.* The matter was set for an audio-visual hearing with the Petitioner appearing at a remote USDA site in Miami, Florida and the other parties appearing in the United States Department of Agriculture Courtroom in Washington, DC. At the hearing, the Agency called five witnesses. Ms. Boynes called one witness and made an unsworn statement in her own behalf.[1] Forty-eight agency exhibits and fifteen Petitioner exhibits were admitted.[2]

Following the hearing, both parties submitted post hearing briefs and the matter is now ripe for disposition.

Statutory and Regulatory Framework

[1] References to the transcript of the proceeding will be indicated as Tr. And the page number.

[2] Agency exhibits are identified as RX-1 through RX-48; Petitioner's exhibits are identified as PX-1 through PX-15. The Petitioner also submitted three photographs with her post hearing brief.

Section 2133 of the AWA provides:

The Secretary shall issue licenses to dealers and exhibitors upon application therefore in such form and manner as he may prescribe…. 7 U.S.C. §2133.

Section 2151 provides:

The Secretary is authorized to promulgate such rule, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter. 7 U.S.C. §2151.

The Regulations require:

Any person operating or intending to operate as a …exhibitor…must have a valid license…The applicant shall provide the information requested on the form…9 C.F.R. §2.1(a);

and

A license will not be issued to any applicant who:…(2) Is not in compliance with any of the regulations or standards in this subchapter. 9 C.F.R. §2.11(a).

The power to require and issue licenses under the Animal Welfare Act includes the power to deny a license and to disqualify a person from being licensed. The Regulations provide that an initial application for an Animal Welfare Act license will be denied if the applicant is unfit to be licensed and the Administrator determines that issuance of the Animal Welfare Act license would be contrary to the purposes of the Act. *In re Amarillo Wildlife Refuge, Inc.,* 67 Agric. Dec. 175 (2008); *In re Animals of Montana, Inc.*, 68 Agric. Dec. 92 (2009).

Discussion

At issue in this action is whether the Administrator, acting through the Eastern Regional Director, Animal Care, Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture (USDA) was justified in denying Petitioner's application for an Animal Welfare Act license on the basis that the applicant (a) failed to

provide all requested information on the application form; (b) that Mr. Sipek was believed to be exhibiting regulated animals without having a valid license to do so and had expressed an intention to continue to routinely declaw large felids contrary to appropriate veterinary care standards; and (c) that issuance of a license would be contrary to the purposes of the Act given Mr. Sipek's history of animal care and his stated intention to deviate from appropriate veterinary care in the future. RX-21.

Melanie Boynes alone appealed that determination. In a letter to the Hearing Clerk dated October 1, 2010, she addressed that portion of the denial based upon the incompleteness of the application indicating that she provided complete information under the advisement and guidance of Dr. Guy [Gaj] and Inspector Megan Adams. Second, she indicated that Mr. Sipek is **required** (emphasis hers) by the Florida Fish and Wildlife Conservation Commission, as was she, to exhibit their animals in order to maintain their Florida Class I Wildlife license. Last, she questioned how she could be found unfit to be licensed based upon Mr. Sipek's history of animal care, non-compliance with regulations, and stated intention to continue his practice of declawing large felids. She concluded her letter indicating that she was doing everything required to obtain the license which she was aware that she needed. Docket Entry 3.

On the basis of the evidence before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Melanie Boynes is an individual with a mailing address in Loxahatchee, Florida.

2. Steve Sipek is an individual with a mailing address in Loxahatchee, Florida. Mr. Sipek, also sometimes known as Steve Hawks Tarzan, has been involved with exotic animals, including lions, tigers, and leopards for over 42 years.[3] Tr. 114-117; RX-5.

3. Mr. Sipek previously applied for an Animal Welfare Act license in 2005. RX-1. Three pre-license inspections were conducted, with each identifying deficiencies that needed corrective action. The third

[3] Mr. Sipek testified that he performed the role of Tarzan in movies and thrasonically recounted an anecdote of being rescued by a lion during the filming of one episode. Tr. 122.

inspection was terminated by Mr. Sipek and no license was issued to him as minimum standards were never met. Tr. 58; RX-2-11.

4. Steve Sipek has continuously exhibited large felids without an Animal Welfare Act license in violation of the AWA and its regulations.[4] RX-2-4, 6-7, 11-13. By letter dated January 10, 2008, Sipek received a Warning Notice for operating as a Class C Exhibitor without a USDA license in violation of the AWA. RX-13. Sipek and Boynes admit that they exhibit animals despite not having a license, but claim that exhibiting is required in order to maintain their Florida license. Docket Entry 3; Tr. 106-107, 129-130.

5. Steve Sipek is licensed by the State of Florida Fish and Wildlife Conservation Commission to exhibit "Felidae."[5] RX-18.

6. The record does not contain the original license application submitted by Ms. Boynes; however, at some date prior to August 24, 2010 she applied for an Animal Welfare Act license in her individual capacity as an exhibitor. Tr. 51. Her application triggered a pre-license inspection which was conducted on August 24, 2010 by Animal Care Inspector Megan Adams and Animal Care Supervisor Gregory Gaj at the facility located in Loxahatchee, Florida where the animals were being kept. RX-20; Tr. 41-51, 72, 80, 100-111.

7. Six areas of concern were identified by the inspectors during the inspection, including adequate veterinary care,[6] documentation of adequate experience and knowledge of the species being maintained, corrective actions needed for the indoor and outdoor housing facilities, review of the feeding protocol by the attending veterinarian,[7] and sanitation. RX-20.

8. During the course of the inspection, questions were raised concerning the appropriateness of Ms. Boynes' application as an individual[8] as the inspectors were informed that Steve Sipek owned both

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[4] Evidence of Mr. Sipek's exhibiting animals includes admissions to APHIS inspectors and investigators. Tr. 58-61, 65; RX-2, 4-7, 11. Although somewhat dated and not contemporaneous with the current application, 2005-2009 visitor logs obtained from state inspections and reports from state regulators also appear in the record. RX-12, 24-35, 37-38, 44-45. The record also contains a photograph of signs advertizing "Tarzan's Big Cat Sanctuary." RX-2a-2b.

[5] The Florida license appearing in the record is for 2008-2009; however, the October 13, 2010 letter implicitly indicates that it is still in force. RX-18.

[6] See, 9 C.F.R. §2.40.

[7] *Id*.

[8] During the inspection it was indicated that Mr. Sipek owned the property and the animals and that Ms. Boynes could not "do the business without him." Tr. 47

the real property and the animals. Tr. 47. As a result, Ms. Boynes was asked to correctly complete the application or update it to indicate who was truly involved in the business.[9] Tr. 51.

9. The subject of the practice of routinely declawing large felids for handling purposes was also discussed with Steve Sipek by Dr. Gaj. Mr. Sipek indicated that declawing was necessary for his safety and then expressing an intention to continue the practice even though Dr. Gaj advised him that routine declawing of the felids for handling purposes was contrary to accepted veterinary care under USDA standards. RX-17, 20, Tr. 44-48.

10. On August 27, 2010, APHIS received a "revised" application from Melanie Boynes and Steve Sipek dated August 24, 2010 which in block 8 of the AHIS Form 7003-A indicated the form of business as being a partnership.[10] Block 2 of the form which calls for business names contains only the word "same." Block 7 which calls for the nature of the business has no entry. The application was signed by Melanie Boynes as "Co-Owner." RX-19.

11. Although Ms. Boynes represented that she was a "co-owner" of the business and represented in her post hearing brief that the real estate is owned by both Steve Sipek and Melanie Boynes, the record before me contains no transfer documents of either the real estate upon which the facility is located or of the animals owned by Steve Sipek.[11] Petitioner's Post Hearing Brief, p. 1, Docket entry 21.

12. On September 16, 2010, without any further pre-license inspection being conducted for the "revised" application, APHIS denied the joint application of Melanie Boynes and Steve Sipek on the grounds that (a) the applicants failed to provide all requested information on the application form; (b) that Mr. Sipek was believed to exhibiting regulated animals without having a valid license to do so and had expressed an

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[9] While Steve Sipek refers to a "show" and the pre-license inspection discussions concern operation of a "business," Ms. Boynes suggests in her brief that their facility is only a residence for two adults, three exotic cats and a domestic cat. Tr. 47, 51, 130, Petitioner's Post hearing brief, p. 1; Docket entry 21.

[10] Although APHIS considered the August 24, 2010 application to be a revision of the one that Ms. Boynes had submitted as an individual, it might also be considered a new application as it was for a partnership entity.

[11] Dr. Gaj's testimony was that at least at the time of the pre-license inspection Steve Sipek was the owner of the cats and the property: "And the animals were owned by him. The property was owned by him. And Ms. Boynes could not do the business without him." Tr. 47.

intention to continue to routinely declaw large felids contrary to appropriate veterinary care standards; and (c) that issuance of a license would be contrary to the purposes of the Act given Mr. Sipek's history of animal care and his stated intention to deviate from appropriate veterinary care in the future. RX-21.

13. At the time of the pre-license inspection, Ms. Boynes indicated that she would try to convince Mr. Sipek to refrain from declawing animals in the future. Tr. 46. At the hearing, Steve Sipek testified that he had no intention of acquiring any more animals and that he would no longer declaw large felids. Tr. 124, 136.

Conclusions of Law

The Secretary has jurisdiction in this matter.

The APHIS Form 7003-A dated August 24, 2010 was incomplete; however, the technical deficiencies are susceptible to have been easily remedied had a pre-license inspection been conducted for the "revised" application[12] and are not considered sufficiently egregious as to warrant any period of disqualification.

The failure of Melanie Boynes and Steve Sipek, assuming *pro arguendo* that they are in fact co-owners as represented by Ms. Boynes, to achieve other minimum standards: (a) to demonstrate provisions for adequate veterinary care, (b) to provide documentation of adequate experience and knowledge of the species being maintained, (c) to implement the necessary corrective actions needed for both the indoor and outdoor housing facilities, (d) to document review of the feeding protocol by the attending veterinarian, and (e) to correct the identified deficient sanitation measures constitute grounds warranting denial of the license until such time as corrective action has been accomplished.

The continued exhibition of large felids by Steve Sipek without an AWA license and his practice of routinely declawing large felids for handling purposes despite being warned by both a number of veterinarians[13] and USDA officials that it was not acceptable veterinary care support the finding of unfitness made by Dr. Goldentyer. RX-16-17, Tr. 134-135, 9 C.F.R. §2.1(a); 9 C.F.R. §2.11(a)(2).

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[12] See footnote 3, *supra.*

[13] At least two veterinarians were identified that declined to perform the operation; others may have been contacted before one that would perform the operation was located. Tr. 135.

Given the circumstances of his history of animal care, non-compliance with the regulations, and intended refusal to discontinue practices contrary to USDA standards of accepted veterinary care, issuance of a license to a partnership in which Steve Sipek is a partner or principal would be contrary to the purposes of the Act.

Order

The determination of unfitness and denial of the license application of Melanie Boynes and Steve Sipek is **AFFIRMED.**

Melanie Boynes is disqualified for a period of one year from obtaining, holding, or using an Animal Welfare Act license directly or indirectly through any corporate or other device or person.

This Decision and Order shall become final without further proceedings 35 days from service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to Section 1.145 of the Rules of Practice. 7 C.F.R. §1.145.

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

LION'S GATE CENTER, LLC.
AWA Docket No. 09-0069
Decision and Order.
Filed September 8, 2011.

AWA

Jay Wayne Swearingen, Esq. and Jennifer Reba Edwards. Esq. for Respondent.
Colleen Carroll for APHIS.
Initial Decision by Chief Administrative Law Judge Peter M. Davenport.
Decision and Order by William Jenson, Judicial Officer.

DECISION AND ORDER

PROCEDURAL HISTORY

Lion's Gate Center, LLC [hereinafter Lion's Gate], instituted the instant proceeding seeking review of the determination by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], that Lion's Gate was unfit to be licensed under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act], and the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations].[1] Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] set the matter for oral hearing to commence in Denver, Colorado, on January 26, 2010; however, prior to that date, the Administrator filed a Motion for Summary Judgment which the Chief ALJ granted in a Decision and Order entered on January 5, 2010.

Lion's Gate appealed the Chief ALJ's Decision and Order, and on August 30, 2010, I remanded the case to the Chief ALJ for further proceedings in accordance with the rules of practice applicable to this proceeding[2] to determine the identity of the person or persons whose Animal Welfare Act license was revoked, effective August 27, 2003, pursuant to *In re Michael Jurich* (Consent Decision), 60 Agric. Dec. 722 (2001). *In re Lion's Gate Center, LLC* (Remand Order), __ Agric. Dec. ___ (Aug. 30, 2010).

Following a conference conducted by the Chief ALJ on February 9, 2011, Lion's Gate and the Administrator agreed that the issues in the proceeding were of law rather than of fact and that disposition could be effected by briefs and affidavits rather than by holding an evidentiary hearing. On May 9, 2011, after Lion's Gate and the Administrator filed briefs, the Chief ALJ issued a Decision and Order on Remand in which the Chief ALJ: (1) affirmed the Administrator's determination that Lion's Gate is unfit to be licensed under the Animal Welfare Act; (2) affirmed the Administrator's denial of Lion's Gate's Animal Welfare

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[1]Lion's Gate is represented by Jay Wayne Swearingen and Jennifer Reba Edwards, The Animal Law Center, LLC, Wheat Ridge, Colorado. The Administrator is represented by Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC.

[2]The rules of practice applicable to the instant proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

Act license application; and (3) disqualified Lion's Gate from obtaining, holding, or using an Animal Welfare Act license for 1 year.

On June 13, 2011, Lion's Gate filed "Petitioner's Appeal Petition to Judicial Officer of May 9, 2011 Order on Remand" [hereinafter Appeal Petition], and on July 5, 2011, the Administrator filed a response to Lion's Gate's Appeal Petition. On August 18, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I adopt, with minor changes, the Chief ALJ's May 9, 2011, Decision and Order on Remand as the final agency decision.

DECISION

Discussion

At issue in this proceeding is whether the Administrator, acting through Dr. Robert M. Gibbens, the Western Regional Director, Animal Care, Animal and Plant Health Inspection Service, United States Department of Agriculture, was justified in denying Lion's Gate's Animal Welfare Act license application. The Administrator based the denial of Lion's Gate's application on Lion's Gate's agreement with Prairie Wind Animal Refuge, an entity whose Animal Welfare Act license had been revoked. The Administrator found that issuance of an Animal Welfare Act license to Lion's Gate would circumvent the Secretary of Agriculture's revocation of Prairie Wind Animal Refuge's Animal Welfare Act license.

Lion's Gate takes the position that Animal Welfare Act license number 84-C-0052,[3] issued to Michael Jurich and Laurie E. Jurich, d/b/a Prairie Wind Animal Refuge,[4] was voluntarily terminated by Mr. Jurich on January 31, 2000, and, accordingly, was not in effect and could not have been revoked in 2003 by violation of the terms of probation in *In re*

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[3]Animal Welfare Act license number 84-C-0052 also appears in the record as Animal Welfare Act license number 84-C-052. Lion's Gate and the Administrator are in agreement that Animal Welfare Act license number 84-C-052 and Animal Welfare Act license number 84-C-0052 are one and the same. *See* Respondent's Brief on Remand Decl. of Robert M. Gibbens, D.V.M., at 1 ¶ 3 and Lion's Gate's Brief in Response to February 9, 2011 at 7-8 ¶ 3.

[4]The Colorado Secretary of State Business Center website lists Prairie Wind Animal Refuge as being incorporated on September 13, 1993.

Michael Jurich (Consent Decision), 60 Agric. Dec. 722 (2001).[5] Lion's Gate's reliance on this position is misplaced. In the Consent Decision, Mr. Jurich and Prairie Wind Animal Refuge agreed they neither would apply for an Animal Welfare Act license nor would engage in any activities for which an Animal Welfare Act license would be required. Mr. Jurich and Prairie Wind Animal Refuge also agreed, if there was a failure to comply with 9 C.F.R. § 2.1, such failure would trigger both revocation of the Animal Welfare Act license and a $15,000 civil penalty.[6]

Lion's Gate argues issuance of Animal Welfare Act license number 84-C-0052 to Michael R. Jurich and Laurie E. Jurich, d/b/a Prairie Wind Animal Refuge, did not constitute issuance of the license to Prairie Wind Animal Refuge, a Colorado nonprofit corporation. That argument is also without merit. Mr. Jurich's initial Animal Welfare Act license application identified Mr. Jurich as "owner" of an unspecified form of an entity[7] and the Animal Welfare Act license renewal applications clearly identify the licensed entity as a corporation in the type of organization block of the renewal forms (Respondent's Brief on Remand Attach. RX 16 at 3-4, 6, 11). Similarly, Dr. Gibbens states Michael R. Jurich and Laurie E. Jurich, d/b/a Prairie Wind Animal Refuge, applied for, and, on February 7, 1994, were issued, an Animal Welfare Act license as a corporation (Respondent's Brief on Remand, Decl. of Robert M. Gibbens, D.V.M., at 1 ¶ 3).

Lion's Gate's letter dated October 31, 2008, accompanying Lion's Gate's Animal Welfare Act license application, explained that Lion's Gate had entered into a License Agreement with Prairie Wind Animal Refuge dated October 27, 2008. That letter acknowledges that Prairie Wind Animal Refuge's Animal Welfare Act license had been revoked. The letter explains that their attorneys had considered dissolving Prairie

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[5]*In re Michael Jurich* (Consent Decision), 60 Agric. Dec. 722 (2001), refers to Animal Welfare Act license number "94-C-052." The references to Animal Welfare Act license number "94-C-052" are typographical errors as no such Animal Welfare Act license number exists.

[6]Revocation is attended by permanent ineligibility to be issued an Animal Welfare Act license (9 C.F.R. §§ 2.10(b), .11(a)(3)).

[7]The type of organization block does not appear on the form; however, it is present on subsequent forms used for renewal of the Animal Welfare Act license.

Wind Animal Refuge, but were concerned that such dissolution might jeopardize Prairie Wind Animal Refuge's grandfather status under State of Colorado rules pertaining to wildlife sanctuaries. (Respondent's Motion for Summary Judgment Attach. RX 6 at 1-2.)

In denying Lion's Gate's Animal Welfare Act license application, the Administrator relied upon 9 C.F.R. §§ 2.10(b) and 2.11(a)(3), which provide, as follows:

§ 2.10 Licensees whose licenses have been suspended or revoked.

. . . .

(b) Any person whose license has been revoked shall not be licensed in his or her own name or in any other manner; nor will any partnership, firm, corporation, or other legal entity in which any such person has a substantial interest, financial or otherwise, be licensed.

§ 2.11 Denial of initial license application.

(a) A license will not be issued to any applicant who:

. . . .

(3) Has had a license revoked or whose license is suspended, as set forth in § 2.10[.]

In a letter to Lion's Gate dated February 18, 2009, Dr. Gibbens stated the reasons for finding Lion's Gate unfit to be licensed under the Animal Welfare Act. Specifically, because of Lion's Gate's involvement and relationship with Prairie Wind Animal Refuge, issuance of a license to Lion's Gate would be contrary to the purposes of the Animal Welfare Act and would circumvent the order of revocation issued by the Secretary of Agriculture against Prairie Wind Animal Refuge. The stated purpose of the agreement between Lion's Gate and Prairie Wind Animal Refuge was to facilitate the exhibition of the animals owned by Prairie Wind Animal Refuge and Dr. Joan Laub at Prairie Wind Animal Refuge's facility. In turn, Lion's Gate would be allowed to employ the wildlife sanctuary license issued by the Colorado Division of Wildlife to Prairie Wind Animal Refuge and Lion's Gate would obtain an Animal Welfare Act license in its name. (Respondent's Motion for Summary Judgment Attachs. RX 6, PX 4.) As Prairie Wind Animal Refuge's Animal Welfare Act license had been revoked, Dr. Gibbens' conclusion that the arrangement between Lion's Gate and Prairie Wind Animal Refuge

would circumvent the Secretary of Agriculture's order revoking Prairie Wind Animal Refuge's Animal Welfare Act license, is correct.

Findings of Fact

1. The records of the Colorado Secretary of State indicate Prairie Wind Animal Refuge is a nonprofit corporation that was formed on September 13, 1993. Prairie Wind Animal Refuge's term of duration is perpetual. Michael R. Jurich's name appears on the early corporate filings; the more recent corporate filings contain Dr. Joan Laub's name. (Respondent's Brief on Remand Attach. RX 8.)

2. On July 31, 2001, Administrative Law Judge Jill S. Clifton entered *In re Michael Jurich* (Consent Decision), 60 Agric. Dec. 722 (2001). That Consent Decision resolved the then-pending administrative proceeding and included a civil penalty, a cease and desist order, and liquidated penalties, including Animal Welfare Act license revocation and an additional civil penalty, should there be a violation of 9 C.F.R. § 2.1 during a specified probationary period. (Respondent's Motion for Summary Judgment Attach. RX 1.)

3. References to Animal Welfare Act license number "94-C-052" in *In re Michael Jurich* (Consent Decision), 60 Agric. Dec. 722 (2001), are typographical errors and should properly have been references to Animal Welfare Act license number "84-C-0052." Animal Welfare Act license number "94-C-052" does not exist. In assigning Animal Welfare Act license numbers, the first two digits refer to the state of issuance. Colorado is coded "84." The letter refers to the type of Animal Welfare Act license. The letter "C" indicates the license is an exhibitor's license. The three (and later four) digits following the letter indicate the sequential numbering of the licenses. (Respondent's Brief on Remand Decl. of Robert M. Gibbens, D.V.M., at 1 ¶ 3.)

4. The Animal Welfare Act license issued originally to Michael R. Jurich and Laurie E. Jurich, d/b/a Prairie Wind Animal Refuge, Animal Welfare Act license number 84-C-052, is one and the same as Animal Welfare Act license number 84-C-0052 and was consistently renewed as a corporate license (Respondent's Brief on Remand Attach. RX 16 at 3-4, 6, 11).

5. Lion's Gate was formed by Peter Winney on or about May 31, 2002.

6. By letter dated February 11, 2003, the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter APHIS], advised Mr. Jurich and Prairie Wind Animal Refuge that APHIS had documented failures to comply with 9 C.F.R. § 2.1 during the probationary period established in *In re Michael Jurich* (Consent Decision), 60 Agric. Dec. 722 (2001), enclosed documentary evidence of the violations, assessed Mr. Jurich and Prairie Wind Animal Refuge a $15,000 civil penalty, and revoked Animal Welfare Act license number 84-C-0052, as provided in *In re Michael Jurich* (Consent Decision), 60 Agric. Dec. 722 (2001) (Respondent's Brief on Remand Attach. RX 2).

7. Mr. Jurich and Prairie Wind Animal Refuge sought judicial review of the APHIS action in the United States District Court for the District of Colorado, *Jurich v. U.S. Dep't of Agric.*, No. 1:03-CV-00793-OWN-OES (D. Colo. Sept. 10, 2003) (Respondent's Motion for Summary Judgment Attach. RX 3a). On or about August 27, 2003, the case was settled, with Mr. Jurich and Prairie Wind Animal Refuge expressly acknowledging revocation of their Animal Welfare Act license (Respondent's Motion for Summary Judgment Attach. RX 3c).

8. On or about May 11, 2005, Mr. Winney applied for an Animal Welfare Act license, identifying himself as an individual doing business as "Lion's Gate." The Animal Welfare Act license application listed Dr. Joan Laub and Mr. Winney as "owners of the business." (Respondent's Motion for Summary Judgment Attach. RX 4.) Mr. Winney's May 11, 2005, Animal Welfare Act license application was subsequently withdrawn.

9. By deed dated December 21, 2007, Dr. Laub took title to the real estate located at 22111 County Road 150, Agate, Colorado, on which Prairie Wind Animal Refuge was, and is currently, located (Respondent's Motion for Summary Judgment Attach. RX 6 at 15-16; Respondent's Brief on Remand Attach. RX 8).

10. Prairie Wind Animal Refuge holds Colorado Division of Wildlife License No. 08CP270. Both Dr. Laub and Mr. Winney are officers of Prairie Wind Animal Refuge.

11. On July 7, 2008, Prairie Wind Animal Refuge applied for an Animal Welfare Act license, identifying Dr. Laub as Prairie Wind Animal Refuge's President and Executive Director, and Mr. Winney as Prairie Wind Animal Refuge's Vice President and Director (Respondent's Motion for Summary Judgment Attach. RX 5 at 1).

12. On August 12, 2008, the Administrator denied Prairie Wind Animal Refuge's Animal Welfare Act license application, stating APHIS was unable to issue an Animal Welfare Act license to Prairie Wind Animal Refuge due to the Secretary of Agriculture's previous revocation of Prairie Wind Animal Refuge's Animal Welfare Act license (Respondent's Motion for Summary Judgment Attach. RX 5 at 2-3).

13. On October 31, 2008, Mr. Winney submitted Lion's Gate's application for an Animal Welfare Act license. Included in the attachments to the application was a "License Agreement" between Lion's Gate and Prairie Wind Animal Refuge, stating Prairie Wind Animal Refuge and Dr. Laub own the property, facility, and animals intended to be exhibited by the applicant Lion's Gate. One of the stated purposes of the agreement was to facilitate the exhibition of the animals owned by Prairie Wind Animal Refuge and Dr. Laub both on and off Prairie Wind Animal Refuge's facility. In turn, Lion's Gate would be allowed to employ the wildlife sanctuary license issued by the Colorado Division of Wildlife to Prairie Wind Animal Refuge and Lion's Gate would obtain an Animal Welfare Act license in its name. (Respondent's Motion for Summary Judgment Attachs. RX 6, PX 4.)

14. In a letter dated October 31, 2008, from Mr. Winney to Dr. Gibbens, Mr. Winney expressly acknowledged that Prairie Wind Animal Refuge's Animal Welfare Act license had been revoked. The letter explained that counsel for Lion's Gate and Mr. Winney had considered dissolving Prairie Wind Animal Refuge, but were concerned that such dissolution might jeopardize Prairie Wind Animal Refuge's grandfather status under State of Colorado rules pertaining to wildlife sanctuaries. (Respondent's Motion for Summary Judgment Attach. RX 6.)

15. On February 18, 2009, the Administrator denied Lion's Gate's Animal Welfare Act license application on the grounds that Lion's Gate was unfit to be licensed and "that issuance of a license to Lion's Gate would be contrary to the purposes of the Act, and would operate so as to circumvent an order of revocation issued by the Secretary of Agriculture as to Prairie Wind Animal Refuge. . . ." (Respondent's Motion for Summary Judgment Attach. PX 14 at 1.)

Conclusions of Law

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

2. The settlement agreement reached in *Jurich v. U.S. Dep't of Agric.*, No. 1:03-CV-00793-OWN-OES (D. Colo. Sept. 10, 2003), acknowledged the revocation of the Animal Welfare Act license previously held by Mr. Jurich and Prairie Wind Animal Refuge and the imposition of the accompanying civil penalty.

3. The Administrator's determination that Lion's Gate was unfit for issuance of an Animal Welfare Act license and the denial of Lion's Gate's Animal Welfare Act license application on the basis of 9 C.F.R. §§ 2.10(b) and 2.11(a) was in accordance with the Animal Welfare Act and the Regulations as an approval of Lion's Gate's Animal Welfare Act license application would result in the circumvention of the Secretary of Agriculture's revocation of Prairie Wind Animal Refuge's Animal Welfare Act license.

4. The divestiture of ownership by, and subsequent death of, Mr. Jurich do not act to remove the permanent disqualification of licensure of a corporate entity whose existence is perpetual.

Lion's Gate's Appeal Petition

Lion's Gate raises three issues in its Appeal Petition. First, Lion's Gate contends the Chief ALJ's finding that Prairie Wind Animal Refuge applied for, and was issued, Animal Welfare Act license number 84-C-0052, is error. Lion's Gate asserts Mr. and Mrs. Jurich applied for, and were issued, Animal Welfare Act license number 84-C-0052. Lion's Gate asserts APHIS cannot issue an Animal Welfare Act license to a legal entity that never applied for a license. (Appeal Pet. at 2-3.)

On October 4, 1993, APHIS received Mr. Jurich's application for an Animal Welfare Act license in which Mr. Jurich identified himself as an owner of an unspecified form of an entity. Mr. Jurich identified Prairie Wind Animal Refuge on the Animal Welfare Act license application as a business name. (Respondent's Brief on Remand Attach. RX 16 at 3.) The October 4, 1993, Animal Welfare Act license application contained no space for identifying the form of the entity applying for the Animal Welfare Act license, whereas each of the Animal Welfare Act license renewal applications has a space for identifying the form of the entity seeking license renewal. Each of the Animal Welfare Act license renewal applications submitted by Mr. Jurich identifies the entity seeking renewal as a corporation and identifies Mr. Jurich as "President" (Respondent's Brief on Remand Attach. RX 16 at 4, 6, 11). The record

also contains a letter from Prairie Wind Animal Refuge to APHIS, dated October 25, 1993, requesting a variance while its Animal Welfare Act license application is pending (Respondent's Brief on Remand Attach. RX 16 at 1-2). Based on this evidence, I reject Lion's Gate's contention that the Chief ALJ's finding that Prairie Wind Animal Refuge applied for, and was issued, Animal Welfare Act license number 84-C-0052, is error.

Lion's Gate also asserts Prairie Wind Animal Refuge is merely a trade name and not a legal entity to which an Animal Welfare Act license can be issued. Nothing in the record identifies Prairie Wind Animal Refuge as merely a trade name. To the contrary, the records of the Colorado Secretary of State indicate Prairie Wind Animal Refuge is a nonprofit corporation that was formed on September 13, 1993. Prairie Wind Animal Refuge's term of duration is perpetual. (Respondent's Brief on Remand Attach. RX 8.)

Second, Lion's Gate asserts the Chief ALJ's finding that Animal Welfare Act license number 84-C-0052 was revoked in 2003, is error. Lion's Gate asserts Mr. and Mrs. Jurich voluntarily surrendered Animal Welfare Act license number 84-C-0052 in January 2000 and APHIS accepted the surrender and terminated Animal Welfare Act license number 84-C-0052 as of January 31, 2000; therefore, any subsequent revocation of Animal Welfare Act license number 84-C-0052 is null and void. (Appeal Pet. at 3-4.)

Lion's Gate's argument that the Secretary of Agriculture cannot revoke a previously surrendered and terminated Animal Welfare Act license, is without merit. The Secretary of Agriculture is authorized under 7 U.S.C. § 2149(a) to revoke Animal Welfare Act licenses. The Secretary of Agriculture's authority to revoke Animal Welfare Act licenses includes the authority to revoke Animal Welfare Act licenses that have been voluntarily surrendered and terminated prior to the revocation.[8]

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[8] *See In re Sam Mazzola* (Order Denying Pet. for Recons. and Ruling Denying Mot. for Oral Argument), __ Agric. Dec. ___, slip op. at 7 (Mar. 29, 2010) (rejecting the argument that, in order to revoke an Animal Welfare Act license, a valid license must exist at the time of revocation); *In re Eric John Drogosch*, 63 Agric. Dec. 623, 648-49 (2004) (holding the Secretary of Agriculture is authorized by 7 U.S.C. § 2149(a) to revoke a violator's Animal Welfare Act license even if the violator's Animal Welfare Act license is cancelled prior to revocation).

Third, Lion's Gate contends the Chief ALJ erroneously found the references to Animal Welfare Act license number 94-C-0052 in *In re Michael Jurich* (Consent Decision), 60 Agric. Dec. 722 (2001), are typographical errors. Lion's Gate speculates that Mr. Jurich may have been aware that Animal Welfare Act license number 94-C-0052 did not exist and may have been willing to have an Animal Welfare Act license that never existed revoked. (Appeal Pet. at 4.)

In re Michael Jurich (Consent Decision), 60 Agric. Dec. 722 (2001), was instituted against Mr. Jurich and Prairie Wind Animal Refuge, who operated as exhibitors under Animal Welfare Act license number 84-C-052. Mr. Jurich and Prairie Wind Animal Refuge had mailing addresses at the same location in Colorado. The first two digits of an Animal Welfare Act license number identify the state in which a license is issued. The number "84" is used to identify Animal Welfare Act licenses issued in Colorado and the number "94" is used to identify Animal Welfare Act licenses issued in Puerto Rico. Animal Welfare Act license number 94-C-052 does not exist. I find these circumstances support the Chief ALJ's finding that the references to Animal Welfare Act license number "94-C-052" in *In re Michael Jurich* (Consent Decision), 60 Agric. Dec. 722 (2001), are typographical errors and that the parties and Administrative Law Judge Jill S. Clifton intended *In re Michael Jurich* (Consent Decision), 60 Agric. Dec. 722 (2001), to apply to Animal Welfare Act license number 84-C-052.

Lion's Gate's speculation that Mr. Jurich intended *In re Michael Jurich* (Consent Decision), 60 Agric. Dec. 722 (2001), to apply to the nonexistent Animal Welfare Act license number 94-C-052, is not a sufficient basis on which to disturb the Chief ALJ's finding regarding the references to Animal Welfare Act license number 94-C-052 in *In re Michael Jurich* (Consent Decision), 60 Agric. Dec. 722 (2001).

ORDER

1. The Administrator's determination that Lion's Gate is unfit to be licensed under the Animal Welfare Act, is affirmed.

2. The Administrator's denial of Lion's Gate's Animal Welfare Act license application is affirmed.

3. Lion's Gate is disqualified for a period of 1 year from obtaining, holding, or using an Animal Welfare Act license directly or indirectly through any corporate or other device or person.

4. This Order shall become effective upon service of this Order on Lion's Gate.

Done at Washington, DC

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BODIE S. KNAPP d/b/a THE WILD SIDE.
AWA Docket No. 09-0175.
Decision and Order.
Filed Sepember 24, 2011.

AWA

Colleen A. Carroll, Esq. for APHIS.
Phillip Westergren, Esq. for Respondent.
Decision and Order by Chief Administrative Law Judge Peter M. Davenport.

Decision and Order

Preliminary Statement

This action was initiated by Kevin Shea, then the Acting Administrator of the Animal and Plant Health Inspection Service (APHIS) by the filing of a Complaint on August 19, 2009 alleging that the Respondent Bodie S. Knapp (Respondent or Knapp) and another individual[1] violated the Animal Welfare Act (the Act or AWA). 7 U.S.C. §2131, *et seq*. Respondent Knapp's Answer was filed on September 11, 2009 and the case was assigned to the docket of Senior United States Administrative Law Judge Victor W. Palmer. Following an adverse ruling upon Respondent's Motion for Discovery, the matter was initially set for hearing in Corpus Christi, Texas to commence on March 10, 2010.

Complainant then filed a Motion for Leave to File an Amended Complaint on February 5, 2010, following which the Respondent sought a continuance of the hearing. The continuance was granted and the matter was then reset for hearing to commence on May 18, 2010. On

[1] As filed, the Complaint named as Respondents Bodie S. Knapp and Kimberley G. Finley. A Consent Decision was entered as to Kimberley G. Finley on March 10, 2010 and the case proceeded thereafter solely against the Respondent Knapp. Docket No. 27.

May 18, 2010, Knapp's Answer to the Amended Complaint was filed. The following day, in response to a number of complaints from witnesses who had been subpoenaed who would have to cancel events and travel on Memorial Day, the hearing was again postponed and rescheduled a third time to commence on September 28, 2010.

Respondent then filed a Motion for Summary Judgment on June 29, 2010.

Complainant responded on August 4, 2010 and by ruling entered on August 16, 2010, Judge Palmer denied the Motion for Summary Judgment. On September 3, 2010, the hearing set for September 28, 2010 was cancelled. On November 17, 2010, a telephonic conference was held; leave was granted for the Complainant to file a Second Amended Complaint; and the matter was set for hearing for the fourth time, this time on June 21, 2011. On December 8, 2010, Respondent filed his Answer to the Second Amended Complaint.

On February 3, 2011, the case was reassigned to my docket. On May 18, 2011, Complainant sought to "correct" the Second Amended Complaint. Respondent opposed the Motion and another teleconference was conducted on June 8, 2011. During the teleconference, I denied Complainant's Motion to correct the Second Amended Complaint, noting the stipulation that the parties had entered into concerning the bulk of the factual allegations, and granted Respondent leave to supplement their witness list.

The oral hearing of this matter commenced on June 21, 2011 in Corpus Christi, Texas. At the hearing, Complainant called six witnesses. Respondent called three witnesses, including the Respondent Bodie S. Knapp.[2] Twenty-five agency exhibits and twelve Respondent exhibits were admitted.[3]

Following the hearing, both parties submitted post hearing briefs and the matter is now ripe for disposition.

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[2] References to the transcript of the proceeding will be indicated as Tr. and the page number.

[3] Agency exhibits are identified as CX-1 through CX-30; in computing the number of agency exhibits, certain exhibits had subsections and were counted separately, i.e, CX-3 and 3a and CX-17a , 17b and 17c. Respondent's exhibits are identified as RX-1 through RX-12. Exhibits RX-11 and RX-12 are the two photographs taken during the hearing but submitted with Respondent's brief.

Statutory and Regulatory Framework

The term "animal" is statutorily defined as:

The term "animal" means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warmblooded animal, as the Secretary may determine is being used , or is intended to be used for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes …(3) other farm animals, such as, but not limited to livestock and poultry……7 U.S.C. §2132(g)

Section 2133 of the AWA provides:

The Secretary shall issue licenses to dealers and exhibitors upon application therefore in such form and manner as he may prescribe…. 7 U.S.C. §2133.

Section 2134 provides:

No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

Section 2151 provides:

The Secretary is authorized to promulgate such rule, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter. 7 U.S.C. §2151.

Exotic animals are defined as:

Exotic animal means any animal not identified in the definition of "animal" provided in this part that is native to a foreign country or of foreign origin or character, is not native to the United States, or was introduced from abroad. This term specifically includes animals such as, but not limited to, lions, tigers, leopards,

elephants, camels, antelope, anteaters, kangaroos, and water buffalo, and species of foreign domestic cattle, such as Ankole, Gayal, and Yak. 7 C.F.R. §1.1

Farm animals are further defined under the Regulations as:

Farm animal means any domestic species of cattle, sheep, swine, goats, llamas, or horses, which are normally and have historically, been kept and raised on farms in the United States, and used for or intended for use as food or fiber, or for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. This term also includes animals such as rabbits, mink, and chinchilla, when they are used solely for the purposes of meat or fur, and animals such as horses and llamas when used solely as work and pack animals. 7 C.F.R. §1.1

The Regulations require:

Any person operating or intending to operate as a …dealer…must have a valid license…except persons who are exempted from the licensing requirements under paragraph 3(a) of this section must have a valid license. 9 C.F.R. §2.1(a);

The exemptions include:

(viii) Any person who buys animals solely for his or her own use or enjoyment and does not sell or exhibit animals, or is otherwise not required to obtain a license. 9 C.F.R. §2.1(a)(3)(viii);

Discussion

The Animal Welfare Act enacted in 1970 (P.L. 91-579) draws its genesis from and is an amendment of the Laboratory Animal Welfare Act (P.L. 89-54) which had been enacted in 1966 to prevent pets from being stolen for sale to research laboratories, and to regulate the humane care and handling of dogs, cats and other laboratory animals. The 1970 legislation amended the name of the prior provision to the Animal

Welfare Act in order to more appropriately reflect its broader scope.[4] Since that time Congress periodically has acted to strengthen enforcement, expand coverage to more animals and

activities, or conversely, curtail practices viewed as cruel or dangerous.[5] Farm animals and those used only for the purposes of food and fiber are specifically not covered by the Act.[6]

Respondent Bodie S. Knapp is a former exhibitor[7] and Animal Welfare Act license holder (74-C-0533) with a history of continued difficulty with respect to APHIS regulators. A Complaint was first filed against him and others by the Administrator on March 17, 2004.[8] The violations in that case followed the entry on October 17, 2003 of a Consent Decision and arose from provisions requiring the Corpus Christi Zoological Association to "place all of its animals…by donation or sale, with persons who have demonstrated the ability to provide proper care for said animals in accordance with the Act and the Regulations, and as approved by the complainant."

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[4] The Congressional statement of policy is set forth in 7 U.S.C. §2131 which provides in pertinent part: "The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent or eliminate burdens on such commerce, in order –

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from theft of their animals by preventing the sale or use of animals which have been stolen.

[5] A 1976 amendment added Section 26 of the Act making illegal a number of activities that contributed to animal fighting. Haley's Act (H.R. 1947) introduced in the 100th Congress made it unlawful for animal exhibitors and dealers (but not accredited zoos) to allow direct contact between the public and large felids such as lions and tigers.

[6] 7 U.S.C. §2132(g)(3); *See also*, 7 C.F.R. §1.1 **Definitions.**

[7] A *Class "C" licensee* (exhibitor) means a person subject to the licensing requirements under part 2 and meeting the definition of an "exhibitor" (§1.1), and whose business involves the showing or displaying of animals to the public. A class "C" licensee may buy and sell animals as a minor part of the business in order to maintain or add to his animal collection. 7 C.F.R. §1.1 **Definitions.**

[8] *In re Coastal Bend Zoological Association, f/k/a Corpus Christi Zoological Assoc.,a Texas corp. d/b/a Corpus Christi Zoo, Robert Brock, Michelle Brock, Bodie Knapp, and Charles Knapp,* AWA Docket No. 04-0015, Decision and Order of Judge Palmer entered on August 31, 2006, 65 Agric. Dec. 993 (2006).

During the pendency of the first action, a second disciplinary Complaint was filed against Knapp by the Administrator on August 31, 2004.[9] Knapp failed to answer that Complaint in a timely manner and pursuant to the Rules of Practice, 7 C.F.R. §1.130, *et seq.*, by such failure was deemed to have admitted willfully committing 84 violations of the Act, Regulations and Standards.[10] Judge Hillson's Decision and Order entered on January 4, 2005 concluded that Knapp had willfully violated the Act, ordered Knapp to cease and desist from future violations, and revoked his AWA license. Knapp appealed Judge Hillson's decision to the Departmental Judicial Officer who affirmed the decision[11] and subsequently denied a motion filed on Knapp's behalf for reconsideration. [12] Following denial of the motion for reconsideration, the revocation became effective September 10, 2005.

On April 19-22, 2005 and August 30-31, 2005 (after the entry of Judge Hillson's decision in the second case), Judge Palmer presided over the hearing in the first case which had been initiated against Knapp and others in the *Coastal Bend Zoological Association* action and entered his decision on August 31, 2006. Although the greatest part of the decision dealt with the zoo and the individuals involved with its operation, Judge Palmer found Knapp's violations which resulted in the overdosing and subsequent death of two lions and two tigers particularly egregious, but in light of Knapp's financial condition imposed a minimal fine of $5,000.00.[13]

Contrary to the earlier two cases, the allegations in the instant action do not involve violations of the Act arising from the exhibition of regulated animals, danger to the animals or public, or any issues regarding deficiencies of his facility or the care, treatment or well being of animals which he and members of his family members own, but rather

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[9] *In re Bodie S. Knapp,* AWA Docket No. 04-0029.

[10] Examination of the decision reflects that although there were violations involving potential danger to animals or public, the majority of the 84 violations were far less serious and subject to remedial or corrective action, including allegations involving involved rust observed in animal enclosures (31 instances), other enclosure related issues, and housekeeping violations, including the failure to remove excessive excreta, a substance which Bess Truman tried unsuccessfully to have her husband call fertilizer (14 instances). 64 Agric. Dec. 253, 274-288 (2005).

[11] *In re Bodie S. Knapp,* 64 Agric. Dec. 253 (2005).

[12] *In re Bodie S. Knapp,* 64 Agric. Dec. 1668 (2005).

[13] *In re Coastal Bend Zoological Association, f/k/a Corpus Christi Zoological Assoc.,a Texas corp. d/b/a Corpus Christi Zoo, Robert Brock, Michelle Brock, Bodie Knapp, and Charles Knapp,* 65 Agric. Dec. 993 (2006). The fine remains unpaid.

the Second Amended Complaint alleges that the Respondent's transactions in buying, selling and transporting animals are regulated, require an AWA license (which he no longer possesses or is eligible for) and amount to violations of the Act and Regulations. The Second Amended Complaint, which supplanted the First Amended Complaint, alleged thirty violations involving the sale, purchase, offer for sale or purchase, delivery for transportation, transportation, negotiation for sale or purchase of 419 animals between the period of November of 2005 and September 25, 2010.[14]

Respondent denies certain of the allegations and takes the position that the other transactions, the greatest number of which were the subject of a stipulation,[15] fall beyond the parameters of regulated conduct.

Four of the alleged violations (involving five animals) involve transactions with Christian Bayne Gray of Bolingbroke, Georgia (and Pensacola, Florida). Those transactions alleged include the sale of one lemur to Gray on April 1, 2007, the offer for sale, delivery for transportation, sale, or negotiation of sale of one lemur to Gray on August 15, 2007, the transportation, purchase, or negotiation of purchase of two lemurs from Gray on August 27, 2007, and the offer for sale, delivery for transportation, transportation, sale or negotiation for sale of one zebra to Gray on October 14, 2007. Gray failed to appear as a witness.[16] The documentary evidence proffered by Complainant was recanted and subjected to question in a subsequent affidavit from Gray obtained by the Respondent.[17] Given the irreconcilable nature of the documentary evidence, without Mr. Gray's testimony, I am unable to assess Gray's credibility and as the Respondent did not have the ability

[14] In her Post Hearing Brief, possibly because the alleged violations were not listed in chronological order, Counsel for the Complainant identifies the period of violations as being only between September 10, 2006 and September 25, 2010 (Agency Brief, Docket Entry 68, at page29); however, examination of the allegations contained in the Complaint include three alleged violations before that onset date, *i.e.* November of 2005, February of 2006 and May 2, 2006. Second Amended Complaint, Docket Entry 58, paras. 7e, f and g.

[15] Document Entry No. 60.

[16] A subpoena had been issued for Mr. Gray's attendance at an earlier hearing which remained in effect and he was advised of the change of hearing date; however, efforts to serve him with a new subpoena for the hearing were unsuccessful. Tr. 74-75. Absent his testimony, the record amounts to dueling affidavits without the means to determine which version was entitled to controlling weight.

[17] RX-5.

to confront the witness, I will find there is inadequate evidence to support a finding of any violation as to those transactions.[18]

Knapp asserts that no violations occurred as to the remaining counts on the grounds that the transactions are exempt from regulation variously, because (a) Knapp had "an absolute right to sell this animal [a camel sold to Kimberly G. Finley] to close out his exhibitor's business; (b) the transaction with the Texas Zoo was not a sale, but rather a gift; (c) a number of the animals involved were farm animals specifically excluded from regulation under the Act; (d) the animals purchased by Knapp were intended for his own use or pleasure as permitted by 7 C.F.R. §2.1(a)(3)(viii); (e) Policy #23 contained in the Licensing Exemption provisions of the Animal Care Resource Guide, Dealer Licensing Guide permits the sale of 10 or fewer exotic hoofstock animals in any 12-month period (RX-2); and (f) no license is required for sales of animals through auctions where the intended use of the animals sold is unknown pursuant to the *Miscellaneous Activities* section of the Licensing Exemptions found in the Animal Care Resource Guide, Dealer Licensing Guide at 3.4.6. (RX-2).

Knapp's claim of exemption concerning the sale of the camel to Kimberly G. Finley is without merit. While Knapp could have disposed of the camel within the 60 day period allowed by the Judicial Officer before his license revocation became effective or upon application with the permission of APHIS after that date, the sale was a regulated transaction requiring a license and was effected in November of 2005 better than a month after the effective date of the license revocation. Not only is a camel specifically listed as an exotic animal in the Regulations, but as the sale was to the spouse of a licensee who was an exhibitor who predictably would exhibit the animal,[19] any claim that the animal was a farm animal to be used as a pack animal or for fur or fiber simply is not worthy of belief. Although some farms in this country may have camels, the camel is not a species normally and historically raised on farms in this country. Moreover, a camel cannot be considered hoofstock, as

[18] No motion was made to withdraw those allegations and although the Complainant's brief failed to discuss them, those allegations were included in the Proposed Finding of Fact. Complainant's Brief, Docket Entry 68.

[19] The camel in question had been gelded and accordingly could not be used for breeding purposes and had been used in the past as a "ride" camel. Both Knapps acknowledged that they expected the animal to continue to be used to give ride. Tr. 185, 216.

camels have pads with toe nails rather than hooves.[20] Given the high probability that camels (camelids) sold would be destined for exhibition use rather than any exempted purpose (meat, fiber, or use as a pack animal), the sales of one camel on September 27, 2008, three camels on April10, 2010 and two camels on September 25, 2010 will be considered regulated transactions requiring a dealer's license which Knapp no longer possessed at the time of those transactions. Of lesser probability of use in exhibitions, but still regulated are the sales on April 10, 2010 of a guanaco which despite its physical resemblance of its appearance to a llama or alpaca is a camelid and the subsequent sale on September 25, 2010 of four other guanaco are regulated sales under the Act. It further appears that there are no exemptions applicable to the sales on July 12, 2008 of two kinkajou (a species of honey bear) on July 11, 2009.[21] While I will find no violation in acquiring such animals, their subsequent sale does constitute a violation in each case.

Knapp claims that no violation of the Act occurred as a result of the September 10, 2006 transaction with the Texas Zoo as he gave the two lemurs to the Zoo and that the Zoo on a later date without consideration gave him two zebras. Tr. 202-206. While Knapp's acquisition of the two zebras may be found exempt as being for either breeding or for his own use and pleasure, his claim of donating the animals is refuted by the APHIS Form 7020 which is signed by Knapp identifying him as the "owner" and the disposition is described as an exchange or transfer. CX-1.

Consideration will next be given to the extent that the sale of farm animals may be regulated transactions subject to the Act. The Act expressly excludes other farm animals in the definition of animals[22] and the previously cited definition of farm animals contained in the Regulations specifically lists domestic species of cattle, sheep, swine,

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[20] Knapp first testified that a camel is hoof stock, but then later acknowledged that he did not know. Tr. 243. Even were I not familiar with the characteristics of camel's feet from past exposure to them in Iraq and elsewhere, one need only to refer to Wikipedia for confirmation of the characteristics.

[21] It is possible that the sale of the four chinchilla could have been for their fur as the animals were sold at auction and the intended use of the purchaser was not known. Use of the animals' pelts as fur is common. It may be coincidental, but Knapp purchased the identical number of four chinchillas on April 10, 2009 for his children to breed. Tr. 188. Although chinchilla are sometimes sold as pets, they are often "mean" and generally not considered suitable for small children. Tr. 272.

[22] 7 U.S.C. §2132(g)(3).

goats, llamas, and horses. The adjective "domestic" is not defined in the Act, but will be given its usual meaning as defined by Webster as tame or domesticated.[23] Examination of the allegations of the sales enumerated in the Second Amended Complaint identifies two species of cattle (zebu and watusi), one species of swine (2 bearded pigs), three species of goat (aoudad,[24] ibex and 3 pygmy goats), one llama and an alpaca.

Despite the vast number of cattle now in this country,[25] cattle are not native to the United States,[26] but rather were introduced from abroad and were first brought to this hemisphere in 1493 when Columbus brought Spanish cattle with him on his second voyage to the New World and landed on Santa Domingo. Shortly thereafter in 1519, Cortez also brought Spanish cattle with him when he landed in Mexico.[27] The common existing breeds of cattle **all** have been imported or developed

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[23] Webster, *Ninth New Collegiate Dictionary*, Merriam-Webster, 1990. An alternate definition is indigenous; however, is not applicable to cattle.

[24] According to Wikipedia, the aoudad (*Ammotragus lervia*) is also known as a Barbary sheep, but is a species of caprid (goat). In this country, the breed is most frequently encountered in Texas, New Mexico and California.

[25] The United States and Brazil are the top beef producing countries in the world. All 50 states in the United States have beef cattle and 30 states each have at least 10,000 cattle farms and ranches. The United States produces about 25% of the world beef supply. There are some 900 different recognized breeds of cattle, with many able to trace their ancestry back 600 years or more. It is generally thought that cattle were first domesticated in Europe and Asia during the Stone Age. Modern domestic cattle all evolved from a single ancestor, the aurochs, the last of which was killed in 1627 near Warsaw, Poland. www.cyberspaceag.com/farmanimals/beefcattle/beefhistory.htm.

[26] Although children born in this country are considered citizens regardless of the citizenship of their parents or their parents' immigration status, under the AWA Regulations, certain animals are to retain their exotic character if not native to the United States, or if introduced from abroad. The Act contains references to farm animals and excludes them from the definition of a regulated animal. 7 U.S.C. §2132(g)(3).

[27] In 1690, a herd of about 200 head were driven northward from Mexico to a mission near the Sabine River in what later would become Texas. These early imports were the ancestors of the Texas Longhorn which later would populate the Great Plains. During the 1600s nearly every ship from Europe brought a few head of cattle to begin the cattle industry in this country. The earliest recognized breed (the Shorthorn) was imported to Virginia in 1783. Henry Clay is credited with bringing the Hereford breed to this country in 1817. The Angus breed was introduced here from Scotland in 1873. Not only are the beef cattle imports, but the same is true of dairy cattle, with Guernsey, Jersey and Holstein breeds all being brought to this country from overseas. *See generally*, Charles E. Ball, *Building the Beef Industry, A Century of Commitment*, Saratoga Publishing, Saratoga, WY (1997) and *Historical Overview of Beef Production and Beef Organizations in the United States.* Proceedings of the Western Section, ASAS, 2000 and www.bovinebazaar.com.

from foreign stock.[28] Zebu cattle are generally thought to be derived from Asian stock and came to this hemisphere (Brazil) in the early twentieth century. In this country and elsewhere, the breed is frequently crossed with Charolais to improve meat quality.[29] Originally from Africa, watusi were brought to this country in the 1960s. While not as common a breed as many others, their ability to utilize poor forage and handling qualities have increased their appeal to breeders and the breed's numbers in this country have steadily increased.[30] While the Regulations list species of foreign domestic cattle, such as Ankole, Gayal and Yak as exotic animals, given the foreign origin of **all** cattle in this country, the attempt by APHIS to include the above cattle transactions appears inconsistent with the intent and express statutory language of the Act.

Bearded pigs are clearly swine, and regardless of whether an aoudad is considered a sheep or a goat, both categories are listed within the above provision. A cursory search on the internet reflects multiple commercial sources of domestically breed aoudad for sale. Although ibex can be found to roam wild in the Florida Mountains of New Mexico, parts of Texas and elsewhere where they are hunted, a growing breeding industry exists for commercially raised domestic animals sold to breeders and collectors.[31] The three pygmy goats sold on July 12, 2008 are still goats, again animals commonly sold at stockyards across the country. The llama is a specifically listed farm animal and although an alpaca is not, alpacas are normally and historically found in significant numbers on farms throughout the country and can be used for meat or more commonly for their wool. The definition of farm animals found in the Regulations contains no limiting language as to size (regular or miniature), but requires only that the animals be domestic, that they be normally and historically kept and raised on farms, and used or intended for use as food or fiber, or for other specified purposes including breeding. Accordingly, I will find that the sales of the above cattle,

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[28] Some breeds have been developed in this country, *i.e.* the Brahman, which was the result of breeding of different types of Indian cattle back in the 1850s. www.bovinebazaar.com

[29] In 1999, researchers at Texas A & M successfully cloned a zebu.

[30] Jennifer Knapp testified that the family ate watusi beef on occasion. Tr.192.

[31] The fact that Knapp had maintained the animals on his property and was able to load them and take them to the auction for sale is some indication that the animals were in fact domestic.

sheep, swine, goats, llamas and the alpaca (a total of fifteen animals) are not transactions regulated by the Act.[32]

Knapp next argues that his sales of hoofstock[33] do not require a license, relying upon the specific language found in the Licensing Exemptions set forth in the Animal Care Resource Guide Dealer Inspection Guide published by USDA. RX-2. Policy #23 of that publication sets forth published "guidance" as to what transactions do not require a license.[34] The pertinent provisions in "Licensing Exemptions" provide:

Hoofstock [Policy #23]

A license is **not** required for anyone who sells *wild/exotic hoofstock*, such as deer, elk and bison:

nonregulated purposes

to game ranches

to private collectors for breeding purposes only

10 or fewer wild/exotic hoofstock in a 12-month period for regulated purposes.

Accepting the contents of the cited enchiridion *pro arguendo* as a guide to interpreting the Regulations and applying its provisions to the allegations, one sees that the language not only exempts limited sales made for regulated purposes, but it is also apparent that the specified quantity threshold was not exceeded by Knapp in any given 12-month period. In 2006, only five hoofstock animals were sold (four addax [a type of antelope] and one blackbuck [also an antelope]). In 2007, no hoofstock were sold. In 2008, only four hooved animals were sold (two zebras, one wildebeest [an antelope] and one addax [an antelope]. In 2009, three buffalo,[35] one addax [antelope], three nilgai [antelope], or a total of seven hooved animals were sold. In 2010, only five animals were sold, (four buffalo and one deer).

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[32] Further support for finding these transactions do not require a license is also found in the Licensing Exemptions contained in the 4/00 version of the Animal Care Guide Dealer Inspection Guide at 3.4.4.

[33] The term "hoofstock" is not defined in the Regulations.

[34] Policy #23 remained in effect at all times pertinent to the violations alleged in this action. It has since been superseded by Policy #8 of the Animal Care Resource Guide, March 25, 2011. RX-3.

[35] I have included the buffalo as a hooved animal; however, in many parts of the country, buffalo are commercially raised, bought and sold for meat, similar to beef.

Complainant argues that Knapp's reliance on the Licensing Exemptions contained in the Dealer Inspection Guide is without merit and argues, based upon the Judicial Officer's ruling in *In re Jerome Schmidt, d/b/a Top of the Ozark Auction,* that what is termed "policy" is to be considered no more than "a useful tool to improve the quality and uniformity of inspections, documentation, and enforcement of the Animal Care Program" and [i]t does not add to, delete from, or change current regulatory requirements or standards – nor does it establish policy.[36] *Schmidt* at 66 Agric. Dec. 159, 214 (2007). In that case, the Judicial Officer found that despite a provision in the Resources Guide indicating that exit interviews were to be conducted, the Inspector was not required to conduct post inspection exit interviews, and that the Inspector's failure to conduct such interviews had no bearing upon whether Dr. Schmidt violated the Regulations and Standards, as alleged in the Complaint. *Id.*

Contrary to the factual setting in the *Schmidt* case, the stated "policy" which Respondent relies upon has a direct bearing upon whether a violation in fact occurred and while the Guide may not add to, delete from or change current regulatory policy, consideration must be given to whether Knapp might reasonably rely upon published explanatory information which has been placed in the public domain by the same Department that seeks to regulate him.[37] Statutory interpretations made by agencies that do not have the force of law, such as opinion letters, policy statements (as in the instant case), agency manuals, and enforcement guidelines while not entitled to *Chevron* deference,[38] are nonetheless entitled to *Skidmore* deference.[39] *Christensen v. Harris County,* 120 S. Ct. 1655 (2000). *Skidmore* deference while less compelling than *Chevron* deference requires federal courts to defer to such interpretations to the extent that the interpretation have the "power to persuade." While it is clear from *F.C.C. v. Fox Television Stations, Inc.* 556 U.S. ____ (2009) that an agency can change its enforcement policy from time to time, there are sound reasons why such changes

[36] Given its characterization in the terminology used in the publication, the argument that Policy #23 was not in fact USDA policy at the time is disingenuous.

[37] A contrary conclusion might be reached by applying Humpty Dumpty's approach in his exchange with Alice concerning the meaning of words in Lewis Carroll's *Through the Looking Glass.*

[38] *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).

[39] *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944).

should not be applied retroactively. Policy #23 appears to be a clear and unambiguous statement which is consistent with the Act and is worthy of being considered persuasive evidence that the Department intended that no license be required for the sales of less than 10 wild/exotic hoofstock in any 12 month period.

Of the 30 allegations contained in the Second Amended Complaint, 16 of the allegations involve purchases of animals by Knapp. Given the broad exemption extended to individuals who buy animals solely for their own use or enjoyment and do not sell or exhibit [regulated] animals, it is difficult (with the exception of the violations already identified) to find violations when the animals are purchased, the stated purpose for their acquisition comes within the broad exemption, and there is no proof to the contrary.[40] Both Knapp's testimony and the pattern observed of significantly greater numbers of animals purchased than sold lend support and credence to Knapp's testimony that the animals were for his own use and enjoyment.[41] No evidence was produced suggesting that Knapp has continued to exhibit his animals and while the Regulations grant substantial latitude in allowing purchases of otherwise regulated animals, it is clear that individuals such as Knapp have to exercise significant care when disposing of any animals purchased, lest a violation be triggered by a sale.[42] Except in those eight instances where I found violations to have occurred and the 2007 Gray transactions where there was irreconcilable conflicting evidence, I found basis for finding the remainder of the transactions to either be exempt or otherwise permissible. Accordingly, it is unnecessary for me to address further the applicability of the *Miscellaneous Activities* in the Licensing Exemptions

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[40] One of the items purchased on October 13, 2006 was what was alleged to be a lion skeleton. Whatever the animal was, the only evidence that it was the skeleton of a lion was the description provided on CX-3a. Other witnesses testified that it was not a lion as the Complaint alleges. Significantly, when asked, Dr. Flynn testified that he was unable to identify what the animal was. Tr. 208. As Complainant failed to prove that even had the animal been a lion that the skeleton was being used for an improper purpose, no violation will be found for this acquisition. Despite the invitation to do so, I decline Complainant's suggestion that I should infer an improper use on Knapp's part.

[41] While the Complainant argues in its brief that Knapp failed to produce reliable evidence that he only bred animals for his own use. Complainant's Brief, Docket Entry No. 68 at p. 27. As APHIS brought this action, the burden of proving improper use is upon the Complainant. No such testimony was received.

[42] It is abundantly clear that the revised Animal Care Resource Guide has significantly decreased the latitude and exemptions which previously existed prior to March 25, 2011.

concerning the issue of whether the sales at the Lolli Brothers Livestock Market, Inc. or any other auction house could also be considered exempted from the requirement to have a license as the intended use by the purchaser of the animals sold was unknown. The evidence establishes that Knapp, with the exception of the transgressions previously identified, complied with USDA policy as articulated in the Licensing Exemptions, selling only farm animals exempt under the Act (*See*, 7 C.F.R. §1.1) and limited, but permissible, quantities of wild/exotic hoofstock during four separate 12 month periods from 2006 to 2010.[43]

In determining the appropriate sanction, I have considered both the Complainant's recommendation that I impose a civil penalty of $75,000.00 for the violations and an additional $33,000.00 for violations of the cease and desist orders as well as Mr. Knapp's affidavit concerning his financial condition and the demands of his large family. While in no way minimizing the violations that I found, considering the available information concerning Knapp's financial condition, I consider a civil penalty of $15,000.00 a sufficient sanction to preclude future violations by him.[44]

Although I have found that Knapp did commit eight violations of the Act and Regulations, in bringing this action APHIS alleged a far greater number of violations, leaving Knapp the prevailing party as to those allegations. As I will also find that APHIS was not substantially justified in including those allegations on which it did not prevail, an award of attorney's fees and expenses is warranted pursuant to the Equal Access to Justice Act (E.A.J.A.).[45] 5 U.S.C. §504; 7 C.F.R. §1.180, *et seq.; See, Fox v. Vice, (*No. 10-114, United States Supreme Court, *Slip Opinion*, [June 6, 2011]) In *Fox*, the Supreme Court articulated a "but for" test, allowing that portion of the fees that the party would have incurred because of, but only because of, what in that action was termed a frivolous [non-prevailing] claim. *Id at* 8. In submitting a petition for such fees, counsel should include specific detail in the description of the hours expended that only that appropriate portion of the fees are included.

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[43] Given the changes in the Animal Care Welfare Guide, Knapp would do well to consult with and obtain permission before selling animals in the future that may be considered regulated by APHIS.

[44] Should future violations come before me by this Respondent, more draconian measures may well result.

[45] The AWA is specifically covered by E.A.J.A. 7 C.F.R. §1.183.

Based upon all of the evidence before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Respondent Bodie S. Knapp is an individual residing in the State of Texas, with a mailing address in Beesville, Texas. At times, he has done business as The Wild Side and Wayne's World Safari.

2. Prior to September 10, 2005, Knapp was licensed under the Act as an exhibitor and held Class "C" AWA License No. 74-C-0533.

3. Knapp has a history of prior disciplinary action being taken against him by APHIS. His AWA license was revoked by the decision and order of then Chief Judge Marc. R. Hillson in AWA Docket No. 04-0029 entered in January of 2005. That decision was later affirmed on appeal and again upon motion for reconsideration. *Aff'd., In re Bodie S. Knapp,* 64 Agric. Dec. 253 (2005); *Mot. for reconsid. den., In re Bodie S. Knapp,* 64 Agric. Dec. 1668 (2005). A prior filed, but later decided, disciplinary action resulted in a cease and desist order and imposition of a civil penalty in the amount of $5,000.00 imposed against Knapp.[46] *In re Coastal Bend Zoological Association, f/k/a Corpus Christi Zoological Assoc., a Texas corp. d/b/a Corpus Christi Zoo, Robert Brock, Michelle Brock, Bodie Knapp, and Charles Knapp,* 65 Agric. Dec. 993 (2006).

4. In September of 2005, Bodie S. Knapp sold a camel to Kimberly G. Finley without possessing a license to engage in a regulated transaction.

5. On September 10, 2006, Bodie S. Knapp sold two lemurs to the Texas Zoo without possessing a license to engage in a regulated transaction.

6. On July 12, 2008, Bodie S. Knapp sold a kinkajou without possessing a license to engage in a regulated transaction.

7. On September 27, 2008, Bodie S. Knapp sold a camel without possessing a license to engage in a regulated transaction.

8. On April 10, 2009, Bodie S. Knapp sold a guanaco without possessing a license to engage in a regulated transaction.

9. On April 10, 2010, Bodie S. Knapp sold three camels without possessing a license to engage in a regulated transaction.

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[46] The civil penalty of $5,000.00 imposed upon Knapp in that action remains unpaid.

10. On July 10, 2010, Bodie S. Knapp, operating as a dealer, sold four guanaco without possessing a license to engage in a regulated transaction.

11. On September 25, 2010, Bodie S. Knapp, operating as a dealer, sold two camels without possessing a license to engage in a regulated transaction.

12. Zebu are a breed of domestic cattle which are considered farm animals and which exist in significant numbers on farms in the United States and are raised for both food and breeding purposes.

13. Watusi are a breed of domestic cattle which are considered farm animals and which exist in significant numbers on farms in the United States and are raised for both food and breeding purposes.

14. Bearded pigs are swine which are considered farm animals and which exist in significant numbers on farms in the United States and are raised for both food and breeding purposes.

15. Auodad, sometimes called Barbary sheep, are goats which are considered farm animals and which exist in significant numbers on farms in the United States and are raised for both food, hunting, and breeding purposes.

16. Ibex are a species of goat which is considered a farm animal and which exists in significant numbers on farms in the United States and are raised for both food, hunting, and breeding purposes.

17. Pygmy goats are goats which are considered farm animals and which exist in significant numbers on farms in the United States and are raised for both food and breeding purposes.

18. A llama is a farm animal which exists in significant numbers on farms in the United States and is raised for both wool, food, work and breeding purposes.

19. An alpaca is a farm animal which exists in significant numbers on farms in the United States and is raised for both wool, food, work and breeding purposes.

20. Addax, blackbucks, zebras, wildebeest, nilgai, and deer are all wild/exotic hooved animals.

21. Buffalo (bison) are animals which are native to the United States and which are not included in the definition of exotic animals contained in the Regulations. For well over than a decade, the meat has been commercially available for home consumption and by patrons of restaurants.

22. Published USDA policy articulated in Policy #23 found in the Licensing Exemptions set forth in the Animal Care Resource Guide Dealer Inspection Guide in effect at the time of the violations alleged in this action allowed the sale of 10 or fewer wild/exotic hoofstock for regulated purposes.

Conclusions of Law

The Secretary has jurisdiction in this matter.

In September of 2005, Bodie S. Knapp, operating as a dealer, sold a camel to Kimberly G. Finley without possessing a license to engage in a regulated transaction and in so doing, violated the Act and Regulations.

On September 10, 2006, Bodie S. Knapp, operating as a dealer, sold two lemurs to the Texas Zoo without possessing a license to engage in a regulated transaction and in so doing, violated the Act and Regulations.

On July 12, 2008, Bodie S. Knapp, operating as a dealer, sold a kinkajou without possessing a license to engage in a regulated transaction and in so doing, violated the Act and Regulations.

On September 27, 2008, Bodie S. Knapp, operating as a dealer, sold a camel without possessing a license to engage in a regulated transaction and in so doing, violated the Act and Regulations.

On April 10, 2009, Bodie S. Knapp, operating as a dealer, sold a guanaco without possessing a license to engage in a regulated transaction and in so doing, violated the Act and Regulations.

On April 10, 2010, Bodie S. Knapp, operating as a dealer, sold three camels without possessing a license to engage in a regulated transaction and in so doing, violated the Act and Regulations.

On July 10, 2010, Bodie S. Knapp, operating as a dealer, sold four guanaco without possessing a license to engage in a regulated transaction and in so doing, violated the Act and Regulations.

On September 25, 2010, Bodie S. Knapp, operating as a dealer, sold two camels without possessing a license to engage in a regulated transaction and in so doing, violated the Act and Regulations.

No violation occurred by reason of the sales of farm animals, including cattle, sheep, swine, goats, and llamas (and alpacas) which are excluded from regulation under the Act. 7 U.S.C. §2132(g)(3).

No violation occurred by reason of the sales of 10 or fewer wild/exotic hoofstock in any 12-month period which sales were made in

reliance upon interpretations of the Act and Regulations promulgated and published by USDA then in effect and denominated as Policy #23.

Given the conflicting evidence as to the 2007 transactions alleged to have taken place between Knapp and Christian Bayne Gray, insufficient evidence exists to support a finding that a violation or violations occurred.

Purchases of animals solely for personal enjoyment by an individual who does not sell or exhibit animals are not regulated transactions under the Act and do not require a dealer's license.

Although Knapp was found to have violated the Act in the instances specified in this decision, the award of attorney fees to his attorney under the Equal Access to Justice Act is nonetheless warranted for prevailing as to the multiple allegations brought by the Complainant which were found not to constitute violations. Those allegations brought by the Secretary are found not to be substantially justified.

Order

Bodie S. Knapp, his agents, employees, successors and assigns shall cease and desist from further violation of the Act and its Regulations.

Bodie S. Knapp is assessed a civil penalty of $15,000.00 for his violations herein.

Payment of such fine shall be by certified check or money order payable to the Treasurer of the United States and sent to:

Colleen A. Carroll, Esquire
United States Department of Agriculture
1400 Independence Avenue, SW
South Building
Washington, DC 20250-1417

Counsel for the Respondent shall submit his Petition for Award of Attorney fees and expenses not later than 60 days after service of this decision, provided this decision is not appealed by either party,.

This Decision and Order shall become final without further proceedings 35 days from service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to Section 1.145 of the Rules of Practice. 7 C.F.R. §1.145.

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

MELANIE H. BOYNES.
AWA Docket No. 11-0012.
Decision and Order.
Filed October 18, 2011.

AWA

Colleen Carroll for APHIS.
Respondent Pro se.
Initial Decision by Chief Administrative Law Judge Peter M. Davenport.
Decision and Order by William Jenson, Judicial Officer

Decision and Order

PROCEDURAL HISTORY

A partnership consisting of two partners, Melanie H. Boynes and Steve Sipek, submitted an application, dated August 24, 2010, for a license under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act], to the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator]. On September 16, 2010, the Administrator denied the partnership's Animal Welfare Act license application. On October 12, 2010, Ms. Boynes instituted the instant proceeding by filing a request for a hearing for the purpose of showing why the partnership's August 24, 2010, application for an Animal Welfare Act license should not be denied. On November 2, 2010, the Administrator filed a response to Ms. Boynes' request.

On May 24, 2011, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] conducted an audio-visual hearing in accordance with the rules of practice applicable to this proceeding[1] at which Ms. Boynes appeared in Miami, Florida, and the Administrator

[1]The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

appeared in Washington, DC. Ms. Boynes appeared pro se. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Ms. Boynes called one witness and provided an unsworn statement in her own behalf, and the Administrator called five witnesses.[2] The Chief ALJ admitted 15 exhibits introduced by Ms. Boynes and 48 exhibits introduced by the Administrator.[3]

On August 4, 2011, after Ms. Boynes and the Administrator filed post-hearing briefs, the Chief ALJ issued a Decision and Order in which the Chief ALJ: (1) affirmed the Administrator's determination that the partnership was unfit to be licensed under the Animal Welfare Act; (2) affirmed the Administrator's September 16, 2010, denial of the partnership's Animal Welfare Act license application; and (3) disqualified Ms. Boynes from obtaining, holding, or using an Animal Welfare Act license for a period of 1 year.

On September 1, 2011, Ms. Boynes appealed the Chief ALJ's Decision and Order to the Judicial Officer, and on September 12, 2011, the Administrator filed "Respondent's Response to Petition for Appeal." On September 15, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I adopt, with minor changes, the Chief ALJ's August 4, 2011, Decision and Order as the final agency decision.

DECISION

Statutory and Regulatory Framework

Sections 3 and 21 of the Animal Welfare Act provide:

§ 2133. Licensing of dealers and exhibitors

The Secretary shall issue licenses to dealers and exhibitors upon application therefore in such form and manner as he may prescribe[.]

§ 2151. Rules and regulations

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[2]Transcript references are designated as "Tr."

[3]Ms. Boynes' exhibits are identified as PX 1 through PX 15. The Administrator's exhibits are identified as RX 1 through RX 48.

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

7 U.S.C. §§ 2133, 2151.

The regulations and standards issued under the Animal Welfare Act[4] provide:

§ 2.1 Requirements and application.

(a)(1) Any person operating or intending to operate as a . . . exhibitor . . . must have a valid license . . . . The applicant shall provide the information requested on the application form[.]

§ 2.11 Denial of initial license application.

(a) A license will not be issued to any applicant who:

(1) Has not complied with the requirements of §§ 2.1, 2.2, 2.3, and 2.4 and has not paid the fees indicated in § 2.6;

(2) Is not in compliance with any of the regulations or standards in this subchapter;

. . . .

(5) Is or would be operating in violation or circumvention of any Federal, State, or local laws; or

(6) Has made any false or fraudulent statements or provided any false or fraudulent records to the Department or other government agencies, or has pled *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

(b) An applicant whose license application has been denied may request a hearing in accordance with the applicable rules of practice for the purpose of showing why the application for license should not be denied. The license denial shall remain in effect until the final legal

[4]The regulations and standards issued under the Animal Welfare Act [hereinafter the Regulations and Standards] are set forth in 9 C.F.R. §§ 1.1-3.142.

decision has been rendered. Should the license denial be upheld, the applicant may again apply for a license 1 year from the date of the final order denying the application, unless the order provides otherwise.

9 C.F.R. §§ 2.1(a)(1), .11(a)(1)-(2), (5)-(6), (b).

The power to require and issue licenses under the Animal Welfare Act includes the power to deny licenses and to disqualify persons from being licensed.[5] The Regulations and Standards provide an initial application for an Animal Welfare Act license will be denied if the applicant is unfit to be licensed and the Administrator determines that issuance of the Animal Welfare Act license would be contrary to the purposes of the Animal Welfare Act.

Discussion

At issue in this proceeding is whether the Administrator, acting through Dr. Elizabeth Goldentyer, Eastern Regional Director, Animal Care, Animal and Plant Health Inspection Service, United States Department of Agriculture, was justified in denying the partnership's August 24, 2010, application for an Animal Welfare Act license on the grounds that: (a) the partnership failed to provide all the information requested on the Animal Welfare Act license application form; (b) Mr. Sipek exhibited regulated animals without a valid Animal Welfare Act license; (c) Mr. Sipek had previously declawed large cats and stated he intended to continue to declaw large cats contrary to veterinary care standards; (d) the partnership was unfit to be licensed based upon Mr. Sipek's history of animal care, Mr. Sipek's non-compliance with the Regulations and Standards, and Mr. Sipek's stated intention to continue to declaw large cats; and (e) issuance of an Animal Welfare Act license to the partnership would be contrary to the purposes of the Animal Welfare Act (RX 21).

Ms. Boynes addressed the Administrator's denial of the partnership's application for an Animal Welfare Act license in a letter dated October 1, 2010, and filed with the Hearing Clerk on October 13, 2010. First, with

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[5] *In re Animals of Montana, Inc.*, 68 Agric. Dec. 92, 94 (2009); *In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. 77, 81 (2009); *In re Loreon Vigne*, 67 Agric. Dec. 1060, 1062 (2008).

regard to the partnership's incomplete application for an Animal Welfare Act license, Ms. Boynes stated the partnership provided information on the application form based upon advice provided by Dr. Gregory Gaj, a supervisor employed by Animal Care, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter APHIS], and Megan E. Adams, an inspector employed by APHIS. Second, with respect to Mr. Sipek's exhibiting regulated animals without a valid Animal Welfare Act license, Ms. Boynes stated she and Mr. Sipek are required by the Florida Fish and Wildlife Conservation Commission to exhibit their animals in order to maintain their Florida Class I Wildlife license. Finally, Ms. Boynes questioned how she could be found unfit to be licensed based upon Mr. Sipek's history of animal care, Mr. Sipek's non-compliance with the Regulations and Standards, and Mr. Sipek's stated intention to continue declawing large cats.

Findings of Fact

1. Melanie H. Boynes is an individual with a mailing address in Loxahatchee, Florida.

2. Steve Sipek is an individual with a mailing address in Loxahatchee, Florida.

3. Mr. Sipek, also known as Steve Hawkes Tarzan,[6] has been involved with exotic animals, including lions, tigers, and leopards for over 42 years (Tr. 114-17; RX 5).

4. Mr. Sipek previously applied for an Animal Welfare Act license in 2005 (RX 1). APHIS conducted three pre-license inspections and, in each inspection, identified deficiencies that required correction before an Animal Welfare Act license could be issued. Mr. Sipek terminated the third inspection and no Animal Welfare Act license was issued to him as he was not in compliance with the Regulations and Standards. (Tr. 58; RX 2-RX 11.)

5. Mr. Sipek has frequently exhibited large cats without an Animal Welfare Act license, in violation of the Animal Welfare Act and the Regulations and Standards (RX 2-RX 4, RX 6-RX 7, RX 11-RX 13).[7]

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[6]Mr. Sipek testified that he performed the role of Tarzan in movies (Tr. 122).

[7]Evidence of Mr. Sipek's exhibiting animals includes admissions to APHIS inspectors and investigators (Tr. 58-61, 65; RX 2, RX 4-RX 7, RX 11). Although

By letter dated January 30, 2008, Mr. Sipek received a Warning Notice for operating as a Class C Exhibitor without a USDA license, in violation of the Animal Welfare Act and the Regulations and Standards (RX 13). Mr. Sipek and Ms. Boynes admit they exhibit animals despite not having an Animal Welfare Act license, but claim exhibiting is required in order to maintain their Florida license (Letter from Ms. Boynes to the Hearing Clerk dated October 1, 2010; Tr. 106-07, 129-30).

6. Mr. Sipek is licensed by the State of Florida Fish and Wildlife Conservation Commission to exhibit "felidae" (RX 18).[8]

7. The record does not contain the original Animal Welfare Act license application submitted by Ms. Boynes; however, prior to August 24, 2010, Ms. Boynes applied for an Animal Welfare Act license in her individual capacity (Tr. 51). Ms. Boynes' Animal Welfare Act license application triggered a pre-license inspection which was conducted on August 24, 2010, by APHIS inspector Megan E. Adams and APHIS supervisor Dr. Gregory Gaj at the facility in Loxahatchee, Florida, where the animals were being kept (RX 20; Tr. 41-51, 72-73, 80-81, 100-11).

8. During the August 24, 2010, inspection, APHIS inspector Megan E. Adams identified six deficiencies that required correction in order for the Loxahatchee, Florida, facility to comply with the Regulations and Standards: (1) adequate veterinary care had to be provided to the animals;[9] (2) documentation that the applicant has adequate experience and knowledge of the species being maintained had to be submitted to APHIS;[10] (3) indoor and outdoor housing facilities had to be improved;[11] (4) the perimeter fence had to be increased in height;[12]

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somewhat dated and not contemporaneous with the current application, 2005-2009 visitor logs obtained from state inspections and reports from state regulators also appear in the record (RX 12, RX 24-RX 35, RX 37-RX 38, RX 44-RX 45). The record also contains photographs of signs advertizing "Steve Sipek's Tarzan Big Cat Sanctuary" (RX 2a-RX 2b).

[8]The State of Florida Fish and Wildlife Conservation Commission license appearing in the record is for 2008-2009; however, Ms. Boynes' October 1, 2010, letter to the Hearing Clerk implicitly indicates that the Florida license is still in force (RX 18).

[9]See 9 C.F.R. § 2.40(b)(2).

[10]See 9 C.F.R. § 2.131(a).

[11]See 9 C.F.R. § 3.125(a).

[12]See 9 C.F.R. § 3.127(d).

(5) the attending veterinarian had to review the animal feeding protocol;[13] and (6) sanitation had to be improved (RX 20).[14] APHIS inspector Megan E. Adams stated on the inspection report: "All items must be in compliance within two more inspections or by 11-24-10 or the applicant will forfeit the application fee and must wait six months to reapply." (RX 20.)

9. During the course of the August 24, 2010, inspection, questions were raised concerning the appropriateness of Ms. Boynes' application for an Animal Welfare Act license as an individual as APHIS inspector Megan E. Adams and APHIS supervisor Dr. Gregory Gaj were informed that Mr. Sipek owned both the real property on which the facility was located and the animals (Tr. 47, 73-74).[15] As a result, Ms. Boynes was asked to complete the Animal Welfare Act license application correctly or to update it to indicate who was truly involved in the business (Tr. 51).

10. Dr. Gregory Gaj discussed the subject of the practice of declawing large cats for handling purposes with Mr. Sipek. Mr. Sipek stated that declawing is necessary for his safety and expressed an intention to continue the practice even though Dr. Gaj advised him that declawing large cats for handling purposes is contrary to accepted veterinary care standards (RX 17, RX 20; Tr. 44-48).

11. On August 27, 2010, APHIS received an Animal Welfare Act license application form dated August 24, 2010, and signed by Ms. Boynes, as co-owner.[16] Block 8 of the application form indicates the type of business organization is a partnership. Block 2 of the application form, which requires all business names, contains only the word "same." Block 7 of the application form, which requires the identification of the nature of the business, has no entry. Block 9 of the application form,

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[13]See 9 C.F.R. § 3.129(a).

[14]See 9 C.F.R. § 3.131(c).

[15]Dr. Gregory Gaj testified that, during the August 24, 2010, inspection, Ms. Boynes stated Mr. Sipek owned the property and the animals and she could not conduct "the business without him" (Tr. 47).

[16]Although APHIS considered the August 24, 2010, Animal Welfare Act license application to be a revision of the application that Ms. Boynes had previously submitted as an individual, the August 24, 2010, application might also be considered a new application as it was submitted by the partnership.

which requires a list of all owners, partners, and officers, lists Melanie Boynes and Steve Sipek as co-owners. (RX 19.)

12. On September 16, 2010, without conducting any further pre-license inspection for the August 24, 2010, Animal Welfare Act license application, the Administrator, acting through Dr. Goldentyer, denied the application on the grounds that: (a) the partnership failed to provide all the information requested on the Animal Welfare Act license application form; (b) Mr. Sipek exhibited regulated animals without a valid Animal Welfare Act license; (c) Mr. Sipek had previously declawed large cats and stated he intended to continue to declaw large cats contrary to veterinary care standards; (d) the partnership was unfit to be licensed based upon Mr. Sipek's history of animal care, Mr. Sipek's non-compliance with the Regulations and Standards, and Mr. Sipek's stated intention to continue to declaw large cats; and (e) issuance of an Animal Welfare Act license to the partnership would be contrary to the purposes of the Animal Welfare Act (RX 21).

13. At the time of the August 24, 2010, pre-license inspection, Ms. Boynes stated she would try to convince Mr. Sipek to refrain from declawing animals in the future (Tr. 46). At the May 24, 2011, hearing, Mr. Sipek testified he had no intention of acquiring any more animals and he would no longer declaw large cats (Tr. 124, 136).

Conclusions of Law

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

2. The August 24, 2010, Animal Welfare Act license application submitted by the partnership was incomplete; however, the deficiencies could have been easily remedied and are not sufficiently egregious as to warrant any period of disqualification from obtaining, holding, or using an Animal Welfare Act license.

3. The failure of the partnership to correct the deficiencies identified in the August 24, 2010, inspection report (RX 20) warrants denial of the Animal Welfare license application, until such time as the partnership corrects all the deficiencies and thereby complies with all of the Regulations and Standards (9 C.F.R. § 2.11(a)(1)-(2)).

4. Mr. Sipek's continued exhibition of large cats without an Animal Welfare Act license, Mr. Sipek's practice of declawing large cats for handling purposes despite being warned by both a number of

veterinarians[17] and APHIS officials that declawing large cats was not acceptable veterinary care, Mr. Sipek's history of animal care, and Mr. Sipek's non-compliance with the Regulations and Standards, support the Administrator's finding that the partnership is unfit to be licensed under the Animal Welfare Act and the Administrator's determination that issuance of an Animal Welfare Act license to the partnership would be contrary to the purposes of the Animal Welfare Act (9 C.F.R. §§ 2.1(a), .11(a)(1)-(2), (5)-(6)).

Ms. Boynes' Appeal Petition

Ms. Boynes raises five issues in her Appeal Petition. First, Ms. Boynes contends the partnership's August 24, 2010, application for an Animal Welfare Act license, was complete (Appeal Pet. ¶¶ 1, 3-4, 6).

The Chief ALJ concluded that the partnership's August 24, 2010, Animal Welfare Act license application was incomplete (Chief ALJ's Decision and Order at 7). An examination of that application (RX 19) reveals that the application is incomplete and the Chief ALJ's conclusion is not error. The Chief ALJ further states the deficiencies in the August 24, 2010, Animal Welfare Act license application could be remedied and do not warrant any period of disqualification (Chief ALJ's Decision and Order at 7). Therefore, even if I were to find the Chief ALJ erroneously concluded the August 24, 2010, Animal Welfare Act license application was incomplete (which I do not so find), I would find the error harmless.

Second, Ms. Boynes states she and Mr. Sipek are co-owners of the Loxahatchee, Florida, property identified on the August 24, 2010, Animal Welfare Act license application as the mailing address of the partnership, the location at which the animals are housed, and the address of the partners (Appeal Pet. ¶ 2). In support of this statement, Ms. Boynes attached to the Appeal Petition a copy of a Palm Beach County, Florida, property appraisal of the Loxahatchee property which indicates that both Ms. Boynes and Mr. Sipek are owners of the property.

The Chief ALJ found with respect to the ownership of the Loxahatchee property:

11. Although Ms. Boynes represented that she was a "co-owner" of the business and represented in her post hearing brief that the real estate

[17] At least two veterinarians were identified as having declined to declaw large cats for Mr. Sipek (Tr. 135).

is owned by both Steve Sipek and Melanie Boynes, the record before me contains no transfer documents of either the real estate upon which the facility is located or of the animals owned by Steve Sipek. Petitioner's Post Hearing Brief, p. 1, Docket entry 21.

Chief ALJ's Decision and Order at 6 (footnote omitted). The record before the Chief ALJ contained no document evidencing Mr. Sipek's transfer of an interest in the Loxahatchee property to Ms. Boynes; therefore, I find no error. Further, even if I were to find that Mr. Sipek transferred an interest in the Loxahatchee property to Ms. Boynes, that finding would not alter the disposition of the instant proceeding; therefore, I decline to remand the proceeding to the Chief ALJ to reopen the hearing to provide Ms. Boynes an additional opportunity to establish her co-ownership of the Loxahatchee property with Mr. Sipek.

Third, Ms. Boynes states the partnership took action to correct the deficiencies in indoor and outdoor housing facilities and sanitation in accordance with the August 24, 2010, inspection report (RX 20) (Appeal Pet. ¶¶ 5, 7).

The Chief ALJ concluded that the partnership's failure to comply with the Regulations and Standards constitutes grounds warranting denial of an Animal Welfare Act license until corrective action has been accomplished (Chief ALJ's Decision and Order at 7). The Chief ALJ's conclusion is correct as a matter of law.[18] Moreover, in addition to the correction of the deficiencies in indoor and outdoor housing facilities and sanitation, which Ms. Boynes now asserts the partnership has taken action to correct, the Chief ALJ found the August 24, 2010, inspection report revealed four other deficiencies that must be corrected before an Animal Welfare Act license could be issued to the partnership. Therefore, the partnership's purported correction of two of the six deficiencies forms no basis for disturbing the Chief ALJ's conclusion that the partnership must demonstrate that it complies with all of the Regulations and Standards prior to the issuance of an Animal Welfare Act license to the partnership.

Fourth, Ms. Boynes asserts Mr. Sipek has stated that he would no longer declaw large cats for handling purposes (Appeal Pet. ¶ 8).

The Chief ALJ found that Mr. Sipek testified he would no longer declaw large cats (Chief ALJ's Decision and Order at 7); thus, the Chief

[18]See 9 C.F.R. §§ 2.3(a), .11(a)(1)-(2).

ALJ made the very finding that Ms. Boynes now urges. Therefore, I decline to modify the Chief ALJ's well-supported finding, with which Ms. Boynes apparently agrees.

Fifth, Ms. Boynes states she should not be disqualified from obtaining, holding, or using an Animal Welfare Act license based upon Mr. Sipek's history of animal care (Appeal Pet. ¶ 9).

The application for an Animal Welfare Act license, which is the subject of the instant proceeding, was submitted by a partnership consisting of two partners, Ms. Boynes and Mr. Sipek. Ms. Boynes asserts she and Mr. Sipek are co-owners of the property on which the facility is located, she and Mr. Sipek share responsibility for the animals, and she cannot conduct the business without Mr. Sipek (Appeal Pet. ¶ 2; Tr. 47, 106-07). Given Ms. Boynes and Mr. Sipek's joint administration of the partnership which applied for an Animal Welfare Act license, I conclude the Chief ALJ's disqualification of Ms. Boynes from obtaining, holding, or using an Animal Welfare Act license for a period of 1 year, based in part on Mr. Sipek's history of animal care, is not error.

ORDER

1. The Administrator's determination that the partnership comprised of Melanie H. Boynes and Steve Sipek is unfit to be licensed under the Animal Welfare Act, is affirmed.

2. The Administrator's denial of the August 24, 2010, Animal Welfare Act license application submitted by the partnership comprised of Melanie H. Boynes and Steve Sipek, is affirmed.

3. Melanie H. Boynes is disqualified for a period of 1 year from obtaining, holding, or using an Animal Welfare Act license directly or indirectly through any corporate or other device or person.

4. This Order shall become effective upon service of this Order on Melanie H. Boynes.

Done at Washington, DC.

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LANCELOT KOLLMAN RAMOS, a/k/a LANCELOT RAMOS AND LANCELOT KOLLMAN.
AWA-Docket No. 10-0417.
Decision and Order.
Filed November 11, 2011.

AWA

Colleen Carroll, Esq for APHIS.
William Cook, Esq. for Respondent.
Initial Decision by Chief Administrative Law Judge Peter M. Davenport.
Decision and Order by William Jenson, Judicial Officer.

Decision and Order

On September 7, 2010, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this administrative disciplinary proceeding by filing a Complaint. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. § § 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. § § 1.1-3.142); 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]. The Administrator's Complaint includes a request for oral hearing, as follows:

The Animal and Plant Health Inspection Service requests that unless the respondent fails to file an answer within the time allowed therefor, or files an answer admitting all the material allegations of this complaint, this matter proceed to oral hearing in conformity with the Rules of Practice[.]

Compl. at 6. On September 27, 2010, Lancelot Kollman Ramos filed an answer in which he denied the allegations of the Complaint and requested a hearing.

On April 20, 2011, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] conducted a teleconference with counsel for Mr. Ramos and counsel for the Administrator. During that

teleconference, the Chief ALJ scheduled an oral hearing to commence on July 19, 2011, in Tampa, Florida.[1]

On July 5, 2011, the Administrator filed an Amended Complaint,[2] and a Motion to Continue Hearing. The Administrator cited an ongoing investigation as the basis for the Motion to Continue Hearing, as follows:

3. In its ongoing investigation, the complainant, the Animal and Plant Health Inspection Service (APHIS), has obtained, and continues to obtain, further evidence relevant to this case. On July 1, 2011, the complainant filed an amended complaint,[3] pursuant to section 1.137(a) of the Rules of Practice, to add allegations based on the documentary evidence known and obtained to date.

4. Complainant's counsel expects to supplement complainant's list of exhibits and witnesses based on the documentary evidence known and obtained to date.

Motion to Continue Hearing at 1 ¶ ¶ 3-4.

On July 15, 2011, the Chief ALJ issued an Order in which he cancelled the scheduled hearing and dismissed the instant proceeding without prejudice, as follows:

It now appearing that this action has been brought prematurely before all alleged violations have been thoroughly investigated and documented, the hearing set to commence on July 19, 2011, is **CANCELLED** and this action is **DISMISSED**, without prejudice.

Chief ALJ's July 15, 2011, Order at 2-3 (emphasis in original). On August 12, 2011, the Administrator appealed the Chief ALJ's July 15, 2011, Order to the Judicial Officer. Mr. Ramos did not file a response to Complainant's Petition for Appeal, and on October 27, 2011, the Hearing

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[1]The Chief ALJ's April 20, 2011, Summary of Teleconference and Order at 2.

[2]The Administrator asserts he filed an amended complaint on July 1, 2011, which was erroneously date stamped "June 31, 2011," by the Office of the Hearing Clerk (Complainant's Pet. for Appeal at 2). The record transmitted by the Hearing Clerk to the Office of the Judicial Officer does not include the Administrator's July 1, 2011, amended complaint.

[3]See note 2.

Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I affirm the Chief ALJ's cancellation of the hearing scheduled for July 19, 2011, and the Chief ALJ's dismissal of the instant proceeding without prejudice.

DECISION

The Administrator requested that this matter proceed to oral hearing in the Complaint, which he signed on August 31, 2010, and filed on September 7, 2010 (Compl. at 1, 6). The Administrator has concluded that he is no longer prepared to proceed to oral hearing (Mot. to Continue Hearing; Complainant's Pet. for Appeal). I find no good reason to maintain this proceeding on the docket of the Office of Administrative Law Judges indefinitely while the Animal and Plant Health Inspection Service completes its investigation of Mr. Ramos. Therefore, I find the Chief ALJ's July 15, 2011, Order cancelling the scheduled hearing and dismissing this proceeding without prejudice, is not error.

ORDER

1. The Chief ALJ's Order, filed July 15, 2011, cancelling the hearing scheduled in the instant proceeding for July 19, 2011, is affirmed.

2. The Chief ALJ's Order, filed July 15, 2011, dismissing without prejudice the instant proceeding, is affirmed.

Done at Washington, DC.

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BRIAN KARL TURNER d/b/a RUNNING WILD.
AWA-Docket No. 09-0128.
Decision and Order.
Filed November 7, 2011.

AWA

Brian Karl Turner
d/b/a Running Wild
70 Agric. Dec. 826

Robert A. Ertman, Esq. for APHIS[1]
Respondent Pro se.
Decision and Order by Chief Administrative Law Judge Peter M. Davenport.

Decision and Order

Preliminary Statement

On June 4, 2009, Kevin Shea, the Acting Administrator of the Animal and Plant Health Inspection Service (APHIS) filed an Order to Show Cause Why Animal Welfare Act License 88-C-0158 Should Not Be Terminated for violations of the Animal Welfare Act, as amended (AWA or Act), 7 U.S.C. §2131 *et seq.* and the regulations and standards issued thereunder, 9 C.F.R. §1.1 *et seq.* Copies of the Order to Show Cause were served upon Respondent Brian Karl Turner (Respondent or Turner) by certified mail on June 12, 2009.

The history of this case is lengthy and remarkable for the exceptional amount of procedural maneuvering attempting to avoid a hearing on the merits. On July 10, 2009, the Hearing Clerk advised Respondent that his Answer to the Order to Show Cause had not been received within the time allotted by the Rules of Practice (7 C.F.R. §1.130, *et seq.*) and that he would be informed of further action.[2] On July 14, 2009, AHIS filed a Motion for Adoption of Decision and Order.[3] On the same date, the Hearing Clerk received both a facsimile transmitted Answer and the original Answer which had been mailed on July 6, 2009.[4] On September 18, 2009, then Chief Judge Marc R. Hillson denied the Motion for Adoption of Decision and Order, finding there was no prejudice to APHIS and expressing his reluctance to deny the Respondent his right to a hearing "in what is obviously a vigorously contested matter for failure of his attorney to comply with a deadline that is not specifically spelled

[1] The Order to Show Cause originally listed Colleen A. Carroll, Esquire of the Office of General Counsel as Counsel for APHIS. After the November 9 and10, 2010 hearing Ms. Carroll was replaced by Brian Hill, Esquire, also of the Office of General Counsel. Mr. Ertman replaced Mr. Hill shortly before trial of this action.

[2] Docket Entry 3.

[3] Docket Entry 4.

[4] Docket Entries 6 and 7.

out in the Rules."[5] The case was subsequently reassigned to the docket of Judge Victor W. Palmer on November 13, 2009 who, after conducting a telephonic prehearing conference, scheduled the case for oral hearing to commence on April 8, 2010 in Las Vegas, Nevada.[6]

On December 22, 2009, APHIS filed a Motion for Summary Judgment. The following day, on December 23, 2009, Respondent's Counsel, Edward O. Lear, Esquire of the Century Law Group, LLP filed a Motion to Withdraw as Counsel.[7] On January 5, 2010, Judge Palmer granted the Motion to Withdraw. Unaware that objection had been lodged by the Respondent opposing the Motion for Summary Judgment, Judge Palmer granted APHIS's Motion for Summary Judgment on March 1, 2010 and entered a Decision and Order adverse to the Respondent. *See,* Decision and Order dated March 1, 2010, Docket Entry 22.

On March 26, 2010, Turner appealed the adverse ruling. APHIS responded maintaining on multiple alternative grounds that entry of a summary judgment was appropriate. On April 7, 2010, William G. Jenson, the Judicial Officer, noted the fact that Turner's objection to the Motion for Summary Judgment had by misfiled by personnel in the Hearing Clerk's Office, vacated Judge Palmer's Decision and Order and remanded the case for further proceedings. Judge Palmer scheduled the case to be heard by audio-visual telecommunication, this time to commence on September 8, 2010 in Washington, DC and Las Vegas. On September 2, 2010, the Hearing Clerk received a letter from Turner addressed to Judge Palmer, Diane Green (the Chief Judge's Secretary) and Marilyn [Kennedy] (Judge Palmer's Secretary) in which he asked that the hearing date be continued as he had medical appointments for testing and treatment at the Veteran's Administration Hospital which

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[5] Docket Entry 12. The Rules of Practice specify the period of time allowed for an Answer to a Complaint filed under the rules (Section 1.136, 7 C.F.R. §1.136), but are silent as to the period allowed to respond to a Show Cause Order. The appropriateness of use of a Show Cause Order rather than a Complaint is subject to question in light of Section 4.1 of the Supplemental Rules, 9 C.F.R. §4.1, which provides:

> The Uniform Rules of Practice for the Department of Agriculture promulgated in subpart H of part 1, subtitle A, title 7, Code of Federal Regulations, are the Rules of Practice applicable to adjudicatory, administrative proceedings under section 19 of the Animal Welfare Act (7 U.S.C. 2149)…..

[6] Docket Entry 14.

[7] A facsimile copy of the Motion was received and filed by the Hearing Clerk's Office on December 23, 2009. Docket Entry 16. The original was received on December 30, 2009. Docket Entry 18.

would conflict with the September date previously set. Judge Palmer then cancelled the September hearing and subsequently scheduled another audio-visual hearing at the same two locations to commence on November 9, 2010.[8]

On November 9, 2010, Judge Palmer commenced the audio-visual hearing. At the hearing, APHIS was represented by Colleen A. Carroll, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, DC. The Respondent, no longer represented by counsel, was present in Las Vegas and participated; however, the hearing was abruptly terminated when the South Building in Washington, DC in which the hearing was being conducted had to be evacuated.[9] Although one of Turner's witnesses did appear at the Las Vegas audio-visual location for the second day of the proceedings, when the hearing resumed, Turner was not present. Citing the rules of practice prescribing the consequences to a party when they fail to appear, Ms. Carroll requested entry of judgment. 1110 Tr. 5. After making a statement for the record explaining the basis for his ruling, Judge Palmer granted APHIS's request for entry of a judgment and issued a second Decision and Order adverse to the Respondent finding *inter alia* that by failing to appear for the second day of the proceedings Turner had admitted the allegations contained in the Order to Show Cause and waived his right to an oral hearing.[10] 1110 Tr. 7-10.

In a letter dated December 6, 2010, but received by the Hearing Clerk on December 20, 2010, Turner objected to Judge Palmer's Decision and Order of November 10, 2010 citing his involvement in a traffic accident that day the injuries from which left him incapable of participating in the hearing. After reviewing the letter, Judge Palmer directed the Hearing Clerk to treat the letter as an appeal and had the correspondence forwarded to the Judicial Officer for appropriate action.

On March 1, 2011, the Judicial Officer issued a Second Remand Order, vacating the Decision and Order of November 10, 2010 and remanding the case for further proceedings. On March 2, 2011, I

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[8] Both the September and November dates were scheduled to be conducted by audio-visual means with the Respondent appearing in Las Vegas and APHIS in Washington, DC. Docket Entries 30 and 33.

[9] Prior to the evacuation of the building, the Agency had called two witnesses and introduced one exhibit. 1109 Tr. 11-20, 22-40.

[10] Docket Entry 35.

reassigned the case to my own docket for further proceedings and on May 4, 2011 set the case for trial in Las Vegas, Nevada to commence on August 23, 2011.

At the hearing on August 23, 2011, both parties were present.[11] APHIS was represented by Robert A. Ertman, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, DC. The Respondent was again unrepresented by counsel and proceeded *pro se.* Four government witnesses appeared and testified on August 23, 2011 and 6 exhibits were received into evidence. On August 24, 2011, the Respondent testified and one government witness was recalled. The Respondent's 33 exhibits were also received into evidence. As the four transcripts of proceedings are each individually numbered and not sequentially numbered in a single sequence, transcript references will be indicated by month and date of the hearing and Tr. (i.e. 1109 Tr., 1110 Tr., 0823 Tr., or 0824 Tr. and the page number.) References to the exhibits will be indicated as CX for Complainant's exhibits and RX for the Respondent's exhibits.

The transcript of proceedings of the final two days of hearing was received on September 14, 2011 and the following day a Notice of Filing of Transcript was sent to the parties. Post hearing briefs have been received and the matter is now ready for disposition.

Discussion

The Order to Show Cause which has been filed in this action seeks revocation of Respondent Turner's Animal Welfare Act License No. 88-C-0158 based upon Turner's unfitness to be licensed and the Administrator's determination that issuance of a license would be contrary to the Act. The Order to Show Cause alleges that beginning October 15, 2007, Respondent in person, in writing, and by telephone repeatedly interfered with, threatened, verbally abused, and/or harassed USDA Animal Care Inspector Jeanne Lorang and unidentified Investigative and Enforcement Services personnel in the course of carrying out their duties to the extent that APHIS was unable to conduct routine inspections of Respondent's facility without inspectors and investigators being accompanied by law enforcement personnel. On two occasions in January of 2008, the Order to Show Cause alleged that

[11] Respondent Turner was delayed; however, the proceedings were delayed until his arrival. 0823 Tr. 6.

Turner and his associate, Dr. Leigh Messinides wrote to USDA and Lorang stating their intent to refuse to permit Inspector Lorang unaccompanied access to the licensed facility for the purpose of conducting an inspection. The Order to Show Cause also complains of Respondent's conduct during a follow up inspection in which Respondent made verbal threats to Inspector Lorang about suing her. In expressing an intention to bring legal action against the inspector and seeking to acquire a different inspector, APHIS alleges that Respondent's acts created obstacles to inspections and were designed to intimidate the inspector and/or cause her to be reluctant to document noncompliance for fear of retaliation in the form of harassment, interference and/or threats of litigation.

Respondent's Answer indicates that the letters quoted in the Order to Show Cause speak for themselves and denies any improper conduct on the Respondent's part.[12] The genesis of Turner's disapprobation of Lorang arises from her actions precipitated by an October 1, 2007 incident at Respondent's facility. The issues before me concern Respondent's interaction and relationship with APHIS officials and in no way involve the care of Respondent's animals or any issues relating to possible physical danger to Respondent's employees or the public. Neither the October 1, 2007 incident nor the contents of the inspection report from the visit conducted on October 10 and 11, 2007 are directly before me; however, the record indicates that Ms. Lorang, an Animal Care Inspector accompanied by Joseph Bauman, then an investigator for the Inspection Enforcement Service (IES) appeared at Respondent's facility on October 10 and 11, 2007 for an inspection visit. 0823 Tr. 54, RX-1. Although Lorang's inspection was characterized as "routine," Turner claimed that he was told by Investigator Bauman that the visit was the result of an anonymous complaint to APHIS involving the facility. [13]RX-1 (typed notes appended to the exhibit).

The testimony of the Respondent indicates that he had been licensed for seven or eight years without record of any prior health, safety or welfare issue deficiencies 0824 Tr. 186; *See, also* RX-21-24. Contrary to the unremarkable earlier inspections of the facility, Lorang's report found a number of deficiencies and appears to be based upon an account

[12] Docket Entries 6 and 7.

[13] Investigator Bauman testified that a directive had been sent to his supervisor and then down to him to investigate an employee that was injured there. 0823 Tr. 98.

of a "volunteer employee"[14] who claimed to have been attacked and was bitten by Sassy, a cougar owned by Respondent.[15] Lorang's report concluded that Respondent's veterinary care and employee training was deficient as "Employees observing animals on a daily basis are not experienced or qualified to assess the health and well being of the animals, and stated they are not in daily communication with the attending veterinarian." RX-1. The inspection report also identified a number of non-compliant items, including structurally non-compliant animal enclosures (both indoor and outdoor), feeding and sanitation violations, employee training deficiencies, and animal separation violations.[16] *Id.*

Fueled by what he considered a baseless, unjust, unsupported and fraudulent inspection report authored by a "s[l]oppy, corrupt," …and "degenerate"… "unstable buffoon" "wielding authority without proper knowledge,"… educational background or foundation and the report's content relying upon the account of a "criminally perjurious individual" (CX-6, Attachment H, p. 3 0f 8; 0824 Tr. 181, 184-187, 190)[paraphrased for simplicity], Respondent thereafter unwisely embarked upon an intemperately conducted campaign to discredit and remove Animal Care Inspector Lorang from further involvement with his facility in a prolific series of letters to USDA.[17] Although not pertinent to the issues before me, it is noted that the record contains material from Nye County Animal Care officials and others casting doubt, if not

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[14] This individual was identified by Turner as being Madeline Mendenhall, the mother of Sadie Mendenhall, an individual who had been Respondent's employee, but who was terminated for allowing an unauthorized individual to be in contact with the animals. Contrary to the Lorang report, there is no evidence that Madeline Mendenhall was ever a volunteer employee at the facility or that she was authorized by anyone having the authority to do so to be in contact with the animals.

[15] The Nye County Animal Shelter Control Report confirmed that an individual had been bitten, but indicated that the animal was able to get out because the individual had failed to properly secure the feed box . RX-4.

[16] Both the absence of prior USDA citations concerning any structural deficiencies and the nearly contemporaneous inspection by Turner's veterinarian finding the enclosures to be satisfactory lend some credence to Turner's claims that the violations were unsupported. Although the date of the photos is not evident, RX-8 through RX-19 appear to suggest that Lorang's estimate of the gap was inaccurate. If indeed they exist, no APHIS photographs were introduced.

[17] The confrontational and often sophomoric tone of Respondent's extensive correspondence appears to have served only to harden Complaint's position and was ill suited to achieving Respondent's stated purpose of setting the record straight. CX-2; CX-6, Attachments A, D, E, H, p. 3 0f 8

refuting the accuracy of the contents of the inspection report which triggered Turner's obvious frustration and reaction of such anger and outrage.[18]

Included in the correspondence sent by Turner to APHIS and its employees is Turner's letter of January 16, 2008 to Animal Care Inspector Lorang (an extract of which appears in Paragraph 5 of the Show Cause Order) in which he advised Lorang that she would not be allowed on the property if unaccompanied by other USDA personnel.[19] Turner's letter reiterates the position of his associate, Dr. Leigh Messinides, expressed in an earlier letter sent by her to Lorang on January 12, 2008 (which is also extracted in the same paragraph of the Show Cause Order).[20] Whether Turner would have followed through on his intent to refuse Lorang admittance to his facility had she been unaccompanied can only be speculated upon. APHIS acceded to the request that Lorang be accompanied and consistent with the contents of the email of December 28, 2007 from Dr. Flynn to Dr. Messinides when Inspector Lorang returned to the facility for a follow-up inspection she was accompanied by three other USDA employees, Anna Marie Casas, an agent from the Department's Office of the Inspector General, Dr. Laurie J. Gage, a APHIS Veterinary Medical Officer, veterinarian and big cat and marine mammal specialist, and IES Investigator Joseph Bauman, all of whom were admitted to and allowed to inspect the facility.[21] CX-6, Attachment C, p. 15-16; RX-25; 1109 Tr. 23; 0823 Tr. 113-118. While the regulations make it clear that a licensee cannot refuse access to a licensed facility to an inspector, as the inspection was performed, there was no "refusal" and Dr. Flynn's email had acknowledged and addressed the possibility of a conflict between Turner and Lorang and expressed willingness to accommodate Turner's request

[18] Turner testified that he considered Lorang's action to be an attempt "undercutting …my ability to provide livelihood not to myself but for the recovery of other abused animals. 0824 Tr. 188 and indicated that his facility represented the culmination of his life's passion (CX-6, Attachment H, p. 3 of 8.)

[19] Attachment A to the Order to Show Cause.

[20] Attachment B to the Order to Show Cause.

[21] Agent Casas testified that her assignment to accompany Lorang was to "watch him [Turner] and to make sure that he doesn't produce a weapon." 1109 Tr. 14. She indicated that Turner did not want to speak to them [Lorang and Gage] as he believed that Agent Casas was there in response to a complaint that he had filed with the Office of the Inspector General. *Id* at 14-15. Agent Casas testified that she did not feel physically threatened in any way. *Id* at 19.

that Inspector Lorang be accompanied on inspection visits as was in fact done on January 16, 2008. RX-25; 0823 Tr. 33-36.

The Show Cause Order also alleges that Turner "repeatedly threatened" Lorang with legal action. Although there is no indication in the record that such legal action was ever filed,[22] assertion of one's legal remedies is generally considered an accepted, legitimate and appropriate means of redressing a wrong, whether real or perceived, and becomes actionable against the party seeking such relief only when it is established that the legal process has been abused. Similarly, while Inspector Lorang may have considered the questionnaire sent to her to be a threatening intrusion into her personal life (0823Tr. 49.), the record makes it abundantly clear that upon the advice of Departmental counsel,[23] she was instructed not to answer the questionnaire, the request for completion of the questionnaire clearly did not impede further action on Lorang's part and no evidence of any harm was introduced. CX-5, p. 14-15.

Considerably more problematic are the allegations that Turner, in person, in writing, and by telephone, repeatedly interfered with, threatened, verbally abused, and/or harassed USDA Animal Care Inspector Jeanne Lorang, and Investigative and Enforcement Services personnel, in the course of their duties, to such an extent that [APHIS] is unable to conduct routine inspections of respondent's facilities, animals and records…Paragraph 3, Order to Show Cause. The record amply demonstrates that contrary to the assertion of any inability to conduct routine inspections of Respondent's facility, a follow-up inspection was in performed and that the presence of others in addition to Inspector Lorang had been agreed to by competent authority. 0823 Tr. 33-36. The record does however contain evidence that Lorang and others were subjected to repeated phone calls on a number of occasions[24] and Lorang

[22] Complaint was made of Lorang's conduct to USDA officials; however, when reviewed by Animal Care officials, the record indicates that the matter was reviewed and no action was taken against Lorang. No evidence of any civil action having been brought was introduced.

[23] Having corresponded with the Respondent in an exhibit later identified and offered by APHIS as evidence in the proceeding, further participation by that attorney as counsel at trial might have been precluded by DR 5-102, American Bar Association Model Code of Professional Responsibility.

[24] The telephone bill of Dr. Messinides was provided by Turner in correspondence to Dr. Flynn which reflects multiple calls. CX-3. Investigator Bauman also testified that he had received multiple calls from Turner generally asking for information he was not at liberty to disclose. 0823 Tr. 100-101, 104.

was subjected to inappropriate, offensive and abusive language,[25] intimidating behavior [26]and harassment[27] on Turner's part.

Turner's status as a now disabled honorably discharged combat veteran was advanced as evidence of his ability to deal appropriately with authority; however, as a former Army non-commissioned officer in a combat arms branch, he is well aware that although he may not care for those in positions of authority above him, despite his like or dislike of such individuals, in the performance of his duties, he must show the appropriate respect for their office.[28] It is in this regard that despite any sympathy for Turner or his concern for his reputation, the future of his facility and livelihood, one need look no further than Turner's vehement, vituperative, and vitriolic[29] verbal criticism of Inspector Lorang, Investigator Bauman and even Dr. Lorrie Gage in the correspondence appearing in the record and occurring during testimony given during the hearing to conclude that the Administrator was correct in his

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[25] In his correspondence, Turner indicated that Lorang had "integrity issues" (CX-2.); expressed concern that she had "succumbed to some obesity related ailment" CX-6, Attachment A, p. 10 of 39); and called Lorang "not very bright" and "not very good at your job"…CX-6, Attachment H, p. 35 of 39. At the hearing, he characterized her as "corpulent and obese," and as a "s[l]oppy," "corrupt," and "degenerate" "unstable buffoon" "wielding authority without proper knowledge," educational background or foundation and who had relied upon the account of a "criminally perjurious individual." CX-6, Attachment H, p.3 of 8; 0823 Tr. 175, 181, 184-187, 190. He also implied that Lorang was "romantically infatuated" with the female non-employee witness making the original complaint. 0823 Tr. 186.

[26] Inspector Lorang testified that Turner would intrude into her personal space, approaching her much closer than normal and that she felt "very, very unsafe." 0823 Tr. 55-56. Lorang also testified that at one point Turner became excited, started yelling, again started to approach her much closer than was necessary, causing her to feel intimidated and being pushed back. When Investigator Bauman asked Turner to stand back, he did. 0823 Tr. 58, 99. Agent Casas did not consider herself threatened in any way (1109 Tr. 19); however, Dr. Gage considered Turner's conduct toward Inspector Lorang to be threatening and intimidating (0823 Tr. 117-118). Investigator Bauman testified that on the visit with Dr. Gage [on January 16, 2008], Turner was really calmed down, polite, up until there were some questions by Jeanne at the end of the inspection. 0823 Tr. 99.

[27] Turner himself noted that his correspondence with Ms. Lorang might be considered harassment. CX-6, Attachment H, p. 4 of 8.

[28] *See*, Articles 89, 91 and 134, Uniform Code of Military Justice, 10 U.S.C. §889, 891 and 934.

[29]A term used by Turner himself to characterize his correspondence. CX-6, Attachment H, p. 3 of 8.

determination that Respondent's relations with APHIS have become damaged and deteriorated to the extent that he would be unable to cooperate with APHIS officials in the future and therefore is unfit to remain a licensee under the Act.

Accordingly, on the basis of the entire record, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. The Respondent Brian Karl Turner is an exhibitor licensed under the Animal Welfare Act, holding Animal Welfare Act License Number 88-C-0158 for a facility located in Pahrump, Nevada. He previously held Animal Welfare Act License No. 48-C-0127 for a facility in Kansas.

2. As a result of an anonymous complaint to APHIS concerning an incident at Respondent's facility,[30] an inspection was conducted on October 10 and 11, 2007 by Animal Care Inspector Jeanne Lorang and IES Inspector Bauman, ostensibly for a "routine" inspection.

3. The report of the October 10, 2007 inspection found a number of violations, including a conclusion that veterinary care and employee training was deficient as "Employees observing animals on a daily basis are not experienced or qualified to assess the health and well being of the animals, and stated they are not in daily communication with the attending veterinarian," and proceeded to find a number of non-compliant items, including structurally non-compliant animal enclosures (both indoor and outdoor), feeding and sanitation violations, employee training deficiencies, and animal separation violations, all of which Turner disputed as being unfounded.[31] RX-1.

4. Prior to the October 10, 2007 inspection, inspections of Respondent's facility had rarely cited with few, if any, deficiencies and inspections performed during the same general time period found his

[30] The source of the complaint has since been identified as coming from a non-employee unhappy over the termination of her daughter's employment.

[31] Turner was not present at the facility during the inspection, but was present the following day, October 11, 2007.

cages secure and in good condition,[32] his animals to be fit and healthy, and proper protocols to be in place.[33] RX-6; 21-24.

5. During the continued site visit on October 11, 2007, Respondent confronted Inspector Lorang in an intimidating manner and so closely approached her personal space that Investigator Bauman felt it necessary to request that respondent step back which Turner did. 0823 Tr. 55-56, 58, 99.

6. Angered by what he considered a baseless and totally unfounded inspection report, Respondent and Dr. Leigh Messinides, acting on his behalf, commenced to challenge the contents of the October 10, 2007 report, contacting Inspector Lorang in writing and on the telephone on numerous occasions and ultimately complained to her APHIS superiors about the performance of her duties and requested that she have no further involvement with his facility in a gallimaufry of a written complaint (with attachments containing some 63 pages). *See*, CX-2; CX-6, Attachments A, B, D, E, F (containing the letter of 31 Oct 07 and the index of materials attached. and H)

7. Respondent's complaint against Inspector Lorang was reviewed by Animal Care officials for the Western Region, IES Investigator Joseph Bauman who had been present during the inspection was interviewed, and a response was sent to Respondent in a December 7, 2007 letter from Dr. Ray Flynn which concluded that the October 10, 2007 inspection was thorough and professionally done, no wrongdoing was evident on the part of Inspector Lorang, and which declined Respondent's request for an inspector change. CX-3.

8. Following an exchange of email and a telephone conversation between Dr. Leigh Messinides and Dr. Ray Flynn, Dr. Flynn sent Dr. Messinides an email dated Friday, December 28, 2007, acknowledging that "when there is disagreement between inspectors and licensees about what transpired during a site visit, it can be helpful to have two USDA employees present at future visits to lessen the likelihood of misunderstandings" and that although deployment of two-employee site

[32] The January 16, 2008 inspection report conducted after the Nye County inspection still faulted the structural sufficiency of one of the cages. If taken, no photographic evidence of the deficiencies was submitted.

[33] No fault has been found concerning Turner's care of his animals as Dr. Gage agreed that the cats looked good. 0823 Tr. 111.

visitor teams was based upon resource availability, that "for the near term at least—we (APHIS) will be able to provide this service." RX-25.

9. The requested inspector change having been declined, but having received assurance that a two-employee site visitor team could be accommodated, Dr. Leigh Messinides, acting on Turner's behalf, wrote to Inspector Lorang in a letter dated January 12, 2008 and informed her that any attempt on her part to perform an inspection without other USDA personnel would not be allowed. Attachment B to Order to Show Cause.

10. Although it is unlikely that it was received by Inspector Lorang prior to the completion of the follow up inspection, Respondent wrote a similar letter dated January 16, 2008 to Lorang, also informing her that any attempt on her part to perform an inspection without other USDA personnel would not be allowed. Attachment A to Order to Show Cause.

11. The follow-up site inspection of the facility was conducted on January 16, 2008 by Inspector Lorang, Agent Anna Marie Casas, Office of the Inspector General, IES Investigator Joseph Bauman, and Veterinary Medical Officer Laurie J. Gage, DVM, all United States Department of Agriculture employees. During the course of that inspection, Respondent initially was disinclined to speak to Inspector Lorang, but when he did so, expressed his intention to pursue legal action against her, and exhibited what Lorang and Dr. Gage considered threatening and intimidating behavior toward Inspector Lorang. 1109 Tr. 14-15; 31-32; 0823 Tr. 117-118; CX-6, Attachment C.

12. The record reflects that beginning at least in October 31, 2007 and continuing through August 24, 2011, Respondent both orally and in writing has repeatedly used contemptuous, disparaging, and offensive language in referring to Inspector Lorang and other USDA officials, thereby creating a hostile inspection environment for USDA personnel. CX-2; CX-6, Attachments A, D, E, H, p. 3 0f 8; 0824 Tr. 181, 184-187, 190.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Animal Welfare Act licensees do not waive any right to pursue legal action against USDA employees by virtue of holding an Animal Welfare Act license.

3. Animal Welfare Act licensees may complain about the conduct of inspections conducted at their facilities, contest the findings of

inspection reports, and request a change of inspectors inspecting their facilities; however, decisions concerning the assignment of inspectors remains within the sound discretion of the Animal Care Director, Animal and Plant Health Inspection Service of the United States Department of Agriculture.

4. Having been given assurance that a two-employee site visitor team could be accommodated and would be provided at least for the near term, the letters from Dr. Messinides and the Respondent in January of 2008 advising Inspector Lorang that any attempt by her to conduct an unaccompanied inspection of Respondent's facility would not be allowed do not constitute a refusal to allow inspection of the facility.

5. The Administrator's determination that Respondent is unfit to be licensed is warranted by Respondent's physical conduct in closely approaching inspection personnel in an intimidating manner and his repeated oral and written contemptuous, disparaging and offensive language used in referring to Inspector Lorang and other USDA officials creating a sufficiently hostile environment that his continued licensure would be contrary to the purposes of the Act.

Order

1. Animal Welfare Act License No. 88-C-0158 is hereby revoked.

2. This Decision and Order shall become final and effective without further proceedings thirty-five days (35) after service on Respondent, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

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

CAROLYN & JULIE ARENDS, d/b/a JULIE'S JEWELS; JULIE ARENDS; AND CAROLYN ARENDS.
AWA-Docket No. 11-0147.
Decision and Order.
Filed November 15, 2011.

AWA

Respondent Pro se.
Colleen Carroll, Esq. for APHIS.
Initial Decision by Administrative Law Judge Janice K. Bullard.
Decision and Order by William Jenson, Judicial Officer.

Decision and Order

PROCEDURAL HISTORY

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this disciplinary administrative proceeding on February 24, 2011, by filing an Order To Show Cause Why Animal Welfare Act License 42-B-0168 Should Not Be Terminated [hereinafter Order to Show Cause]. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. § § 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. § § 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § § 1.130-.151) [hereinafter the Rules of Practice]. The Administrator alleges Carolyn & Julie Arends, a general partnership [hereinafter C&JA],[1] through its agents Carolyn Arends and Julie Arends, interfered with, threatened, verbally abused, and/or harassed United States Department of Agriculture, Animal and Plant Health Inspection Service [hereinafter APHIS], employees in the course of their performing duties under the Animal Welfare Act.[2] The Administrator seeks an order (1) terminating Animal Welfare Act license number 42-B-0168 issued to C&JA and (2) disqualifying the following from obtaining an Animal Welfare Act license: (a) C&JA, (b) C&JA's agents and assigns, and (c) any business entity in which Carolyn Arends or Julie Arends is an officer, agent, or representative, or holds a substantial business interest.[3]

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[1]C&JA consists of two partners, Carolyn Arends and Julie Arends. References in this Decision and Order to "Respondents" are references to all three respondents, C&JA, Carolyn Arends, and Julie Arends.

[2]Order to Show Cause at 3-6 ¶ ¶ 6-9.

[3]Order to Show Cause at 7.

The Hearing Clerk served Respondents with the Order to Show Cause, the Rules of Practice, and the Hearing Clerk's service letter on February 28, 2011.[4] Respondents failed to file a response to the Order to Show Cause with the Hearing Clerk within 20 days after service, as required by 7 C.F.R. § 1.136(a). Instead, on March 23, 2011, Colleen A. Carroll, counsel for the Administrator, received Respondents' response to the Order to Show Cause. Ms. Carroll did not file Respondents' response to the Order to Show Cause with the Hearing Clerk, and the Hearing Clerk sent Respondents a letter dated March 28, 2011, informing Respondents that they failed to file a timely response to the Order to Show Cause.

On April 4, 2011, in accordance with 7 C.F.R. § 1.139, the Administrator filed a Motion For Adoption Of Decision And Order By Reason Of Default [hereinafter Motion for Default Decision] and a proposed Decision And Order [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondents with the Administrator's Motion for Default Decision, the Administrator's Proposed Default Decision, and the Hearing Clerk's service letter on April 22, 2011.[5] On April 26, 2011, and May 2, 2011, Respondents filed objections to the Administrator's Motion for Default Decision and the Administrator's Proposed Default Decision with the Hearing Clerk, stating they had responded to the Order to Show Cause, but they had sent their response to counsel for the Administrator, rather than to the Hearing Clerk.

On June 9, 2011, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] issued a Decision And Order Denying Motion For Default Judgment [hereinafter ALJ's Decision]: (1) tolling the time for filing Respondents' response to the Order to Show Cause; and (2) denying the Administrator's Motion for Default Decision.

On July 7, 2011, the Administrator filed Complainant's Petition For Appeal [hereinafter Appeal Petition] seeking: (1) reversal of the ALJ's Decision, or (2) an order vacating the ALJ's Decision and remanding the

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[4]United States Postal Service Domestic Return Receipt for article number 7009 1680 0001 9852 2268 and United States Postal Service Domestic Return Receipt for article number 7009 1680 0001 9852 2237.

[5]United States Postal Service Domestic Return Receipt for article number 7009 1680 0001 9852 1759 and United States Postal Service Domestic Return Receipt for article number 7009 1680 0001 9852 1742.

proceeding to the ALJ for further proceedings in accordance with the Rules of Practice. On August 1, 2011, Respondents filed a response to the Administrator's Appeal Petition. On August 4, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful review of the record, I reverse the ALJ's Decision and adopt, with minor changes, the proposed findings of fact, the proposed conclusions of law, and the proposed order in the Administrator's Proposed Default Decision.

DECISION

Statement of the Case

Respondents failed to file, with the Hearing Clerk, a response to the Order to Show Cause within the time prescribed in 7 C.F.R. § 1.136(a). Moreover, Respondents' response to the Order to Show Cause, which they sent to counsel for the Administrator, rather than to the Hearing Clerk, does not deny, or otherwise respond to, the allegations in the Order to Show Cause. The Rules of Practice (7 C.F.R. § 1.136(c)) provide the failure to file an answer with the Hearing Clerk within the time provided in 7 C.F.R. § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in a complaint. The Rules of Practice (7 C.F.R. § 1.136(c)) also provide the failure to deny, or otherwise respond to, an allegation in a complaint shall be deemed, for purposes of the proceeding, an admission of that allegation. Further, pursuant to 7 C.F.R. § 1.139, the failure to file an answer, or the admission by the answer of all the material allegations of fact contained in a complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Order to Show Cause are adopted as findings of fact. I issue this Decision and Order pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. C&JA is a general partnership doing business variously as "Julie's Jewels," "Julie's Jewels Puppies," and "Julie's Jewels Precious Puppies." C&JA's business mailing address is 3434 Little Wall Lake Road, Jewell, Iowa 50130. At all times material to this proceeding, C&JA operated as a "dealer," as that term is defined in the Animal

Welfare Act and the Regulations, and held Animal Welfare Act license number 42-B-0168 as a partnership.[6]

2. Julie Arends is an individual whose mailing address is 3434 Little Wall Lake Road, Jewell, Iowa 50130. At all times material to this proceeding, Julie Arends operated as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, and was a partner and principal of C&JA.

3. Carolyn Arends is an individual whose mailing address is 3434 Little Wall Lake Road, Jewell, Iowa 50130. At all times material to this proceeding, Carolyn Arends operated as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, and was a partner and principal of C&JA.

4. The Animal Welfare Act is a remedial statute enacted "to insure that animals . . . are provided humane care and treatment" (7 U.S.C. § 2131). The Regulations provide that the Secretary of Agriculture may terminate an Animal Welfare Act license, as follows:

§ 2.11 Denial of initial license application.

(a) A license will not be issued to any applicant who:

. . . .

(6) Has made any false or fraudulent statements or provided any false or fraudulent records to the Department or other government agencies, or has pled *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

. . . .

§ 2.12 Termination of a license.

A license may be terminated during the license renewal process or at any other time for any reason that an initial license application may be denied pursuant to § 2.11 after a hearing in accordance with the applicable rules of practice.

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[6]Copies of C&JA's most recent Animal Welfare Act license renewal application and C&JA's most recent Animal Welfare Act license are attached to the Order to Show Cause as Complainant's Exhibit 1.

9 C.F.R. § § 2.11(a)(6), .12.

The final version of 9 C.F.R. § § 2.11 and 2.12 was published in the Federal Register on July 14, 2004, and became effective August 13, 2004 (69 Fed. Reg. 42,089 (July 14, 2004)).

5. The Animal Welfare Act authorizes the Secretary of Agriculture to conduct inspections and investigations of dealers and requires dealers to allow access for those purposes:

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale. The Secretary shall inspect each research facility at least once a year and, in the case of deficiencies or deviations from the standards promulgated under this chapter, shall conduct such follow-up inspections as may be necessary until all deficiencies or deviations from such standards are corrected.

7 U.S.C. § 2146(a).[7]

The Regulations require all dealers to allow APHIS officials to conduct inspections, as follows:

§ 2.126 Access and inspection of records and property.

(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:

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[7]The term "Secretary" means the Secretary of Agriculture of the United States or the Secretary's representative who shall be an employee of the United States Department of Agriculture (7 U.S.C. § 2132(b); 9 C.F.R. § 1.1 (definition of "Secretary")).

(1) To enter its place of business;

(2) To examine records required to be kept by the Act and the regulations in this part;

(3) To make copies of the records;

(4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and

(5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

(b) The use of a room, table, or other facilities necessary for the proper examination of the records and inspection of the property or animals must be extended to APHIS officials by the dealer, exhibitor, intermediate handler or carrier, and a responsible adult shall be made available to accompany APHIS officials during the inspection process.

9 C.F.R. § 2.126.

6. On September 15, 2010, C&JA, through its agents Carolyn Arends and Julie Arends, interfered with, threatened, verbally abused, and/or harassed APHIS employees, specifically Animal Care Inspector Cynthia Neis and Supervisory Animal Care Specialist Dr. Richard Watkins, in the course of their performing duties under the Animal Welfare Act, to such an extent that the Administrator is unable to conduct normal routine inspections of Respondents' facilities, animals, and records, without having APHIS employees accompanied by armed law enforcement officers. Specifically, during the course of the inspection, Julie Arends became irate, yelled at Animal Care Inspector Cynthia Neis and Supervisory Animal Care Specialist Dr. Richard Watkins, threw a chain at the bench in front of a shed, and made numerous threats to kill herself.

7. On September 15, 2010, C&JA, through its agent Julie Arends, interfered with, threatened, verbally abused, and/or harassed APHIS employees, specifically Animal Care Inspector Cynthia Neis and Supervisory Animal Care Specialist Dr. Richard Watkins, in the course of their performing duties under the Animal Welfare Act, to such an extent that the Administrator is unable to conduct normal routine inspections of Respondents' facilities, animals, and records, without having APHIS employees accompanied by armed law enforcement officers:

a. During the exit interview, Animal Care Inspector Cynthia Neis and Supervisory Animal Care Specialist Dr. Richard Watkins attempted to review the September 13, 2010, inspection report[8] with Carolyn Arends and Julie Arends. Julie Arends yelled at Carolyn Arends not to sign the inspection report and yelled at Animal Care Inspector Cynthia Neis and Supervisory Animal Care Specialist Dr. Richard Watkins regarding microchipped dogs.

b. During the exit interview, Animal Care Inspector Cynthia Neis and Supervisory Animal Care Specialist Dr. Richard Watkins showed Respondents photographs taken during the inspection on September 13, 2010, to illustrate the deficiencies described in the inspection report. C&JA, through Carolyn Arends and her husband Eldon Arends, took possession of the photographs, wrote on the photographs, and refused to return the photographs to Animal Care Inspector Cynthia Neis and Supervisory Animal Care Specialist Dr. Richard Watkins, despite repeated requests for return of the photographs. Julie Arends became upset and loud and warned Animal Care Inspector Cynthia Neis and Supervisory Animal Care Specialist Dr. Richard Watkins that perhaps she would "start packing heat like Randy" (another dog dealer) apparently does.

c. During the exit interview, Julie Arends called the APHIS regional office in Fort Collins, Colorado, yelled at the person who answered the telephone in that office, and reported to Animal Care Inspector Cynthia Neis and Supervisory Animal Care Specialist Dr. Richard Watkins that that person had ordered them to identify the locations of the photographed deficiencies so that Respondents could take their own photographs.

d. Following Julie Arends' telephone call to the APHIS regional office, Julie Arends advised Animal Care Inspector Cynthia Neis and Supervisory Animal Care Specialist Dr. Richard Watkins, among other things, that the dogs were "her dogs," that she could do what she wanted with them, and that she was going to have the veterinarian kill 50 of them.

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[8] A copy of the September 13, 2010, inspection report is attached to the Order to Show Cause as Complainant's Exhibit 2. The previous inspection of C&JA was conducted on July 16, 2009, and a copy of the July 16, 2009, inspection report is attached to the Order to Show Cause as Complainant's Exhibit 3.

e. After Respondents determined that they were unable to locate a camera with which to take their own photographs, Julie Arends quickly got into a red pickup truck that was parked at the house, started the engine, "spun out" of the driveway, losing control of the vehicle, and then turned right onto Highway 69 at high speed.

f. Animal Care Inspector Cynthia Neis and Supervisory Animal Care Specialist Dr. Richard Watkins advised Carolyn Arends that they thought it best to leave and departed the premises in Ms. Neis' government vehicle. Ms. Neis and Dr. Watkins turned right onto Highway 69 and headed north toward Jewell, Iowa. Ms. Neis was driving. Ms. Neis and Dr. Watkins had only been on the highway a short time (about a minute) when they saw a red pickup truck approaching from the opposite direction. The truck picked up speed and veered from the southbound lane into the northbound lane heading toward the government vehicle. Ms. Neis drove the government vehicle onto the northbound shoulder and stopped. The red truck continued to gain speed and moved onto the northbound shoulder as well, heading for a direct impact with the government vehicle. Shortly before impact, the driver swerved back onto the highway, missing the government vehicle by 10 to 15 feet, stopped perpendicular to the highway, and glared at the inspectors. The driver was Julie Arends. While Julie Arends started to make a U-turn, Ms. Neis drove back onto the northbound lane and quickly headed to Jewell, Iowa, to get away from the red truck before Julie Arends could complete the U-turn. Ms. Neis and Dr. Watkins proceeded to the Hamilton County Sheriff's Department where they reported the incident. Ms. Neis and Dr. Watkins also documented the incident in affidavits.[9]

8. The need to have additional personnel, as well as local law enforcement officers, accompany APHIS employees on every occasion when APHIS has in-person dealings with Respondents is an unwarranted strain on the Administrator's and the United States Department of Agriculture's resources and diverts those resources from other enforcement activities.

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[9]A copy of Animal Care Inspector Cynthia Neis' affidavit is attached to the Order to Show Cause as Complainant's Exhibit 4. A copy of Supervisory Animal Care Specialist Dr. Richard Watkins' affidavit is attached to the Order to Show Cause as Complainant's Exhibit 5.

Conclusions of Law

Respondents have acted to impede the Administrator from carrying out his mandate to enforce the Animal Welfare Act. Respondents' acts create obstacles to inspections. Allowing C&JA to continue to hold an Animal Welfare Act license would be contrary to the Animal Welfare Act's purpose of ensuring humane treatment of animals because C&JA and its agents have made it unsafe for APHIS employees to inspect C&JA's facilities, animals, and records. C&JA's principals, Julie Arends and Carolyn Arends, and C&JA's apparent agent, Eldon Arends, are unwilling and/or unable to comply with the requirements of the Animal Welfare Act and the Regulations. Their behavior evidences that APHIS employees cannot safely conduct inspections of Respondents' facilities, animals, and records. Respondents' actions constitute an abuse of the licensure privileges of the Animal Welfare Act and render Respondents unfit to be licensed under the Animal Welfare Act. For these reasons, the Administrator's determination that renewal of Animal Welfare Act license number 42-B-0168 would be contrary to the purposes of the Animal Welfare Act is supported by the facts admitted here.

The Administrator's Appeal Petition

The Administrator raises six issues in his Appeal Petition. First, the Administrator contends the ALJ erroneously concluded the Order to Show Cause is not a complaint requiring Respondents to respond in order to avoid a default, as provided in 7 C.F.R. § § 1.136(c) and 1.139 (Appeal Pet. 3-5).

The ALJ construed the Order to Show Cause as a motion or request, as follows:

Complainant argues that default is appropriate because Respondents failed to adhere to the Rules regarding filing an Answer. However, Complainant did not file a formal complaint under the Rules, but rather issued an Order to show cause, which I construe as a motion or request within the definition of 7 C.F.R. § 1.143(d).

ALJ's Decision at 4. However, an order to show cause is, by definition, a "complaint" under the Rules of Practice:

§ 1.132 Definitions.

As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:

. . . .

Complaint means the formal complaint, order to show cause, or other document by virtue of which a proceeding is instituted.

7 C.F.R. § 1.132. Moreover, the Order to Show Cause is the document by virtue of which the Administrator instituted the instant proceeding. While the Order to Show Cause contains three requests,[10] the Order to Show Cause is not a motion or request filed in accordance with 7 C.F.R. § 1.143. The Order to Show Cause explicitly states Respondents' failure to file a timely response to the Order to Show Cause will constitute an admission of all the material allegations of the Order to Show Cause, as follows:

WHEREFORE, it is hereby requested that for the purpose of determining whether Animal Welfare Act license 42-B-0168 should be terminated in accordance with the Act and the Regulations issued under the Act, this Order to Show Cause shall be served upon the respondents. Respondents 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.). Failure to file an answer shall constitute an admission of all the material allegations of this Order to Show Cause.

The Animal and Plant Health Inspection Service requests that unless respondents fail to file an answer within the time allowed therefor, or file an answer admitting all the material allegations of this Order to Show Cause, this proceeding be set for oral hearing in conformity with the Rules of Practice governing proceedings under the Act[.]

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[10]The Administrator requests: (1) that the Hearing Clerk serve the Order to Show Cause on Respondents, (2) that the proceeding be set for oral hearing, and (3) issuance of such orders as are authorized by the Animal Welfare Act and warranted under the circumstances (Order to Show Cause at 6-7).

Order to Show Cause at 6-7. In addition, the Hearing Clerk's letter, dated February 25, 2011, served on Respondents with the Order to Show Cause and the Rules of Practice, states Respondents' failure to file a timely response to the Order to Show Cause with the Hearing Clerk shall constitute an admission of the allegations of the Order to Show Cause and a waiver of the right to hearing, as follows:

Enclosed is a copy of the Order to Show Cause Why Animal Welfare Act License 42-B-0168 Should Not be Terminated, which has been filed in the above-captioned proceeding. Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. Please familiarize yourself with the rules and note that the comments which follow are not a substitute for the rule requirements.

The rules specify that you may represent yourself or obtain legal counsel. If an attorney does not file an appearance on your behalf, it shall be presumed that you have elected to represent yourself. Most importantly, **you have 20 days from receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed answer to the complaint**. It is necessary that your answer set forth any defense you wish to assert, admit, deny, or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint shall constitute an admission of those allegations and waive your right to an oral hearing.

Letter, dated February 25, 2011, from the Hearing Clerk to Respondents at 1 (emphasis in original).

Further still, Respondents do not assert that the Order to Show Cause is not a valid form of complaint. Instead, Respondents assert they responded to the Order to Show Cause, but they sent their response to the Order to Show Cause to the Administrator's counsel, rather than to the Hearing Clerk.[11]

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[11]Motion for Default Decision attached to which is Carolyn Arends' April 1, 2011, e-mail to Ms. Carroll stating Respondents mailed the response to the Order to Show Cause to Ms. Carroll; Respondents' April 26, 2011, filing at second unnumbered page stating Respondents sent their response to the Order to Show Cause to the wrong address; and Respondents' May 2, 2011, filing at third unnumbered page stating Respondents sent their response to the Order to Show Cause to the wrong address.

Therefore, I reject the ALJ's conclusion that the Order to Show Cause is a motion or request filed in accordance with 7 C.F.R. § 1.143. Instead, I find the Order to Show Cause is a "complaint," as defined in the Rules of Practice, and is the document by which the Administrator instituted the instant proceeding. In order to avoid being deemed to have admitted the allegations of the Order to Show Cause and to avoid waiving the right to hearing, as provided in 7 C.F.R. § § 1.136(c) and 1.139, Respondents were required to file a timely response to the Order to Show Cause with the Hearing Clerk.

Second, the Administrator contends the ALJ's conclusion that Ms. Carroll's receipt of Respondents' response to the Order to Show Cause equates to filing with the Hearing Clerk, is error (Appeal Pet. at 5-7).

The record establishes that Respondents mailed their response to the Order to Show Cause to counsel for the Administrator, rather than to the Hearing Clerk[12] as required by the Rules of Practice.[13] The Order to Show Cause, the Rules of Practice, and the Hearing Clerk's letter dated February 25, 2011, all of which the Hearing Clerk served on Respondents on February 28, 2011, state that Respondents' response to the Order to Show Cause must be filed with the Hearing Clerk. I have consistently held that delivery to a location or person other than the Hearing Clerk does not constitute filing with the Hearing Clerk.[14]

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[12]Motion for Default Decision attached to which is a redacted letter dated March 18, 2011, from Respondents to Colleen A. Carroll, Attorney for Complainant, Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, S.W., Washington, DC 20250-1417 and an envelope in which that letter was mailed which is addressed to Colleen A. Carroll, Attorney for Complainant, Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, S.W., Washington, DC 20250-1417.

[13]7 C.F.R. § § 1.136(a), .147(g).

[14]*See In re Heartland Kennels, Inc.*, 61 Agric. Dec. 492, 537 (2002) (stating an incarcerated pro se respondent's delivery of a document to prison authorities for forwarding to the Hearing Clerk does not constitute filing with the Hearing Clerk); *In re Jack Stepp* (Ruling Denying Respondents' Pet. for Recons. of Order Lifting Stay), 59 Agric. Dec. 265, 268 (2000) (stating 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, constitutes filing with the Hearing Clerk); *In re Sweck's, Inc.*, 58 Agric. Dec. 212, 213 n.1 (1999) (stating appeal petitions must be filed with the Hearing Clerk; indicating that the hearing officer erred when he instructed litigants that appeal petitions

Moreover, I have specifically held that a complainant's counsel's receipt of a respondent's response to a complaint does not constitute filing with the Hearing Clerk.[15] Therefore, I find the ALJ's conclusion that Ms. Carroll's receipt of Respondents' response to the Order to Show Cause equates to Respondents' filing their response to the Order to Show Cause with the Hearing Clerk, is error.

Third, the Administrator contends the ALJ's conclusion that Respondents timely filed their response to the Order to Show Cause, is error (Appeal Pet. at 7-10).

On February 28, 2011, the Hearing Clerk served Respondents with the Order to Show Cause.[16] The Rules of Practice require that Respondents file their response to the Order to Show Cause within 20 days after the Hearing Clerk serves them with the Order to Show Cause.[17] Therefore, Respondents were required to file their response to the Order to Show Cause no later than March 21, 2011.[18] Counsel for the

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must be filed with Judicial Officer); *In re Severin Peterson* (Order Denying Late Appeal), 57 Agric. Dec. 1304, 1310 n.3 (1998) (stating that neither the applicants' mailing their appeal petition to Regional Director, National Appeals Division, nor receipt of the applicants' appeal petition by the National Appeals Division, Eastern Regional Office, nor the National Appeals Division's delivering the applicants' appeal petition to the Office of the Judicial Officer, constitutes filing with the Hearing Clerk).

[15] *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504, 514 (1996) (stating, even if the respondent's answer had been received by complainant's counsel within the time for filing the answer, respondent's answer would not be timely because complainant's counsel's receipt of the respondent's answer does not constitute filing with the Hearing Clerk), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997).

[16] United States Postal Service Domestic Return Receipt for article number 7009 1680 0001 9852 2268 and United States Postal Service Domestic Return Receipt for article number 7009 1680 0001 9852 2237.

[17] 7 C.F.R. § 1.136(a).

[18] Twenty days after February 28, 2011, was March 20, 2011. However, March 20, 2011, was a Sunday. The Rules of Practice provide that when the time for filing a document or paper 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.
>
> . . . .

Administrator asserts she did not receive Respondents' response to the Order to Show Cause until March 23, 2011.[19] In support of counsel's assertion, the Administrator attached to the Motion for Default Decision a copy of the envelope containing Respondents' response to the Order to Show Cause indicating that Respondents' response to the Order to Show Cause was received by the United States Department of Agriculture, Mail & Reproduction Management Division, Mail Services Branch, on March 23, 2011. Therefore, even if I were to conclude that the Administrator's counsel's receipt of Respondents' response to the Order to Show Cause equates to filing with the Hearing Clerk (which I do not so conclude), I would find Respondents' response to the Order to Show Cause was late-filed and deem Respondents' failure to file a timely response an admission of the allegations of the Order to Show Cause and a waiver of hearing.

Fourth, the Administrator contends the ALJ, relying on the Federal Rules of Civil Procedure, erroneously enlarged Respondents' time for filing a response to the Order to Show Cause (Appeal Pet. at 10-13).

Rule 1 of the Federal Rules of Civil Procedure provides that the Federal Rules of Civil Procedure govern procedure in the United States district courts, as follows:

Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

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

7 C.F.R. § 1.147(h).

The next business day after Sunday, March 20, 2011, was Monday, March 21, 2011. Therefore, Respondents were required to file their response to the Order to Show Cause no later than Monday, March 21, 2011.

[19] Appeal Pet. at 1; Motion for Default Decision at 2.

Fed. R. Civ. P. 1. The Federal Rules of Civil Procedure are not applicable to administrative proceedings conducted before the Secretary of Agriculture under the Animal Welfare Act and the Rules of Practice.[20] Therefore, I find the ALJ's application of the Federal Rules of Civil Procedure to the instant proceeding, error.

Fifth, the Administrator contends the ALJ's denial of the Administrator's Motion for Default Decision is error because Respondents did not deny, or respond to, the allegations of the Order to Show Cause (Appeal Pet. at 13-15).

The Rules of Practice address the contents of a response to a complaint, the consequences of the failure to file a timely response to a complaint, and the consequences of the failure to deny, or otherwise respond to, an allegation of a complaint, as follows:

> **§ 1.136 Answer.**
>
> . . . .
>
> (b) *Contents*. The answer shall:
>
> (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or
>
> (2) State that the respondent admits all the facts alleged in the complaint; or
>
> (3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.
>
> (c) *Default*. Failure to file an answer within the time provided under paragraph (a) of this section 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.

7 C.F.R. § 1.136(b)-(c). Moreover, the failure to file an answer, or the admission by answer of all the material allegations of fact contained in a complaint, constitutes a

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[20] *In re Heartland Kennels, Inc*., 61 Agric. Dec. 492, 535 (2002); *In re Karl Mitchell*, 60 Agric. Dec. 91, 123 (2001), *aff'd*, 42 F. App'x 991 (9th Cir. 2002); *In re Anna Mae Noell*, 58 Agric. Dec. 130, 147 (1999), *appeal dismissed sub nom. The Chimp Farm, Inc. v. U.S. Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000).

waiver of hearing.[21] Even if Respondents had timely filed their response to the Order to Show Cause with the Hearing Clerk, a default decision would be appropriate because the Respondents' response to the Order to Show Cause does not deny, or respond to, the allegations of the Order to Show Cause. Respondents' response to the Order to Show Cause contains a settlement proposal, and, even if read liberally, does not address any of the allegations in the Order to Show Cause.[22]

Even construing Kollman's letter liberally, the contents of his July 22, 2005 letter simply do not equate to a denial or other response to any of the allegations against him in the Complaint. Therefore, the USDA did not err when it concluded, pursuant to Rule of Practice 1.136(c), 7 C.F.R. § 1.136(c), that Kollman failed to deny or otherwise respond to any of the material allegations of the Complaint and thus was deemed to have admitted all those allegations.

Ramos v. U.S. Dep't of Agric., 322 F. App'x 814, 821 (11th Cir. 2009) (unpublished).

Sixth, the Administrator contends the ALJ erroneously applied equitable tolling to the instant proceeding (Appeal Pet. at 15-20).

The ALJ held Respondents' sending their response to the Order to Show Cause to the Administrator's counsel constitutes the type of defective pleading that supports equitable tolling of the time for Respondents' filing a response to the Order to Show Cause (ALJ's Decision 4-6).

Equitable tolling does not apply in the instant proceeding. The Rules of Practice do not provide for equitable relief.[23] Moreover, where equitable tolling is authorized, it has been applied in very limited circumstances – which are not present in the instant proceeding.

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[21] 7 C.F.R. § 1.139.

[22] Motion for Default Decision attached to which is Respondents' response to Order to Show Cause, which the Administrator redacted to remove the specifics of Respondents' settlement proposal; Respondent's May 2, 2011, filing attached to which is Respondents' unredacted response to the Order to Show Cause; and Respondents' response to the Administrator's Appeal Petition attached to which is Respondents' unredacted response to the Order to Show Cause.

[23] *In re J. Reid Hoggan*, 35 Agric. Dec. 1812, 1817-19 (1976) (neither the administrative law judges nor the Judicial Officer can provide equitable relief under the Rules of Practice).

Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990) (footnotes omitted). The instant proceeding presents no inequity. Respondents' response to the Order to Show Cause was not filed during the period for filing an answer. Moreover, I do not find Respondents were induced or tricked by the Administrator into missing the deadline for filing a response to the Order to Show Cause. Respondents received the same information sent to all similarly-situated respondents, Respondents were advised as to the procedure for filing an answer, Respondents were advised as to the consequences for failing to file an answer, and Respondents were advised as to the consequences for failing to respond to any allegation of the Order to Show Cause. Respondents' response to the Order to Show Cause did not respond to any allegation in the Order to Show Cause, Respondents' response to the Order to Show Cause was not filed with the Hearing Clerk, and Respondents' response to the Order to Show Cause was not timely.

The ALJ found that extraordinary circumstances justified equitable tolling of the 20-day time limit for filing an answer. The extraordinary circumstances were an ambiguity as to Julie Arends' role in C&JA and Julie Arends' hospitalization and illness. The record contains no ambiguity as to Julie Arends' role in C&JA. Her name appears on the Animal Welfare Act license renewal application and the Animal Welfare Act dealer's license.[24] Further still, Respondents failed to deny the allegations that describe Julie Arends' relationship to C&JA, which allegations are admitted pursuant to the Rules of Practice. Respondents do not assert that Respondents' failure to file a timely response to the Order to Show Cause was due to Julie Arends' illness or hospitalization, and I find nothing in the record to support a finding that Respondents' failure to file a timely response to the Order to Show Cause was due to

[24]Order to Show Cause at Complainant's Exhibit 1.

Julie Arends' illness or hospitalization. Generally, physical incapacity is not a basis for failing to issue, or for setting aside, a default decision.[25]

The ALJ also considered Julie Arends' *pro se* status in applying equitable tolling.[26] A party's *pro se* status is not relevant to whether that party filed a timely answer or to whether a motion for default decision should be granted.[27] Moreover, even if equitable tolling is available, *pro se* status does not warrant its application.

Pro se status, ignorance of the law, and administrative processes that "are too slow or involve too much delay" do not warrant equitable tolling. *Wakefield v. R.R. Ret. Bd.*, 131 F.3d 967, 970 (11th Cir. 1997). Furthermore, the liberal construction given to *pro se* pleadings "does not mean liberal deadlines." *Wayne v. Jarvis*, 197 F.3d 1098, 1104 (11th Cir. 1999), *overruled on other grounds by Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003).

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[25] *In re Mary Jean Williams* (Order Denying Pet. to Reconsider as to Deborah Ann Milette), 64 Agric. Dec. 1673, 1678 (2005) (stating, generally, physical and mental incapacity are not bases for setting aside a default decision); *In re Jim Aron*, 58 Agric. Dec. 451, 462 (1999) (stating the respondent's automobile accident, loss of memory, payment of taxes, status as a United States citizen, and status as a veteran of the United States Army are not bases for setting aside the default decision); *In re Anna Mae Noell*, 58 Agric. Dec. 130, 146 (1999) (stating respondent's age, ill health, and hospitalization are not bases for setting aside the default decision), *appeal dismissed sub nom. The Chimp Farm, Inc. v. U.S. Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re James J. Everhart*, 56 Agric. Dec. 1400, 1417 (1997) (holding the respondent's disability is not a mitigating factor and forms no basis for setting aside or modifying a default decision).

[26] ALJ's Decision at 5-6.

[27] *In re Loreon Vigne* (Order Denying Pet. to Reconsider), 68 Agric. Dec. 362, 364 (2009) (stating the Rules of Practice do not distinguish between persons who appear pro se and persons represented by counsel; Ms. Vigne's status as a pro se litigant is not a basis on which to set aside her waiver of the right to an oral hearing); *In re Octagon Sequence of Eight, Inc.* (Order Denying Pet. for Rehearing as to Lancelot Kollman Ramos), 66 Agric. Dec. 1283, 1286 (2007) (holding the respondent's status as a pro se litigant is not a basis on which to grant his petition for rehearing or set aside the default decision); *In re Anna Mae Noell*, 58 Agric. Dec. 130, 146 (1999) (stating lack of representation by counsel is not a basis for setting aside the default decision), *appeal dismissed sub nom. The Chimp Farm, Inc. v. U.S. Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543, 1559 (1997) (stating the respondent's decision to proceed pro se does not operate as an excuse for the respondent's failure to file an answer).

Robinson v. Schafer, 305 F. App'x 629, 630 (11th Cir. 2008) (per curiam).

For the foregoing reasons, the following Order is issued.

ORDER

Animal Welfare Act license number 42-B-0168 is terminated. This Order shall become effective on the 60th day after service of this Order on Respondents.

Done at Washington, DC

TERRANOVA ENTERPRISES, INC. d/b/a ANIMAL ENCOUNTERS, INC.; DOUGLAS KEITH TERRANOVA; WILL ANN TERRANOVA; FARIN FLEMING; CRAIG PERRY, d/b/a PERRY'S EXOTIC PETTING ZOO; EUGENE ("TREY") KEY, III, AND KEY EQUIPMENT COMPANY, INC.; d/b/a CULPEPPER & MERRIWEATHER CIRCUS.
AWA-Docket Nos. 09-0155 and 10-0418.
Decision and Order.
Filed December 20, 2011.

AWA

Colleen Carroll, Esq. for APHIS.

Bruce Mornning, Esq. Derek Shaffer. Esq. Vincent Colatriano, Esq. and Michael Weitzner, Esq for Respondents.

Decision and Order by Administrative Law Judge Janice K. Bullard.

DECISION AND ORDER
(RESPONDENT FARIN FLEMING)

1. Introduction

The above captioned matters involve administrative disciplinary proceedings initiated by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"; "Complainant"), against Terranova Enterprises Inc., Douglas Terranova, Will Ann Terranova,

Farin Fleming ("Terranova Respondents")[1]; Craig Perry ("Perry Respondent"); and Eugene "Trey" Key, III, and Key Equipment Company, Inc. (" Key Respondents"). Complainant alleges that Respondents violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131- 2159; "the Act"), and the Regulations and Standards issued under the Act (9 C.F.R. §§ 1.1-3.142; "Regulations and Standards").

A. Procedural History

In a Complaint filed on July 23, 2009, amended on June 8, 2010, Complainant alleged that the Terranova, Key and Perry Respondents[2] willfully violated the Act and the Regulations on multiple occasions between 2005 and 2008. Complainant filed another Complaint on September 7, 2010, charging the Terranova Respondents with additional violations of the Act. Generally, the Complaints allege that Respondents failed to properly handle and care for a variety of animals; failed to maintain proper records and facilities; failed to allow access to inspectors; and exhibited animals without proper licenses.

The two Complaints were consolidated, but in deference to the joint request of the Key and Perry Respondents, I found it appropriate to partition the hearing between the allegations raised in the 2009 Complaint and those raised in the 2010 Complaint. The events allegedly underlying the 2009 Complaint were addressed in a hearing that commenced on February 17, 2011 and continued through February 25, 2011, held in person in Washington, D.C., and through audio-visual equipment located in Texas, Iowa and Missouri. Events involving the Terranova Respondents alone were addressed at a hearing that was held on June 1 and 2, 2011 in Dallas, Texas.

Complainant is represented by Colleen A. Carroll, Esq., Office of the General Counsel, Washington D.C. The Terranova Respondents are represented by Bruce Monning, Esq.; the Perry Respondents are represented by Larry Thorson, Esq.; and the Key Respondents are

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[1] I have issued separate Decisions and Orders addressing the charges against Will Ann Terranova, Doug Terranova and the Terranova business entities, as well as all other named Respondents.

[2] The complaint also named an individual Sloan Damon as a Respondent, but Complainant and Respondent Damon entered into a Consent Decision dismissing Mr. Damon from the cause of action, which was filed with the Hearing Clerk for OALJ on January 31, 2011. Accordingly, I shall not address charges against Mr. Damon in this Decision and Order.

represented by Derek Shaffer, Esq. and Michael Weitzner, Esq. At the hearings, the testimony of witnesses was transcribed, and I received into evidence[3] the parties' exhibits. At the hearing that commenced on February 17, 2011, I admitted to the record Complainant's exhibits identified as CX-1 through CX-67; Terranova Respondents' exhibits TX-1 through TX-41; Key Respondent exhibits KX-1 through KX-30; and Perry Respondents' exhibits PX-1 through PX-8. In addition, the parties entered into stipulations, regarding the admissibility and authenticity of the documentary evidence with the exception of certain photographic and holographic evidence. Tr. at 90-140.

At the hearing that commenced on June 1, 2011, I admitted to the record exhibits CX-69-93, and TX-42, 42. I granted Respondent's objection to the testimony of Margaret Whittaker. Tr. at 3162 - 3206. The witness was called by Complainant to provide opinions regarding what she believed to be the best training methods for working with elephants, which may have led to her concluding that Respondents did not use the best methods to handle animals. However, Ms. Whittaker had not reviewed the evidence regarding the incidents involved in the instant matter, and could formulate no opinion regarding whether animals had been handled properly. Tr. 3187 -3190. Though I credit Ms. Whittaker's training and expertise, I concluded that the proffered testimony regarding her opinion on the best methods to use to train animals in general is not material to my inquiry, as the Act and controlling regulations do not specify a particular method to train and handle animals. Moreover, Ms. Whittaker was not a fact witness, and was given no evidence relating to the events of this case to allow her to formulate an expert opinion that could be rebutted by Respondent.

Pursuant to my Order of June 28, 2011 the parties submitted corrections to the transcript, which I adopted by Order issued August 8, 2011. The parties submitted written closing argument pursuant to my Order of June 28, 2011. The instant decision[4] is limited to Respondent Will Ann Terranova, and is based upon consideration of the record evidence; the pleadings, arguments and explanations of the parties; and controlling law.

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[3] I excluded from the record CX 23. Tr. at 116.

[4] In this decision, exhibits shall be denoted as follows: Complainant's shall be "CX-#"; Terranova Respondents' shall be "TX-#"; Perry Respondent shall be "PX-#"; Key Respondents shall be "KX-#". References to the transcript of the hearing shall be denoted as "Tr. at [page] #".

II. Issue

Is Farin Fleming responsible for any violations of the Act as the result of her association with Terranova Enterprises Inc.?

III Findings of Fact and Conclusions of Law

A. Admissions

In its Answer to the Amended Complaint filed July 23, 2010, Respondents admitted that Terranova Enterprises, Inc. is a Texas corporation doing business as "Animal Encounters, Inc.", corporate Number 159995901. The corporation's registered agent, President, and director is Douglas Keith Terranova, who resides at 6962 S. FM 148, Kaufman, Texas 75142, which is also the corporation's registered address. The corporate charter was forfeited during the period from February 11, 2005 until on or about November 30, 2005, for failure to file or pay state franchise taxes. The charter was again forfeited for noncompliance with state tax law for the period July 25, 2008 through March 11, 2009. Terranova Enterprises, Inc. and Mr. Terranova continued to operate as an exhibitor and held Animal Welfare Act license number 74-C-0199 during the periods relevant to this adjudication. Respondent Farin Fleming's mailing address and residence is noted to be 1200 Overlook, Kaufman, Texas 75142. She was a director of Terranova Enterprises.

B. Summary of Factual History

During the period encompassed by the instant causes of action, all of the Respondents were in the business of exhibiting animals. Craig Alan Perry has been involved with exotic animals since he was sixteen years of age. Tr. at 1700. He has exhibited animals as an individual and through the auspices of a corporation, which is licensed by USDA. Tr. at 1700-1701. Mr. Perry has a number of different animals, including bobcats, servals, lynx, leopards, mountain lions, tigers, lions; and animals shown in a "petting zoo", such as zebras, kangaroos, goats, cattle, and water buffalo. Tr. at 1701. The petting zoo has been in operation for many years under the name of "Perry's Exotic Petting Zoo". Tr. at 1702.

From 1987 until sometime in 2010, Douglas Keith Terranova trained animals under contract with their owners, and presented instructional programs at fairs and facilities using animals that he owned. Tr. at 2509; 2511; 2517-18. He also provided animals to circuses and production crews for television shows and films and acted with his animals. Tr. at 2517-2518. Mr. Terranova owns many different animals, including a number of tigers, camels, a cougar, and spider monkeys. Tr. at 2518-2523. He owned two elephants, Kamba and Congo, until he donated them to the Dallas zoo in 2009. Tr. at 2801.

Eugene Key, III, familiarly known as "Trey", manages the Culpepper and Merriweather Circus ("the Circus"). Tr. at 2217. Mr. Key is President of Key Equipment Company, which bought the Circus approximately ten years ago. Tr. at 2217. The Key Respondents hold an exhibitor's license, and Mr. Key performs in his circus with two tigers, Delia and Solomon, and a lion named Francis, owned by Key Equipment. Tr. at 1222.

In December, 2007, Respondent Perry executed a contract with the Iowa State Fair ("the Fair") to provide entertainment in the form of a petting zoo and animal rides during the August, 2008 Fair. PX-3; Tr. at 1709. Seeking to enhance the quality of his services, Mr. Perry arranged for horse and camel rides, and engaged the Terranova Respondents to provide elephant rides. Tr. at 1707-1708; 2654-2657; 2660. Mr. Perry provided the equipment for camel rides and the camels, which the Terranova Respondents had purchased[5]. Tr. at 2654-2656; 2657-8. Mr. Terranova also provided two zebu for Mr. Perry's petting zoo. Tr. at 2666.

It was anticipated that the elephants would be brought to the Fair from the Circus, where they were performing under an agreement between the Terranova and Key Respondents. Tr. at 2553. The Circus travels to different venues from Chicago and the Mississippi to the West Coast, putting on two daily shows under "the Big Top". Tr. at 2218-19. Mr. Key performs in the Circus with two tigers, Solomon and Delia, and a lion, Francis, which the Circus acquired in 2005. Tr. at 2207. The tigers are of the golden tabby variety and were litter mates. Tr. at 2213-2214.

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[5] The camels belonged to Perry in April, 2008, when arrangements were made with Terranova to provide camel rides at the Fair, but they belonged to Respondents by the time of the Fair. Tr. at 2049.

Before the 2008 circus season began, the Key Respondents' big cats were housed in a compound built on Mr. Terranova's facility. Tr. at 2222; 2551-2. The compound was built to ensure separation of Delia from Solomon when necessary, though they were allowed to socialize; Mr. Terranova agreed with Mr. Key that the tigers should not be allowed to breed. Tr. at 2223. Mr. Key believed it would be irresponsible to intentionally breed litter mates, considering the risk of genetic mutation. Tr. at 2225. Mr. Terranova supervised the care of the cats in Mr. Key's absence, and Mr. Key was not at the Terranova property to confirm that the tigers were kept apart when Delia was "in heat". Tr. at 2224; 2551-2552.

At the start of the 2008 circus season, Terranova's elephant handler delivered the Key cats and Kamba and Congo to the Circus, but he soon returned to the Terranova facility with the elephants and quit his job. Tr. at 2556. Mr. Terranova could not show the elephants himself because of personal circumstances, and he therefore hired Mr. Sloan Damon upon a friend's recommendation. Tr. at 2557-2559. Mr. Damon trained under Mr. Terranova's supervision at his home before taking the elephants back to the Circus with Richard Childs. Tr. at 233; 2561-2562. Mr. Damon hired Mr. Childs to drive the semi-trailer that was used to transport the animals. Tr. at 231; 238. 230; 239. The semi-trailer was partitioned to transport the elephants in the front and the cats in the rear. Tr. at 239. Mr. Damon and Mr. Childs traveled with the animals in the semi until sometime in June or July, when Mr. Key purchased a truck to carry the cats. Tr. at 239. Mr. Damon also looked after Mr. Key's cats because Mr. Damon had large cat experience. Tr. at 2228.

Shortly after he joined the Circus, Mr. Damon noticed that Mr. Key's female tiger was exhibiting behavior associated with pregnancy, although she did not appear to be expecting cubs. Tr. at 241; 2225-7. While the Circus was in Glasgow, Missouri on May 3, 2008, Delia delivered three cubs, which Mr. Damon found outside the mother's cage. Tr. at 2229-2230. Mr. Damon alerted Mr. Key to the births and Mr. Key observed as Mr. Damon replaced the cubs in the cage with Delia, who pushed them away. Tr. at 2232. Mr. Damon was reluctant to expose the cubs to further rejection from their mother, and Mr. Key gave him approval to hand-raise the cubs. Tr. at 2233. Mr. Key was a risk to the newborns' immune systems because he lived with house cats, and he relied upon Mr. Damon's experience with large cats and his reassurance that he had hand-raised tigers in the past. Tr. at 2233; 226-230. A local

veterinarian, Dr. Miller, was called to the site to examine the cubs on the night they were born. Tr. at 180-184; 2236. The doctor helped supply kitten milk replacer (KMR) and vitamins for the cubs, and injected Delia with antibiotics. Tr. at 185-188; CX-7.

Although the cubs appeared to be flourishing with hand feedings, the smallest died on May 6, 2008. Tr. at 246; 2239. It was buried at the Circus site, and the Circus moved to its next engagement in Kansas. Tr. at 2240. When one of the remaining cubs refused to eat on May 12, 2008, Mr. Key authorized Mr. Damon to make an appointment to take the cubs to the Kansas State University Veterinary School for examination. Tr. at 247; 2241. The cub soon showed signs of a seizure and Mr. Damon drove both cubs to the Veterinary School. Tr. at 247-248; 2242. By the time they arrived for examination by Dr. Gary West, the ailing cub had suffered additional seizures and was confirmed dead. Tr. at 248; 2242; 680; CX-9. Dr. West ordered a necropsy, and placed the surviving cub in intensive care for observation. Tr. at 2243; Tr. at 680-1; CX-9; CX-12. The following day, the doctor discharged the survivor, a male that Mr. Damon named "Tubbs", with a prescription for dietary changes. Tr. at 692-4; 2244 CX-12. Mr. Damon continued to feed and care for Tubbs, who was kept in a transport carrier in the cab of the truck used to transport the elephants and adult tigers. Tr. at 269-272.

On August 3, 2008, Mr. Damon left the Circus to travel to the Fair under the arrangement between the Perry and Terranova Respondents. Tr. at 2259. Mr. Damon set up the elephant ride arena in an area close to the Petting Zoo and camel rides. Tr. at 259-260; CX-35 at p. 4. He kept the semi, with Tubbs in the cab, parked away from the public. Tr. at 270-273; CX-35 at pp 121, 122, 127. Nearby, Mr. Damon erected a large outdoor pen where Tubbs spent some time together with a dog that Mr. Damon had found in his travels. Tr. at 272; CX-35 at p. 128.

On August 13, 2008, APHIS inspectors Dr. Zeigerer and Dr. Sofranko, together with APHIS investigator Mike Booth, arrived at the fairgrounds to inspect the facilities and animals. Tr. at 1715; 2536; 1919; CX-38, 39. The trailers belonging to Perry and Terranova were parked in close proximity, and were inspected, as were the Petting Zoo, and the elephant and camel ride areas. Tr. at 1721; CX-38, 39. The inspectors continued to visit the Respondents over the course of several days at the Fair, and on the second day of their inspection, they observed Tubbs in the cab of Terranova's trailer. Tr. at 2602; 2612-13; CX-35 at pp. 121, 122. Mr. Damon did not have a written plan of veterinary care (Tr. at

233-234) and the inspectors instructed Mr. Damon to have Tubbs examined by a qualified veterinarian. Tr. at 288; 2612-4.

Mr. Terranova asked the Fair veterinarians to examine the cub, and Dr. Clothier, Dr. Lucien and two veterinary school students examined Tubbs. Tr. at 2614-5. Dr. Clothier produced a report of examination, and she also consulted with USDA's veterinarian Dr. Gage and drafted recommendations for the cub's diet. Tr. at 2121. Dr. Clothier's examination report was provided to the inspectors on August 15, 2008. Tr. at 2629; Tr. 2119-2121.

Meanwhile, the inspectors were concerned about the cub's welfare, as they believed the cab of the truck where he was kept during the day was too hot; that he was underweight; and that his living conditions were unsanitary. CX-38, 29, 48, 49. The inspectors conferred with other USDA personnel, in particular Dr. Gage, USDA's large cat expert. It was decided that Tubbs' interests would be best served if he were confiscated by the inspection team and relocated to another facility. CX-50. The confiscation was effected on Saturday, August 16, 2008, after which the cub was transported to a USDA approved facility, where he was examined by Dr. June Olds. CX-52, CX-54, CX-55. Dr. Olds concluded that the cub had worn an ill-fitting harness that caused skin abrasions, that he was underweight, and had suffered a wound near his right eye. CX-54, 55. X-rays needed to be highlighted to see the tiger's bone structure. Tr. at 573; CX-53.

The inspectors cited all the Terranova and Key Respondents with violations of the Act regarding the care of the tiger cubs. CX-48, 49. The inspectors cited the Terranova and Perry Respondents with violations pertaining to the care, feeding and housing of the elephants, which were inspected on Saturday morning at the Fair in August 2008. Tr. at 2630-2631. Terranova and Perry Respondents were also charged with failure to handle the elephants in a manner sufficient to avoid harm, and with failure to provide sufficient barrier between the public and elephants during elephant rides. Terranova was also charged with failure to provide adequate veterinary care and maintain a program of adequate care for the elephants.

APHIS investigator Rodney Walker traveled to the Fair from Kansas as part of his investigation into reports that Terranova's elephants had gotten loose on June 4, 2008, while traveling with the Circus in WaKeeney, Kansas. Tr. at 427; 439; CX-21. Strong winds were present and although Mr. Key denied awareness of tornado advisories for the

area, the weather was uncommonly changeable. Tr. at 252-254; 430; 2347. Mr. Key monitored the weather before determining that the Circus could be set up. Tr. at 252; 2344-2346. Mr. Damon had unloaded the elephants, but they were not prepared to conduct rides or show them because the weather was questionable. Tr. at 253-254. He was concerned about leaving the animals in the truck for too long. Tr. at 253. Although Mr. Damon said the decision to conduct the rides was his, he also testified that he would consult Mr. Key, who could override him. Id.

At some point it was decided that that the worst of the weather would bypass the Circus site, and the Circus began to set up attractions. Tr. at 253; 2279. The wind suddenly picked up, and the elephants spooked when a large inflatable amusement slide was blown toward[6] them, and they escaped from their handler. Tr. at 254. They wandered onto nearby private property and were reclaimed only after one was shot with tranquilizers. Tr. at 255-256; CX-18, 21, 22, 26. Apparently, the elephants suffered no permanent injury as the result of this incident in June, because they continued to work at the Circus with Mr. Damon and travel with him to the Fair in August. Tr. at 234. There is conflicting evidence regarding whether Mr. Damon was injured by an elephant during this incident. CX-26.

After the Iowa Fair, Mr. Damon rejoined the circus with the elephants, but he quit his job in September, 2008. Tr. at 234. Mr. Terranova took over the work of handling the animals and was with them on November 4, 2009, at the Family Fun Circus in Enid, Oklahoma, when Kamba escaped and ran onto a highway where she was struck by a vehicle. Tr. at 3483 -3514; CX-70. She sustained various injuries, including lacerations on her right side, a fractured tarsal bone, a broken tusk, bruised trunk, and numerous abrasions. CX-74-76. When Mr. Terranova and his employee Carlos Quinones gave chase to Kamba, they left the other elephant, Congo, unattended for a period of time. Tr. at 3141. Kamba's injuries were treated at the Oklahoma State University School of Veterinary Medicine on the following day. CX-74-76. Kamba recovered from her injuries, and in February 2010, Terranova sold her and Congo to the Dallas Zoo. Tr. at 3517-3520. Mr. Terranova worked

[6] There is conflicting testimony regarding whether one of the elephants was struck by the inflatable device or whether the device was blown near the elephants. I need not determine which version is accurate because the significance of the event is that it precipitated the elephants' escape.

at the Zoo until February, 2011, when he resigned following negative publicity involving this case. Tr. at 3520.

Inspections of Terranova's exhibitions at other facilities were conducted and resulted in citations of violations of the Act. It is undisputed that spider monkeys on display at the Circus World Museum in Baraboo, Wisconsin in June, 2005 were provided a variety of foodstuffs and entertainment, but there was no formal enrichment program for primates in place. CX-1. Other inspections revealed that on June 15, 2006, a camel became entangled in a loose rope barrier that separated Terranova's camels and elephants at the Circus World Museum (Tr. at 88; CX-2) and inspections further found that two camels were left unattended on that day (Tr. at 3444; CX-2). In addition, it was determined that there were insufficient distance and insufficient perimeter fencing at the Circus World Museum in July, 2007. Tr. at 3449; CX-4.

The record reflects that on June 5, 2007, an APHIS Veterinary Medical Officer ("VMO") observed Terranova's mountain lion being inadvertently sprayed with water and exposed to detergent during the cleaning of his cage at the Universoul Circus in Landover, Maryland. CX-3.

Terranova admittedly failed to provide a written program of veterinary care and other records required by the Act while exhibiting at Turner Field in Atlanta, Georgia in February, 2008. CX-6. Further, on June 9 and 10, 2008 no one was available to allow inspection of the Terranova home facility in Kaufman, Texas. CX-6.

At the hearing that commenced on June 1, 2011, Will Ann Terranova testified that Mr. Terranova's father gave them the business when they married. Tr. at 3226. She was named a corporate officer, and her daughter, Farin Fleming, was also named a corporate officer and director. Tr. at 3226. Mrs. Terranova testified that her daughter was no longer supposed to be a corporate officer, and further stated that Ms. Fleming was never involved in making business decisions regarding the operation of Terranova Enterprises, Inc. Tr. at 3227. Ms. Fleming may have attended some meetings when the business first started, but Mr. Terranova mainly made the business decisions. Tr. at 3228. Ms. Fleming did not share in any business profits. Id.

C. Prevailing Law and Regulations

The purpose of the Animal Welfare Act, as it relates to exhibited animals, is to insure that they are provided humane care and treatment (7 U.S.C. § 2131). The Secretary of Agriculture is specifically authorized to promulgate regulations to govern the humane handling and transportation of animals by (7 U.S.C. §§ 2143(a), 2151). The Act requires exhibitors to be licensed and requires the maintenance of records regarding the purchase, sale, transfer and transportation of regulated animals. 7 U.S.C. §§2133, 2134, 2140. Exhibitors must also allow inspection by APHIS inspectors to assure that the provisions of the Act and the Regulations and Standards are being followed. 7 U.S.C. §§ 2142, 2143, 2143 (a)(1) and (2), 2146 (a).

Violations of the Act by licensees may result in the assessment of civil penalties, and the suspension or revocation of licensees. 7 U.S.C. § 2149. The maximum civil penalty that may be assessed for each violation was modified under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note) and various implementing regulations issued by the Secretary. Though the Act originally specified a $2,500 maximum, between April 14, 2004 and June 17, 2008 the maximum for each violation was $3,750. In addition, 7 U.S.C. § 2149(b), was itself amended and, effective June 18, 2008, the maximum civil penalty for each violation has been increased to $10,000.

The Act extends liability for violations to agents, pursuant to 7 U.S.C. §2139, which states, in pertinent part: "the act, omission, or failure of any person acting for or employed by . . . an exhibitor or a person licensed as . . . an exhibitor . . . within the scope of his employment or office, shall be deemed the act, omission or failure of such . . . exhibitor as well as of such person." 7 U.S.C. §2139.

Regulations promulgated to implement the Act provide requirements for licensing, recordkeeping and attending veterinary care, as well as specifications for the humane handling, care, treatment and transportation of covered animals. 9 C.F.R. Chapter 1, Subchapter A, Parts 1 through 4. The regulations set forth specific instructions regarding the size and environmental specifications of facilities where animals are housed or kept; the need for adequate barriers; the feeding and watering of animals; sanitation requirements; and the size of enclosures and manner used to transport animals. 9 C.F.R. Chapter 1, Subchapter A, Part 3, Subpart F. The regulations make it clear that exhibited animals must be handled in a manner that assures not only their

safety but also the safety of the public, with sufficient distance or barriers between animals and people. Id.

D. Discussion

Complainant argues that because Respondent Farin Fleming was listed as an officer and director of Terranova Enterprises, Inc., she should be held personally responsible for any violations of the Act devolving from acts of other officers. In support of this theory, Complainant cites to the holding in *In re Lion Raisins, Inc.*, 69 Agric. Dec. __, 2010, whereby the failure of a corporation to observe corporate formalities sufficed to render the individual officers indistinguishable from the corporate entity.

It is clear from the record that beyond holding a few meetings early after its formation, Terranova Enterprises, Inc. did not engage in formal corporate decision-making processes. I fully credit Will Ann Terranova's testimony that the business decisions were left to her ex-husband, who had the experience and expertise with exhibiting animals. There is no record evidence rebutting her testimony that Ms. Fleming was not involved in corporate operations or decisions. There is no evidence that Farin Fleming was an employee of the corporation, or anything other than a nominal officer and director. Therefore, factually, the instant matter is distinguishable from the circumstances involved in *In re Lion Raisins, Inc.*, supra., where the individuals were each involved in the operations of the business.

I place further weight upon the fact that Ms. Fleming is the daughter of Mrs. Terranova, and is not related to Mr. Terranova. I find little reason to infer that Ms. Fleming had a relationship with Mr. Terranova after he and her mother separated in 2006. Her address is not the same as the corporate address. The only alleged violation cited before 2006 is the failure to document a plan for environmental enhancement adequate to promote the psychological well-being of spider monkeys on exhibition at the Circus World Museum in Baraboo, Wisconsin in June, 2005. There is no evidence that she was aware of this particular exhibition, or that she was involved in keeping records required under the Act.

Despite the fact that Farin Fleming was named as a director of Terranova Enterprises, Inc., I find that there is insufficient evidence of record to conclude that Ms. Farin Fleming was individually responsible for any of the alleged violations represented by actions taken by

Terranova Enterprises, Inc. or Mr. Douglas Terranova at any time relevant to this adjudication. I find that the remedial nature of the Act would not contemplate holding an individual responsible for corporate acts without some evidence of involvement in corporate decisions.

E. Findings of Fact

1. Respondent Farin Fleming is an individual residing in Kaufman, Texas.
2. Respondent Farin Fleming was a director of Respondent Terranova Enterprises, Inc.
3. Terranova Enterprises, Inc., is a moderate sized business that exhibits wild and exotic animals, including tigers, a cougar, and spider monkeys, which operated as an exhibitor under the Act at all times relevant to this adjudication, under AWA license number 74-C-0199.
4. Respondent Farin Fleming was not involved in any manner with the acts of Douglas Keith Terranova or Terranova Enterprises Inc. at any time relevant to this adjudication.

F. Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Although she was named as a director of Terranova Enterprises, Inc., Respondent Farin Fleming was only nominally director, and was not involved in any decisions regarding the operation of the business.
3. Respondent Farin Fleming is not individually responsible for any actions of the other Terranova Respondents.

G. Sanctions

With respect to assessing civil penalties against Respondent for the violation of the Act and the Regulations and Standards, 7 U.S.C. § 2149(b) directs that "…[t]he Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations". 7 U.S.C. § 2149(b). The purpose of sanctions is deterrence, and not punishment. In re David M. Zimmerman, 56 Ag. Dec. 433 (1997).

As I have found no evidence to impute individual responsibility to Respondent Farin Fleming for any acts, omissions or failures of the other Terranova Respondents, no sanction of any kind may be taken against her.

ORDER

The allegations brought against Farin Fleming are DISMISSED.

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

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

So Ordered this day of , 2011 at Washington, DC.

TERRANOVA ENTERPRISES, INC d/b/a ANIMAL ENCOUNTERS, INC.; DOUGLAS KEITH TERRANOVA; WILL ANN TERRANOVA; FARIN FLEMING; CRAIG PERRY d/b/a PERRY'S EXOTIC PETTING ZOO; PERRY'S WILDERNESS RANCH & ZOO, INC.; EUGENE ("TREY") KEY, III; KEY EQUIPMENT COMPANY, INC. d/b/a CULPEPPER & MERRIWEATHER CIRCUS.
AWA-Docket Nos. 09-0155 and 10-0418.
Decision and Order.
Filed December 20, 2011.

AWA

Colleen Carroll, Esq. for APHIS.

Bruce Mornning, Esq. Derek Shaffer. Esq. Vincent Colatriano, Esq. and Michael Weitzner, Esq for Respondents.

Decision and Order by Administrative Law Judge Janice K. Bullard.

DECISION AND ORDER (KEY EQUIPMENT COMPANY, INC., d/b/a CULPEPPER & MERRIWEATHER CIRCUS and EUGENE ("TREY") KEY

I. INTRODUCTION

The above captioned matters involve administrative disciplinary proceedings initiated by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"; "Complainant"), against Terranova Enterprises Inc., d/b/a Animal Encounters, Inc.; Douglas Terranova; Will Ann Terranova; Farin Fleming ("Terranova Respondents"); Perry's Wilderness Ranch and Zoo, Inc., d/b/a Perry's Exotic Petting Zoo; Craig Perry ("Perry Respondents"); Eugene "Trey" Key, III; and Key Equipment Company, Inc. ("Key Respondents")[1]. Complainant alleges that Respondents violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131- 2159; "the Act"), and the Regulations and Standards issued under the Act (9 C.F.R. §§ 1.1-3.142; "Regulations and Standards").

Procedural History

In a Complaint filed on July 23, 2009, amended on June 8, 2010, Complainant alleged that the Key, Terranova, and Perry Respondents[2] willfully violated the Act and the Regulations on multiple occasions between 2005 and 2008. Complainant filed another Complaint on September 7, 2010, charging the Terranova Respondents with additional violations of the Act. Generally, the Complaints allege that Respondents failed to properly handle and care for a variety of animals; failed to maintain proper records and facilities; failed to allow access to facilities for inspection by inspectors; and exhibited animals without proper licenses.

The two Complaints were consolidated, but in deference to the joint request of the Key and Perry Respondents, I found it appropriate to partition the hearing between the allegations raised in the 2009 Complaint and those raised in the 2010 Complaint. The events allegedly

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[1] I have issued separate Decisions and Orders addressing the charges against the other named Respondents.

[2] The Complaints also named an individual, Sloan Damon, as a Respondent, but Complainant and Respondent Damon entered into a Consent Decision dismissing Mr. Damon from the cause of action, which was filed with the Hearing Clerk for OALJ on January 31, 2011. Accordingly, I shall not specifically address charges against Mr. Damon in this Decision and Order.

underlying the 2009 Complaint were addressed in a hearing that commenced on February 17, 2011 and continued through February 25, 2011, held in person in Washington, D.C., and through audio-visual equipment located in Texas, Iowa and Missouri. Events involving the Terranova Respondents alone were addressed at a hearing that was held on June 1 and 2, 2011 in Dallas, Texas.

Complainant is represented by Colleen A. Carroll, Esq., Office of the General Counsel, Washington D.C. The Terranova Respondents are represented by Bruce Monning, Esq.; the Perry Respondents are represented by Larry Thorson, Esq.; and the Key Respondents are represented by Derek Shaffer, Esq. and Michael Weitzner, Esq. At the hearings, witnesses testified and I received into evidence[3] the parties' exhibits. At the hearing that commenced on February 17, 2011, I admitted to the record Complainant's exhibits identified as CX-1 through CX-67; Terranova Respondents' exhibits TX-1 through TX-41; Key Respondent exhibits KX-1 through KX-30; and Perry Respondents' exhibits PX-1 through PX-8. In addition, the parties entered into stipulations regarding the admissibility and authenticity of the documentary evidence, with the exception of certain photographic and holographic evidence. Tr. at 90-140.

At the hearing that commenced on June 1, 2011, I admitted to the record exhibits CX-68-93, and TX-42, 43. I granted Respondent's objection to the testimony of Margaret Whittaker. Tr. at 3162 - 3206. Pursuant to my Order of June 28, 2011 the parties submitted corrections to the transcript, which I adopted by Order issued August 8, 2011. The parties submitted written closing argument pursuant to my Order of June 28, 2011.

The instant decision[4] is limited to Eugene ("Trey") Key, III, an individual and Key Equipment Company, Inc., d/b/a Culpepper & Merriweather Circus, and is based upon consideration of the record evidence; the pleadings, arguments and explanations of the parties; and controlling law.

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[3] I excluded from the record CX-23. Tr. at 116.

[4] In this decision, exhibits shall be denoted as follows: Complainant's shall be "CX-#"; Terranova Respondents' shall be "TX-#"; Perry Respondent shall be "PX-#"; Key Respondents shall be "KX-#". References to the transcript of the hearing shall be denoted as "Tr. at [page] #".

II. ISSUES

Is either the Key corporate Respondent or Eugene Key IIIs responsible for any violations of the Act pertaining to elephants owned by the Terranova Respondents?

Did the Key corporate Respondents violate the Animal Welfare Act, and if so, what sanctions, if any, should be imposed because of the violations?

Is Eugene ("Trey") Key, III personally liable for acts of the corporate Respondents?

III FINDINGS OF FACT AND CONCLUSIONS OF LAW[5]

A. Admissions

In its Answer to the Amended Complaint filed June 23, 2010, Respondents admitted that Key Equipment Company, Inc. ("Key Equipment") is an Oklahoma corporation, number 1900657188 doing business as "Culpepper & Merriweather Circus" ("the Circus"). The corporation's registered agent, is Brian Galvano. Respondents held Animal Welfare Act license number 73-C-0144 during the periods relevant to this adjudication, and they operated as an exhibitor under the Act at all pertinent times. Respondent Eugene "Trey" Key, III, is the president of Key Equipment Company, Inc., and Manager of the Circus. The Circus is an animal exhibition business operated for profit, and as of 2008, when its AWA license was renewed, Key Equipment owned three exotic animals.

B. Summary of Factual History

During the period encompassed by the instant causes of action, all of the Respondents were in the business of exhibiting animals. Eugene Key, III, familiarly known as "Trey", manages the Culpepper and Merriweather Circus ("the Circus"). Tr. at 2217. Mr. Key is President of Key Equipment Company, which bought the Circus approximately ten years ago. Tr. at 2217. The Key Respondents hold an exhibitor's license, and Mr. Key performs in his circus with two tigers, Delia and

[5] The discussion focuses on the facts pertinent to the Key Respondents.

Solomon, and a lion named Francis that are owned by Key Equipment. Tr. at 1222

From 1987 until sometime in 2010, Douglas Keith Terranova trained animals under contract with their owners, and presented instructional programs at fairs and facilities using animals that he owned. Tr. at 2509; 2511; 2517-18. He also provided animals to circuses and production crews for television shows and films and acted with his animals. Tr. at 2517-2518. Mr. Terranova owns many different animals, including a number of tigers, camels, a cougar, and spider monkeys. Tr. at 2518-2523; CX-68. He owned two elephants, Kamba and Congo, until he donated them to the Dallas zoo in 2010. Tr. at 2801.

Craig Alan Perry has been involved with exotic animals since he was sixteen years of age. Tr. at 1700. He has exhibited animals as an individual and through the auspices of a corporation, "Perry's Wilderness Ranch & Zoo, Inc." ("PWR"), which is licensed by USDA. Tr. at 1700-1701; PX-1, 2; Attachments to Answer filed September 9, 2009. PWR owns a number of different animals, including bobcats, servals, lynx, leopards, mountain lions, tigers, lions; and animals shown in a "petting zoo", such as zebras, kangaroos, goats, cattle, and water buffalo. Tr. at 1701. The petting zoo has been in operation for many years and is not a separate entity from PWR, but rather exhibits certain animals under the name of "Perry's Exotic Petting Zoo". Tr. at 1702.

In December, 2007, Respondent Perry executed a contract with the Iowa State Fair ("the Fair") to provide entertainment in the form of a petting zoo and animal rides during the August, 2008 Fair. PX-3; Tr. at 1709. Seeking to enhance the quality of his services, Mr. Perry arranged for horse and camel rides, and engaged the Terranova Respondents to provide elephant rides. Tr. at 1707-1708; 2654-2657; 2660. It was anticipated that the elephants would be brought to the Fair from the Circus, where they were performing under an agreement between the Terranova and Key Respondents. Tr. at 2553.

The Circus travels to different venues ranging from Chicago, to the Mississippi River, to the West Coast, putting on two daily shows under "the Big Top". Tr. at 2218-19. Mr. Key performs in the Circus with large cats that the Circus acquired in 2005. Tr. at 2207. The tigers are of the golden tabby variety and were litter mates. Tr. at 2213-2214. Before the 2008 circus season began, the Key Respondents' big cats were housed in a compound on Mr. Terranova's facility. Tr. at 2222; 2551-2. The compound was built to ensure separation of Delia from Solomon

when necessary, as Mr. Terranova agreed with Mr. Key that the tigers should not be allowed to breed considering the risk of genetic mutation in offspring of litter mates. Tr. at 2223- 2225; 2341. Mr. Terranova supervised the care of the cats in Mr. Key's absence, and Mr. Key was not at the Terranova property to confirm that the tigers were kept apart when Delia was "in heat". Tr. at 2224; 2551-2552l 23030-2304. The cats did socialize together at times. Tr. at 2304.

Sometime in late March, 2008, Mr. Terranova's employee elephant handler brought the cats and elephants to the Circus, but returned shortly with the elephants to quit his job. Mr. Terranova hired Sloan Damon to replace the handler, and Mr. Damon brought the elephants back to the Circus with Richard Childs, who was hired to drive the semi-trailer that was used to transport the animals. Tr. at 231-233; 238. 230; 239; 2561-2562. The semi-trailer was partitioned to transport the elephants in the front and the cats in the rear. Tr. at 239. Mr. Damon and Mr. Childs traveled with the animals in the semi until sometime in June or July, when Mr. Key purchased a truck to carry the cats. Tr. at 239. Mr. Damon also looked after Mr. Key's cats because Mr. Damon had large cat experience. Tr. at 2228.

Shortly after he joined the Circus, Mr. Damon noticed that Mr. Key's female tiger was exhibiting behavior associated with pregnancy, although she did not appear to be expecting cubs. Tr. at 241; 2225-7. While the Circus was in Glasgow, Missouri on May 3, 2008, Delia delivered three cubs, which Mr. Damon found outside the mother's cage. Tr. at 2229-2230. It was presumed that the cubs were the offspring of Delia and her sibling. Id. Mr. Damon alerted Mr. Key to the births and Mr. Key observed Mr. Damon as he replaced the cubs in the cage with Delia, who pushed them away. Tr. at 2231; 2234. Mr. Damon was reluctant to expose the cubs to further rejection from their mother, and Mr. Key gave him approval to hand-raise the cubs. Tr. at 2233. Mr. Key was a risk to the newborns' immune systems because he lived with house cats, and he relied upon Mr. Damon's experience with large cats and his reassurance that he had hand-raised tigers in the past. Tr. at 2233-2335; 226-230. A local veterinarian, Dr. Miller, was called to the site to examine the cubs on the night they were born. Tr. at 180-184; 2236. The doctor helped supply kitten milk replacer ("KMR") and vitamins for the cubs, and injected Delia with antibiotics. Tr. at 185-188; CX-7.

Although the cubs appeared to be flourishing with hand feedings, the smallest died on May 6, 2008. Tr. at 246; 2239. It was buried at the

Circus site, and the Circus moved to its next engagement in Kansas. Tr. at 2240. When one of the remaining cubs refused to eat on May 12, 2008, Mr. Key authorized Mr. Damon to make an appointment to take the cubs to the Kansas State University Veterinary School for examination. Tr. at 247; 2241. The cub soon showed signs of a seizure and Mr. Damon drove both cubs to the Veterinary School. Tr. at 247-248; 2242. By the time they arrived for examination by Dr. Gary West, the ailing cub had suffered additional seizures and was confirmed dead on arrival. Tr. at 248; 2242; 680; CX-9. Dr. West ordered a necropsy, and placed the surviving cub in intensive care for observation. Tr. at 2243; Tr. at 680-1; CX-9; CX-12, duplicated at CX-44(a).

The following day, the doctor discharged the survivor, a male that Mr. Damon named "Tubbs", with a prescription for dietary changes. Tr. at 692-4; 2244; CX-12. Mr. Damon continued to feed and care for Tubbs, who was kept in a transport carrier in the cab of the truck used to transport the elephants and adult tigers. Tr. at 269-272. During his travels with the Circus, Mr. Damon consulted veterinarians, who examined Tubbs and wormed and vaccinated him. Tr. at 2252-2253; CX 11, 13, 15, 16, 17.

On August 3, 2008, Mr. Damon left the Circus to travel to the Fair under the arrangement between the Perry and Terranova Respondents. Tr. at 2259. Mr. Damon set up the elephant ride arena in an area close to the Petting Zoo and camel rides. Tr. at 259-260; CX 35 at p. 4. He kept the semi, with Tubbs in the cab, parked away from the public. Tr. at 270-273; CX-35 at pp. 121, 122, 127. Nearby, Mr. Damon erected a large outdoor pen where Tubbs spent some time together with a dog that Mr. Damon had found in his travels. Tr. at 272; CX-35 at p.128.

APHIS investigator Rodney Walker traveled to the Iowa State Fair, where he understood the elephants were working, in order to investigate reports that Terranova's elephants had escaped on June 4, 2008, while traveling with the Circus in WaKeeney, Kansas. Tr. at 427; 439; CX-21. Strong winds were present and although Mr. Key denied awareness of tornado advisories for the area, the weather was uncommonly changeable. Tr. at 252-254; 430; 2347. Mr. Key monitored the weather before determining that the Circus could be set up. Tr. at 252; 2344-2346. Mr. Damon had unloaded the elephants, but they were not prepared to conduct rides or show them because the weather was questionable. Tr. at 253-254. He was concerned about leaving the animals in the truck for too long. Tr. at 253. Although Mr. Damon said

the decision to conduct the rides was his, he also testified that he believed that Mr. Key could override his decisions. Id.

At some point it was decided that that the worst of the weather would bypass the Circus site, and the Circus began to set up attractions. Tr. at 253; 2279. The wind suddenly picked up, and the elephants spooked when a large inflatable amusement slide was blown toward[6] them, and they escaped from their handler. Tr. at 254. They wandered onto nearby private property and were reclaimed only after one was tranquilized. Tr. at 255-256; CX-18, 21, 22, 26. Apparently, the elephants suffered no permanent injury as the result of this incident in June, because they continued to work at the Circus with Mr. Damon and travel with him to the Fair in August. Tr. at 234. There is conflicting evidence regarding whether Mr. Damon was injured by an elephant during this incident. See, Mr. Damon's testimony, cf. CX-26. Mr. Key denied that he had any control over the elephants, observing that he was not competent to handle them. Tr. at 2280.

On August 13, 2008, APHIS inspectors Dr. Zeigerer and Dr. Sofranko, together with APHIS investigator Mike Booth, arrived at the fairgrounds to inspect the facilities and animals. Tr. at 1715; 2536; 1919; CX-38, 39. The trailers belonging to Perry and Terranova were parked in close proximity, and were inspected, as were the Petting Zoo, and the elephant and camel ride areas. Tr. at 1721; CX-38, 39. The inspectors continued to visit the Respondents over the course of several days at the Fair, and on the second day of their inspection, they observed Tubbs in the cab of Terranova's trailer. Tr. at 2602; 2612-13; CX-35 at pp. 121, 122. Mr. Damon did not have a written plan of veterinary care (Tr. at 233-234) for the cub, and the inspectors instructed Mr. Damon to have Tubbs examined by a qualified veterinarian (Tr. at 288; 2612-4).

Mr. Terranova asked the Fair veterinarians to examine the cub, and Dr. Clothier, Dr. Lucien, and two veterinary school students examined Tubbs. Tr. at 2614-2615. Dr. Clothier brought the other vets with her because it was an opportunity to see an exotic species, and Dr. Lucien had a lot of experience with a variety of animals. Tr. at 2101-2103. Dr. Clothier physically examined the cat, reviewed his history of prior veterinarian examinations, and expressed concerns about a worming

[6] There is conflicting testimony regarding whether one of the elephants was struck by the inflatable device or whether the device was blown near the elephants. I need not determine which version is accurate because the significance of the event is that it precipitated the elephants' escape.

regimen. Tr. at 2104-2107. She made some recommendations about diet, based upon Mr. Terranova's description of the cub's nutrition. Tr. at 2108. Dr. Clothier produced a certificate of health in which she basically concluded that Tubbs was healthy. Tr. at 2106; 2109; 2113; CX-32.

Dr. Clothier met with Drs. Zeigerer and Sofranko, and spoke with USDA's veterinarian Dr. Gage. Tr. at 2116-2121. Based upon her discussions with Dr. Gage, Dr. Clothier revised her dietary recommendations for Tubbs. Tr. at 2121; CX-32. Dr. Clothier's examination report was provided to the inspectors on August 15, 2008. Tr. at 2119-2121; 2629; CX-32.

Meanwhile, the inspectors were concerned about the cub's welfare, as they believed the cab of the truck where he was kept during the day was too hot; that his container was too small; that he was underweight due to an inappropriate diet; and that his living conditions were unsanitary. CX-38, 39, 48, 49. The inspectors conferred with other USDA personnel, in particular Dr. Gage, USDA's large cat expert. Id. It was decided that Tubbs' interests would be best served if he were confiscated by the inspection team and relocated to another facility. CX-50. The confiscation was effected on Saturday, August 16, 2008, after which the cub was transported to a USDA approved facility, the Blank Park Zoo, where he was examined by Dr. June Olds. CX-52; CX-54; CX-55, 55(a), 55(b). Dr. Olds concluded that the cub had worn an ill-fitting harness that caused skin abrasions, that he was underweight, and had suffered a wound near his right eye. CX-54, 55. X-rays needed to be highlighted to see the tiger's bone structure, but Dr. Olds did not have enough experience reading X-rays to say whether they depicted normal or abnormal tiger cub bones. Tr. at 573; CX-53.

The inspectors cited all of the Terranova and Key Respondents with violations of the Act regarding the care of the tiger cubs. CX-48, 49.

C. Prevailing Law and Regulations

The purpose of the Animal Welfare Act, as it relates to exhibited animals, is to insure that they are provided humane care and treatment (7 U.S.C. § 2131). The Secretary of Agriculture is specifically authorized to promulgate regulations to govern the humane handling and transportation of animals by (7 U.S.C. §§ 2143(a), 2151). The Act requires exhibitors to be licensed and requires the maintenance of records regarding the

purchase, sale, transfer and transportation of regulated animals. 7 U.S.C. §§2133, 2134, 2140. Exhibitors must also allow inspection by APHIS inspectors to assure that the provisions of the Act and the Regulations and Standards are being followed. 7 U.S.C. §§ 2142, 2143, 2143 (a)(1) and (2), 2146 (a).

Violations of the Act by licensees may result in the assessment of civil penalties, and the suspension or revocation of licensees. 7 U.S.C. § 2149. The maximum civil penalty that may be assessed for each violation was modified under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note) and various implementing regulations issued by the Secretary. Though the Act originally specified a $2,500 maximum, between April 14, 2004 and June 17, 2008 the maximum for each violation was $3,750. In addition, 7 U.S.C. § 2149(b), was itself amended and, effective June 18, 2008, the maximum civil penalty for each violation was increased to $10,000.

The Act extends liability for violations to agents, pursuant to 7 U.S.C. §2139, which states, in pertinent part: "the act, omission, or failure of any person acting for or employed by . . . an exhibitor or a person licensed as . . . an exhibitor . . . within the scope of his employment or office, shall be deemed the act, omission or failure of such . . . exhibitor as well as of such person." 7 U.S.C. §2139.

Regulations promulgated to implement the Act provide requirements for licensing, record keeping and attending veterinary care, as well as specifications for the humane handling, care, treatment and transportation of covered animals. 9 C.F.R. Chapter 1, Subchapter A, Parts 1 through 4. The regulations set forth specific instructions regarding the size and environmental specifications of facilities where animals are housed or kept; the need for adequate barriers; the feeding and watering of animals; sanitation requirements; and the size of enclosures and manner used to transport animals. 9 C.F.R. Chapter 1, Subchapter A, Part 3, Subpart F. The regulations make it clear that exhibited animals must be handled in a manner that assures not only their safety but also the safety of the public, with sufficient distance or barriers between animals and people. Id. Exhibitors are also required to engage a veterinarian and develop a written plan of veterinary care appropriate for each species of animal exhibited.

The burden of proof on Complainant is the preponderance of the evidence. *In re John Davenport, d/b/a King Royal Circus*, 57 Agri. Dec. 189 (1998).

D. Discussion

1. Liability of Key Respondents for Terranova Actions

The AWA provides, in pertinent part: "[w]hen construing or enforcing the provisions of this chapter, the act, omission, or failure of any person acting for or employed by …an exhibitor or a person licensed as…an exhibitor…shall be deemed the act, omission or failure of such exhibitor…[or] licensee…as well as of such person". 7 U.S.C. § 2139. "[T]the term 'person' includes any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity." 7 U.S.C. § 2132(a).

a. Actions related to tigers owned by Key Respondents

I have considered that no one raised the defense that the Act should not apply to the tiger cubs, which had not been exhibited in any manner. Therefore, I find that activities related to the tiger cubs born at the Circus are subject to the AWA.

The record establishes that the Key corporate Respondent, which is licensed under the Act, is responsible for the acts of Mr. Damon that affected the animals that Respondent owned. Mr. Key entrusted the care of the newborn tigers to Mr. Damon. Tr. at 2233-2234. Although Mr. Damon was not paid by Respondents (Tr. at 275-276), he "answered to" Mr. Key and Mr. Terranova (Tr. at 323). Mr. Terranova provided advice about caring for the cubs. Tr. at 242, 307-308; Tr. at 2701. 2707-2708; CX-65. Mr. Damon secured the paperwork to transport the elephants and the cub to the Fair (Tr. at 285-285) and listed the surviving cub, "Tubbs", as Terranova's animals for economic reasons (Tr. at 309; CX-44). Mr. Terranova sought out a veterinarian to examine Tubbs at the Fair. Tr. at 2724; 2733; CX-32. Mr. Terranova offered to take Tubbs from the Fair to his home facility in Kaufman, Texas, and also offered to house all the cubs after they were born. Tr. at 2708, 339. Mr. Terranova interacted with APHIS inspectors at the Fair with respect to the cub. Tr. at 2734.

Each of these activities signifies the exercise of control over animals, and to that extent, Mr. Terranova and his employee acted as agents for the Key Respondents. Principals are liable for acts performed by their agents within the scope of their authority. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). The knowledge of an agent may be

imputed to the principal where it is relevant to the agency and to the matters entrusted to the agent. *Fleming v. United States*, 648 F.2d 1122 (7th Cir. Wis. 1981).

Mr. Key traveled with Mr. Damon and checked with him about the condition of the tiger cubs "five times a day". Tr. at 2240. Mr. Key reimbursed Mr. Damon for expenses related to the care of the tiger cubs and paid for veterinary care. Tr. at 287-289; KX-16. Mr. Key claimed that the corporation owned the tigers, and by extension, the cubs. Tr. at 2209.

I find that the Key corporate entity is liable for any violations arising from actions relating to their tigers and their offspring.

b. Actions regarding Terranova Elephants

On June 5, 2008, those responsible for handling Terranova's elephants failed to handle the elephants as carefully as possible, resulting in their escape. Severe weather was in the area, resulting in uncertainty about whether the Circus would perform. Tr. 253; Tr. at 2345-2350. Considering Mr. Damon's credible testimony about Mr. Key's surveillance of weather forecasts (Tr. at 252-253), Mr. Damon's decision to unload the elephants presented risks related to the unpredictable state of the weather that appear to outweigh any risk presented by their confinement to their transportation vehicle.

Although weather can pose unpredictable hazards, the forecast on June 5, 2008 included predictions of high winds, resulting in the delay of the Circus. Tr. at 253-254. Although it is unlikely that anyone could have foreseen that wind would blow an inflatable amusement slide close enough to the elephants to provoke a stampede, high winds always portend the risk of bodily injury and property damage. Mr. Damon's decision to expose the elephants to fluctuating and severe weather conditions jeopardized their safety. Despite Mr. Damon's opinion that Mr. Childs was competent to handle the elephants, the record does not establish a basis for that opinion, and rather demonstrates that Damon had insufficient help. See, Tr. at 232, 311-312.

There is evidence that Mr. Damon had been injured by his charges on several occasions[7], including an incident where he allegedly suffered broken teeth and ribs. CX-26; Tr. at 250-251. Considering Mr. Damon's history of problems from the elephants, the potential for severe weather

[7] There is contradictory evidence regarding whether Mr. Damon was injured on June 5, 2008. CX-26; 18.

should have inspired extra caution from the handler. Although the event ended with no long-term negative implications, the elephants were out of their handler's control for hours, and one had to be tranquilized before being restrained, which most certainly represents harm and stress to an animal.

Mr. Key credibly testified that he had no experience handling the elephants and could not have recaptured them, but he followed his protocol for escaped animals when the elephants got loose in WaKeeney. Tr. at 2282. Although he testified that the Circus did not have a written escape and capture plan[8], he reviews the protocol with staff regularly. Tr. at 2353. He considered the elephants to be entirely within Mr. Damon's control, and did not have a plan specifically addressing them. Tr. at 2280; 2354. Mr. Key did not know how long Mr. Damon had trained with the elephants, and was not too concerned about them, as they were not his. Tr. at 2355. Mr. Terranova expected Mr. Damon to take whatever actions promoted the elephants' interests, regardless of Mr. Key's opinion. Tr. at 2677.

I find no evidence of an agency relationship between the Key and Terranova Respondents relative to the elephants. Mr. Key did not pay Mr. Damon for his activities relative to the elephants, and Mr. Damon was free to take the elephants away from the Circus. Although there was a verbal agreement between the Terranova and Key Respondents to exhibit the elephants at the Circus, there is little evidence regarding who profited from the arrangement.

The preponderance of the evidence establishes that Terranova failed to exercise sufficient care when assigning Mr. Damon full responsibility to travel and care for elephants on the road. Mr. Damon trained with Mr. Terranova and the elephants for a brief period before setting off for the Circus in the spring of 2008 with no other help but an individual whose highest credential was the possession of a commercial driver's license. I fully credit the testimony of elephant handler Tim Hendrickson, who believed that training and adequate personnel are crucial when working with elephants. Tr. at 3258-3275. I decline to hold the Key Respondents liable for actions of Terranova's elephant handlers that led to their escape, and those allegations are dismissed.

I further dismiss allegations charging the Key Respondents with failure to have an attending veterinarian to care for Terranova's

[8] The record includes an undated written "Animal Retrieval Protocol" for Respondents. KX-15.

elephants. The record does not establish that the Key Respondents acted as the Terranova's agents regarding the exhibition of Terranova's elephants, and those charges are likewise dismissed.

2. Did Key Respondents violate the AWA

The Key Respondents are charged with violations of the Act that generally fall within the categories of failing to notify APHIS regarding changes in corporate management or location; handling and care of animals; retaining veterinarians and having a plan of, and providing, veterinary care. The allegations and evidence are summarized as follows:

a. Failure to Notify APHIS of Changes in Corporate Management

Respondents are charged with violating 9 C.F.R. §2.8 because it has been alleged that Key Equipment has been an inactive and suspended corporation during the period pertinent herein. See, amended Complaint. No record evidence has been submitted to support these allegations, and I find that they are unsubstantiated on those grounds. Further, the prevailing regulation states in its totality:

A licensee shall promptly notify the AC Regional Director by certified mail of any change in the name, address, management, or substantial control or ownership of his business or operation or of any additional sites within 10 days of any change.

9 C.F.R. §2.8.

The record fails to establish that Respondents neglected to abide by the directives encompassed by the prevailing regulation. Respondents have admitted that Eugene Key III is the manager and operator of the business enterprise, and therefore there is no evidence of a change in the name, address, management, control or ownership of Respondents' operation. Moreover, Respondents have provided notice to APHIS of changes in exhibition sites during the time period at issue. KX-19, 20. I note that APHIS made no effort to verify the legal status of the corporate entity before reissuing its AWA license. KX-17; 18. Inspection Reports are directed to Key Equipment Co. KX-1, KX-2, KX-3, KX-4, KX-21. This charge is not substantiated and is hereby dismissed.

b. Handling of Animals

Allegations of failure to handle animals as carefully as possible relating to Delia's pregnancy, and birth and death of cubs

On May 2 or 3, 2008, the Key's female tiger, Delia, gave birth to three cubs while traveling with the Circus in Glasgow, Missouri. Tr. at 239. I fully credit Mr. Damon's testimony that although Delia exhibited behaviors shortly before the birth that may have signified pregnancy, she did not have the appearance of pregnancy. Tr. at 241. Delia and her litter mate were generally kept separated when housed at the Terranova facility to avoid the chance of their mating because offspring of litter mates are predisposed to genetic mutations, as Dr. Gage conceded. Tr. at 2224-2234; 2683-2694; 952; 241. It was assumed that the siblings were kept separate. Dr. Mohr issued a certificate of veterinary inspection of his examination of Delia on February 29, 2008 before she was transported to the Circus, and did not note that she was pregnant. KX-6; TX-25. The preponderance of the evidence demonstrates that Delia's pregnancy was not apparent and not known until ten or so days before she gave birth. The surprise birth of her cubs while traveling with the Circus does not constitute mishandling of Delia. Mr. Key's authorizations for veterinary care for Delia and the tiger cubs that were eventually born demonstrate his attention to the well-being of the animals.

Mr. Key testified that Delia appeared eager to exercise and workout in her regular routine a couple weeks after the birth of the cubs. Tr. at 2307. I accord weight to his opinion, considering his familiarity with the tiger. In addition, there is no evidence that Delia's activity posed a risk of harm or discomfort to her. Mr. Key testified that he kept the tigers out of the show for two to three weeks after Delia gave birth. Tr. at 2307. The record does not reveal whether Delia participated in Circus acts after her pregnancy was suspected.

Respondents acted in a responsible manner after Delia rejected the cubs following their birth. Mr. Damon and Mr. Key immediately contacted a veterinarian, Dr. Stephen Miller, who examined her and administered antibiotics. Tr. at 185; CX-7. Dr. Miller found no evidence of stress, physical harm, or discomfort. Id. Dr. Miller also examined the newborn cubs and provided kitten milk replacement (KMR), as it was apparent that Delia had rejected them and would not nurse them. Tr. at 186-188. Dr. Gage agreed with Mr. Damon that it was not uncommon for tigers to reject their first litter, and in such event, cubs would be hand-reared. Tr. at 951; 888; 358. Although Mr. Damon acknowledged that raising cubs by human hand may make them easier to train (Tr. at

358), I credit his testimony that he reintroduced them to their mother before volunteering to raise them (Tr. at 358-359).

The record establishes that the Respondents exercised care in handling the newborn cubs. They were examined by a licensed veterinarian within hours of their birth, and they followed his advice about nutrition. Although the smallest of the cubs died within days of birth, it has been generally acknowledged that newborns that do not have the benefit of colostrum are likely to have compromised immune systems. Tr. at 189; 690-699;895-898. Although a necropsy was not performed on the first cub that died, the regulations do not require such, and the early death of rejected cubs is not uncommon. The regulatory scheme does not require an examination by an expert with exotic cat experience. KX-26.

On May 12, 2008, one of the remaining male cubs developed seizures, and Mr. Damon took the survivors to Kansas State University, where Dr. Gary West, a veterinarian with large felid experience, examined them. Tr. at 681; CX-8; 9; CX-9a; CX-12. The seizing cub had died en route, and necropsy revealed that the animal was immuno-compromised and had suffered from a fatal e-coli infection. Id. The lone survivor was kept for observation, and Dr. West found evidence of hypoglycemia, hyponatremia and hypochloridema, which he related to improper diet. Tr. at 684-680; CX-9, 12. Dr. West released the cub the following day with a prescription for proper nutrition and the recommendation that the cub be weighed daily. Tr. at 692-695.

Respondents' newborns slept in a laundry basket lined with blankets over an electric heating blanket. Tr. at 194; CX-7. They were kept in the cab of the semi that was used to transport the elephants and tigers from site to site. Tr. at 270-272. At the Fair, Tubbs was fed with a recycled soda pop bottle. CX-44.

The contrast between Dr. Gage's description of best practices for raising newborn tigers and the living quarters of Delia's cubs could not be starker. I fully credit Dr. Gage's opinion regarding the best care that could have been provided to cubs whose mother rejected them before they had the benefit of colostrum. Dr. Gage testified that in the facility where she worked, newborn cubs that are hand raised are kept in the equivalent of sterile surroundings, in specially designed water warmed isolettes. Tr. at 891-894. Every care is taken to keep too many people from handling the cubs, in order to minimize risks from exposure to disease on their delicate immune systems. Tr. at 891-892; 896-900. Dr.

Gage expressed her surprise that the cub survived the conditions of its surroundings, which she found unsanitary. Tr. at 930-950. She testified that the dirty conditions of a truck, and the potential risk of burns from heating pads, were evidence of unsafe handling. She believed that more sanitary and better physical facilities would possibly have saved the lives of the other cubs.

I have no doubt that Respondents could have provided a cleaner environment and better equipment, had they been prepared for the birth of cubs, which was unexpected. The question is whether the Act and regulations required Respondents to do more than they were able to improvise. I credit Mr. Key's testimony that Mr. Damon was provided help with laundry, food, and living quarters when he was with the Circus, and that he disapproved of Tubbs' living conditions at the Fair. Tr. at 2380; 2384; See, CX-47. I further credit Mr. Key's explanation that he turned over the care of the tiger cubs to Mr. Damon because Mr. Key's association with house cats presented an additional risk to the cubs. Tr. at 2230-2233; 891. The record supports the testimony that Mr. Key authorized veterinary care for the cubs from the time of their birth. CX-12; KX-7; 9;11; 13; 15; 16; 17.

Neither the Act nor regulations define the level of care suggested by USDA. There is no bright line rule that defines how animals are to be "handled as carefully as possible". Dr. Gage described best practices in an idyllic setting[9], but there is no evidence that her recommendations constitute the standard of care for the typical animal exhibitor. As the 6th Circuit Court of Appeals observed in *Hodgins v. U.S.D.A.*, 59 Agric. Dec. 534 (6th Cir. 2000) the regulations do not contemplate "utopian conditions". *Hodgins*, supra. I credit Dr. West's opinion that newborns in zoos are not kept in sterile incubators, and so long as the surroundings were "fairly clean" and isolated from other animals, cubs should thrive. Tr. at 731-732.

In addition, although Dr. Gage saw pictures of the cubs shortly after their birth, the bulk of the pictures in evidence depict the conditions of Tubbs' living arrangements at the Fair. The record establishes that when Mr. Damon was traveling with the Circus he had help that was unavailable at the Fair. Moreover, Dr. Gage admitted that the best of care was not always enough to prevent disease in cubs that were raised

[9] It is axiomatic that animals born at a zoo with research facilities and a host of volunteers will have more luxurious surroundings and better equipment than an animal born at a traveling circus.

under her supervision (Tr. at 923-924) and further admitted that "[s]ometimes animals will die through no fault of anyone" (Tr. at 986). Although Dr. Gage would have prescribed Ebisilac, Dr. West, who has experience with large felids, recommended that the surviving cub continue to take the KMR that had been prescribed by Dr. Miller. CX-8, 9; 12. Tubbs was seen by a number of veterinarians who pronounced him healthy. The consensus of the medical opinions of record is that hand reared cubs are hard to raise under the most sterile and supportive conditions. Dr. Gage's opinion that cleaner facilities may have prevented the death of the two cubs is speculative and not fully supported by the evidence, most persuasively, the survival of one of the cubs.

The preponderance of the evidence fails to demonstrate that the newborn cubs were mishandled from the time of their birth until the events that led them to Dr. West at Kansas State University. They were immediately examined by a veterinarian, who prescribed a diet that the Respondents followed, although it is difficult to determine how carefully Respondents adhered to the instructions. There is agreement among the veterinarians of record that cubs who do not nurse are at heightened risk of developing problems, as the lack of colostrum compromises their immune systems. The cubs were at further risk because of their heritage as offspring of sibling tigers.

Although no necropsy was performed on the first cub that died, she was at risk due to her size and compromised immune system. The second death was due to an infection that the cub's compromised immune system could not ward off. Dr. West had seen hand raised cubs succumb to secondary infections. Tr. at 727. The record does not support the conclusion that the cubs died because of unsanitary conditions. I credit Dr. West's testimony "that septicemias can occur in the cleanest of conditions" and "that the mortality rate for hand raised carnivores is fairly high". Tr. at 708; 712. It is significant that Dr. West observed that cubs who have received colostrum may still fall to bacterial infection. Tr. at 712. Dr. West did not attribute the death of either cub to actions of any of the Respondents, and he was satisfied that Mr. Damon had acted appropriately on behalf of the animals. Tr. at 732.

I accord substantial weight to Dr. West's opinions, and find that they outweigh the speculative conclusions made Dr. Gage. I conclude that Respondents' care of Delia and her cubs, both before and immediately after they were born, constitutes safe handling of animals under the Act, with the exception of providing adequate nutrition.

Tubbs' nutrition

Mr. Damon took on the demanding job of hand rearing tigers amidst his other duties relating to exhibiting the Terranova elephants. Although Mr. Damon may have successfully hand reared many tiger cubs in his career, he testified that he had last hand raised a cub from birth in 1984. Tr. at 257. He used his own feeding formula, which was based on estimates. Tr. at 228-230; 249. Mr. Damon rejected Mr. Terranova's advice, and did not carefully follow Dr. West's prescription, and as a result, Tubbs' growth and well-being were compromised. Laboratory tests conducted by Dr. West at his examination of Tubbs on May 12, 2008, when Tubbs was 10 or 11 days old, revealed hypoglycemia, hyponatremia and hypochloridema, which the doctor related to improper diet. CX-9; CX-12. Dr. West released the cub the following day with a prescription for proper nutrition and the recommendation that the cub be weighed daily. Id.

Although Mr. Damon may have believed that he fed Tubbs in a manner consistent with Dr. West's prescription, Mr. Damon admittedly failed to weigh the cub daily, lacking a scale, and presumably failing to ask Mr. Key to buy one[10]. Tr. at 2321. When consulted after the birth of the cubs, Mr. Terranova made recommendations of a diet that more closely resembled that endorsed by Dr. Gage. See, CX-67 (email from Terranova dated May 6, 2008). Mr. Damon relied upon his own formula instead, which failed to keep up with Tubbs' nutritional needs. Photographs relating to Mr. Damon's preparation of Tubbs' meals depict a less than scientific approach to volumes and measures. CX-47. He also had not supplemented the cat's diet with meat until advised to do so at the Fair. I credit Mr. Damon with making adjustments to Tubbs' diet at certain times, but the record conclusively establishes that the cub was underweight by a significant proportion. Tr. at 556.

I decline to speculate whether Tubbs would have suffered metabolic bone disease had Mr. Damon continued the dietary regime in place. There is no definitive diagnosis of that condition, even though X-rays needed to be highlighted to reveal the cub's bone structure. Tr. at 650 . I note that ground turkey meat had been added to the diet sometime during the Fair[11], and that Dr. Clothier intended to share a more rigorous diet plan with Mr. Damon that was recommended by Dr. Gage. Dr. Gage

[10] Mr. Damon testified that Mr. Key had never refused to pay for Tubbs' care. Tr. at 288.

[11]The meat was added to the cub's diet at the Fair after Mr. Terranova's discussion with Dr. Clothier. Tr. at 2759.

testified that metabolic bone disease was reversible with sufficient calcium. Tr. at 909; CX-40(a). Therefore, it is possible that Tubbs' dietary deficiencies would have been corrected. Regardless, the haphazard approach to Tubbs' nutrition resulted in the cub being significantly underweight, which constitutes a failure to handle an animal carefully.

The deficiencies in Tubbs' nutrition are imputed to Key Equipment. Mr. Key was in daily contact with Mr. Damon regarding the welfare of the tiger cubs. He spoke with Dr. West, who reviewed his examination of the tiger and his prescription for his growth. Tr. at 2247. Having entrusted the cub's welfare to Mr. Damon, Mr. Key, on behalf of Key Equipment, assumed liability for the acts of its agent. Accordingly, Key Equipment is jointly and severally responsible for the acts of the Terranova Respondents and Mr. Damon regarding Tubbs' nutrition.

Adequacy of Tubbs' living facilities and restraints

Respondents are charged with housing Tubbs in a small dog carrier in an overly hot transport truck, with insufficient ventilation. I accord weight to Mr. Damon's testimony that Tubbs was free to roam the entire interior of the truck's cab, and was confined to the carrier for limited periods of time during the day. Tr. at 271-272. The carrier allowed the cub to fully stand and turn, contrary to testimony from inspectors. See, CX-47. Respondents provided a large outdoor pen where Tubbs was allowed to exercise. Tr. at 273; CX-47. Mr. Damon kept Tubbs in the pen at night, while he slept nearby. Id.

APHIS inspectors did not observe the cub for an entire day and night, and were unable to render a reliable opinion regarding where he spent his time, and for how long. There is no credible testimony demonstrating how Tubbs suffered from confinement for periods of time in a dog carrier that was the size of one used to restrain him when the government confiscated him and transported him to a distant facility. In addition, the inspectors' opinion totally disregarded the evidence involving the outdoor kennel, and the likelihood that he was free to roam the cab of the truck at times. This charge is not supported by the preponderance of the evidence.

Additionally, the record does not substantiate that the cab of the truck was routinely unventilated and overly hot. Mr. Damon kept the windows and vents open and ran a fan constantly when Tubbs was in the truck. Tr. at 271-272. I accord substantial weight to Mr. Damon's

testimony that during their inspection, one of the inspectors, either Dr. Sofranko or Dr. Zeigerer, asked him to turn off the fan that he otherwise ran continually. Id.; Tr. at 281. A kestrel recorded the interior of the cab without the fan, and the temperature registered above that recommended by Dr. West for the comfort of a tiger cub. CX-47. However, there is no evidence of the temperature of the cab while the fan was running. Mr. Damon testified that the inspectors wanted the fan off to "get an accurate reading" (Tr. at 281), although the accurate temperature would have been taken in the conditions in which Tubbs was kept, i.e., with a fan circulating the air. I fully credit Mr. Damon's testimony on this issue, noting his general concern for Tubbs' welfare.

Dr. Gage testified that Tubbs would not be comfortable at high temperatures all day long, but could tolerate them for a time. Tr. at 931. Overall, as I credit the testimony that the cub was free to roam the entire cab and was allowed outside intermittently to spend time in a large kennel, I am unable to conclude that he was consistently confined in an area with unhealthy temperatures[12]. Even crediting the somewhat unreliable evidence regarding the temperature of the cab, there is no meaningful explanation of record as to why exposure to a high temperature for a portion of the day posed a hazard to the cub. I decline to give additional weight to Drs. Sofranko and Zeigerer, who have no special experience with tigers. I accord some weight to the article entitled Survey of the Transport Environment of Circus Tigers (KX-27) but am unable to equate the conditions of tigers described therein to Tubbs' confinement in the truck cab.

Furthermore, the inspectors appeared to have no immediate concerns for the temperature of the enclosure, as the inspectors did not provide Respondents with the opportunity to resolve the issue immediately. Respondents were not advised of the alleged violation until late at night on August 14, 2008. Tr. at 290. Therefore, it is inappropriate to conclude that Respondents failed to take measures to alleviate any impact from the climate inside the truck.

Similarly, there is no credible evidence that Respondents played loud music to mask the tiger's cries, as alleged by Dr. Gage. Tr. at 926. Dr. Sofranko testified that Mr. Damon told her and Dr. Zeigerer that he had the radio on so people would not hear the tiger. Tr. at 1558. Mr. Damon testified that he wasn't trying to hide Tubbs, but he "did not want

[12] Parenthetically, there is no evidence of the outdoor temperatures at the Fair in Iowa in August.

him on display". Tr. at 328. Dr. Sofranko did not offer any evidence regarding the volume of the radio, and only asserted that Mr. Damon turned it off when the inspectors approached the truck. Tr. at 1558. Dr. Zeigerer did not recall whether she heard a radio as she approached the truck. Tr. at 1219. Dr. Gage was not at the Fair during the relevant period, and based her opinion on a conversation with Dr. Sofranko. CX-34. The preponderance of the evidence does not establish that a radio was played loudly to camouflage Tubbs' vocalizations. Further, whether loud music played or not, there is no evidence about how that condition would pose harm or stress to the tiger, as Dr. Gage merely testified that it "did not sound like a good situation" to her. Tr. at 926. That opinion is less than academic and is insufficient to sustain this allegation.

The photographic evidence of the cab of the truck is decidedly aesthetically unpleasing. CX-47. However, there is no credible evidence[13] demonstrating that the presence of trash in a slovenly kept truck represented anything but an eyesore to the inspectors. The record fails to establish how the truck was unsanitary to the point of representing harm or imposing stress on a growing tiger[14], considering the fact that the cub had survived until August, 2008, and a number of veterinarians considered him healthy. Although I credit Dr. Gage's testimony about the benefits of sanitation, particularly for an immuno-compromised animal, the record does not support that Tubbs' health was adversely affected by his dirty surroundings. I have already concluded that the physical surroundings of the infant tigers while at the Circus were cleaner than at the Fair, relying upon Mr. Key's reliable testimony. It follows, therefore, that Tubbs' had spent most of his life in a cleaner environment. This charge is dismissed.

Respondents are charged with keeping Tubbs in a harness that was too small and that caused discomfort that was evidenced by the condition of the tiger's skin. Dr. Olds believed that a growing cat could quickly outgrow a harness, and she found that Tubbs had chafed skin under his axilla Tr. at 553-554. Photographic evidence depicts areas under the tiger's legs that appear pink. CX-59. Dr. Clothier did not

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[13] Although it is common knowledge that unsanitary conditions can lead to certain diseases, I decline to take official notice that the conditions of the truck posed a health risk to Tubbs. This conclusion requires a medical opinion, which has not been proffered.

[14] Or growing children, for that matter. As a parent of three children who survived adolescence, I take official notice that a slovenly bedroom does not ipso facto represent unhygienic conditions.

believe that the tiger's skin was chafed, noting that the animal had very little hair in the areas where the strap met the skin. Tr. at 2144. Although Dr. Clothier did not inspect the tiger's underarms, she was able to examine him without removing the harness, and assured herself that it was not too tight by placing her fingers between the strap and the animal. Tr. at 2143-2144. In any event, any problem posed by a too tight harness would have been easily remedied by removing it, as Dr. Olds acknowledged, and which the inspectors failed to advise Respondents. I find that the evidence on this issue is in equipoise and Complainant has not met its burden of proof.

Wound treatment

Mr. Damon told Mr. Key that Tubbs suffered a scratch wound to his nose when exposed to his seizing sibling during the ride to Kansas State Veterinary School. Tr. at 2244-2245. Mr. Key testified that Tubbs' nose "wound healed terribly slowly". Tr. at 2245. Although Mr. Key stated that doctors told Mr. Damon that it would have been inappropriate to dress the wound, there is no record in veterinarians' records documenting discussion of the wound. It appears that Respondents did little but wait for time to heal the wound, and I find that the failure to seek affirmative treatment for the wound represents failure to handle Tubbs carefully.

c. Adequate Veterinary Care and Attending Veterinarian

Allegations regarding animals owned by Key Respondents

Respondents are charged with failure to provide adequate veterinary care and attending veterinarians with respect to the Key's tigers. Although I have imputed responsibility for handling the tigers to the Terranova Respondents, I decline to extend all responsibility under the Act to the agents of a principal who was on site with the tigers, in control of compensating veterinarians, and who had the ability to engage a veterinarian to develop a plan of care.

Agents are responsible for acts that they consent to undertake and there is no evidence that Mr. Damon assumed responsibility for developing a plan of veterinary care. The evidence demonstrates the opposite: Mr. Damon consulted with Mr. Key and not Mr. Terranova regarding veterinary care for the tigers[15]; he followed veterinary advice

[15] Indeed, Mr. Damon ignored Mr. Terranova's early advice about hand-raising the cubs.

that Mr. Key paid for; and appeared to take an ad hoc approach to consulting veterinarians, relying upon Mr. Key's direction and the needs of the cub. CX 11, 13, 15, 16, 17. I infer that the Key Respondents had not developed a written plan for veterinary care of their big cats, since Mr. Key had asked Dr. West to draft one, and Dr. West declined on the basis of potential conflict of interest. Tr. at 2550-2552. When Dr. West was unable to draft a plan of care, Respondents failed to seek out a veterinarian who would be willing to do so.

I decline to hold the Terranova Respondents responsible for acts outside the scope of the responsibilities they assumed when agreeing to raise the newborn cubs. The preponderance of the evidence establishes that the Key Respondents alone were responsible for developing a plan of adequate veterinary care for their cats, and this allegation is sustained.

The record demonstrates that the Key tigers were provided veterinary care. Tubbs and his siblings and mother were seen immediately after the birth by Dr. Miller. After a cub experienced seizures, they were seen by Dr. West, a veterinarian with large felid experience, and Tubbs was later seen by a number of other veterinarians of unknown backgrounds (KX-7; 11, 13, 15, 16) and by Dr. Clothier (CX-32). However, there is no record that anyone engaged a primary veterinarian for Tubbs' care, or that the Circus had an attending veterinarian on staff. Indeed, Tubbs' care followed no demonstrable pattern, and the daily observations of Tubbs' care by Mr. Damon ignored recommendations by veterinarians and resulted in the cub being underfed. The preponderance of the evidence establishes that the Key Respondents failed to have an attending veterinarian, in violation of the Act and regulations.

I find that the Terranova Respondents generally were not responsible for providing veterinarian care for Tubbs. However, when Mr. Terranova volunteered to have Tubbs examined at the Fair upon order of APHIS inspectors, he acted as agent for the Key Respondents. Complainant contends that the examination provided by Dr. Clothier did not meet the standards of adequate veterinary care, as she had no large felid experience, other than observing large cats during veterinary school. Tr. at 2092. However, Dr. Clothier's credentials are at least equivalent to those of the inspectors who were on site at the Fair. Dr. Clothier is a licensed veterinarian, an adjunct professor, and in addition to being an accredited, licensed DVM, Dr. Clothier holds a PhD in epidemiology. Tr. at 2085-2093; CX-32. Dr. Clothier worked with the United States Department of Justice, and was selected to serve as one of

the attending veterinarians at the Iowa State Fair in 2008. Tr. at 2088, 2093-2095.

The Fair inspectors relied upon the opinions of Dr. Gage, who looked at pictures and made assessments about the cub's well being. Dr. Gage's credentials with respect to large felids are superlative, and it was sensible for the comparatively inexperienced inspectors to consult her. CX-34(a). However, despite Dr. Gage's opinion that the cub was poorly cared for, undernourished, and poorly treated, she did not have the benefit of examining the cub, as did Dr. Clothier. Tubbs had been seen by a number of veterinarians during the few months he lived with Mr. Damon, all of whom found him healthy. The regulations do not specify that a veterinarian be experienced with the species being examination in order to be qualified to examine an animal. If they did, then Dr. Zeigerer was not qualified to inspect elephants, and neither she nor Dr. Sofranko were qualified to inspect a tiger cub.

There is no doubt that Tubbs' diet was less than optimum, a condition that was in the process of being reversed at the Fair, when he was introduced to meat. Dr. Gage believed that more calcium was needed, and she provided a diet plan to Dr. Clothier, who did not have the opportunity to share it with Respondents because Tubbs was confiscated by USDA. CX-32; Tr. at 2126. The deficiencies in Tubbs' diet represents lack of attention to his care by his handler, and not inadequacy of veterinary care. The preponderance of the evidence establishes that Tubbs was seen by qualified veterinarians[16] at the Fair.

3. Is Mr. Key personally liable for the acts performed on behalf of Key Equipment?

All acts of the corporate entity in these circumstances arose out of decisions made by Mr. Key. It has been settled that individuals who direct licensee's activities are individually liable pursuant to 7 U.S.C. §2139. See, In *re Coastal Bend Zoological Ass'n, etc. et al*, 67 Agric. Dec. 154 (2008). I find that Mr. Key may be held personally liable for acts he performed on behalf of Key Equipment. A corporation and the individual who exercised sole control over corporate activities are jointly assessed penalties under 7 U.S.C. § 2149 pursuant to the operation of 7

[16] It appears from the record that even if Dr. Clothier had first hand experience with tiger cubs, APHIS officials would not have been impressed, as the decision to confiscate Tubbs appears to have been made before they received the report of her examination.

U.S.C. § 2139. *Irvin Wilson and Pet Paradise Inc. v. U.S.D.A.*, 54 Agric. Dec. 111 (1995)

E. Willfulness

The Administrative Procedures Act, 5 U.S.C. § 558 (c) provides for the:

Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefore, the licensee has been given -

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency. 5 U.S.C. § 558 (c).

Willfulness under the AWA has been defined as "an act done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements". *In re Pet Paradise*, 51 Agric. Dec. 1047, 1067 (Sept. 16, 1992). A willful violation occurs when a prohibited act is intentionally performed without regard to motive or erroneous advice, or is performed with careless disregard of statutory requirements. *In re Terry Lee & Pamela Sue Harrison*, 51 Agric. Dec. 234 (1992). Pursuant

to 7 U.S.C. § 2149 (a), the only requirement for the suspension or revocation of an exhibitor's license is willfulness of at least one violation. *In re Big Bear Farm, Inc. et al.,*, 55 Agric. Dec. 1107 (1996); *In re Cecil Browning, d/b/a Alligatorland Safari Zoo, Inc*., 52 Agric. Dec. 129 (1993). Willfulness is not required for cease and desist order or for monetary fine. *Id*.

This case illustrates the tension inherent in the commercial use of animals and their welfare, as many of the incidents that led to violations of the Act could have been avoided with additional help and some forethought about the consequences. The Key Respondents demonstrated a shockingly cavalier attitude regarding the health and safety of animals that they owned. Although I have found that the evidence of record does not establish that Delia' surprise pregnancy and subsequent birth of three cubs constitutes mishandling of animals, a prudent animal handler would have had the potentially pregnant tiger examined by a veterinarian.

Once the cubs were born, they were left in the care of an individual who was expediently on hand, and very economical, as Mr. Damon received no extra remuneration for rearing the tiger cubs. Although I credit Mr. Key's testimony that he had conducted some research into Mr. Damon's background and satisfied himself about the handler's experience with tiger cubs (Tr. at 2290-2291), it is unclear whom Respondents would have charged with the onerous task of hand-raising cubs in Damon's absence. It is troubling that Mr. Key purposely ignored the advice of Mr. Terranova regarding the care and feeding of the animals (Tr. at 2332-2333), particularly given Key's personal relationship with Terranova, compared with his relative lack of knowledge about Mr. Damon.

Mr. Key's operation of the Circus did not include close concern about the welfare of his animals. He had no plan of veterinary care, and no attending veterinarian, preferring to use whatever local veterinarian worked in proximity to wherever the Circus pitched its tents. This lack of plan, and Mr. Key's misplaced reliance upon Mr. Damon's self-related experience with hand-rearing tigers, led to the undernourishment of a tiger cub. In addition, by charging Mr. Damon with the sole responsibility for caring for the cubs, Mr. Key showed little regard for Mr. Damon's responsibilities to the elephants, thereby jeopardizing their well-being. The record demonstrates that the elephants' skin and feet were poorly maintained, conditions that Mr. Terranova attributed to the

burden of Mr. Damon caring for the tiger cub. Tr. at 2563; CX-42. The Key Respondents' failure to provide a plan of veterinary care and failure to safely handle Tubbs represent careless disregard of the Act and regulations that led to harm, discomfort and risk to animals.

Considering the preponderance of the evidence, I find that the Key Respondents willfully violated the AWA, prevailing regulations and standards.

F. Sanctions

1. License Revocation

The purpose of assessing penalties is not to punish actors, but to deter similar behavior in others. *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997). The Secretary may revoke or suspend the license of an exhibitor for violations of the Act. 7 U.S.C. § 2149(a). APHIS has recommended that Respondents' license be revoked, relying in large part upon the alleged failure to handle elephants as carefully as possible, leading to an escape, and failure to handle tigers carefully, leading in deaths.

I have found that the preponderance of the evidence establishes that the Key Respondents are not responsible for actions relating to the Terranova elephants. I have further found that the evidence does not demonstrate that two of the cubs died because of mishandling; there is insufficient evidence to directly relate the cause of their deaths to any actions taken by any of the Respondents. I have given careful consideration to the sanction proposed by APHIS. The sanction recommended by an administrative officer charged with enforcing statutory purposes is entitled to weight, but not controlling weight, and circumstances may support a different outcome. *In re Judie Hansen*, 57 Agric. Dec. 1072 (1998); *In re Marilyn Shephard*, 57 Agric. Dec. 242 (1998).

Considering that I have failed to find sufficient record support for the most serious allegations charged against the Key Respondents, I find that revocation of Key Equipment's AWA license would be punitive, and would not serve the remedial purposes of the Act.

The record does establish that Respondents willfully failed to develop a plan of veterinary care, and further, willfully allowed the one surviving cub of a litter of three to be hand-raised in a capricious manner that led to poor nutrition, which risked its development and health. The Terranova

Respondents are liable for violations regarding the care of the Key tigers only through the operation of the law of agency. Mr. Key had only to consult a veterinarian to develop a proper plan of care for the developing tiger cub (and his other cats) and to supervise Mr. Damon in his execution of the plan, to fulfill his obligations under the Act. The Key Respondents' deliberate failure to do so with obvious disregard for consequences to his animals, and those belong to Terranova, warrant a sanction that will act as a deterrent against circumstances that lead to unavoidable mishandling of animals.

I find that the Key Respondents' actions warrant suspension of the AWA license held by Key Equipment for a period of not less than six (6) months. If the renewal period for the license falls within that period, then the license may not be issued until the expiration of the suspension period.

2. Civil Money Penalties

Pursuant to 7 U.S.C. § 2149 (b), an exhibitor that violates the AWA, regulations or standards may be assessed a civil penalty of not more than $2,500 per violation. 7 U.S.C. § 2149 (b). When considering the propriety of assessing civil penalties for violations of the Act, the Secretary shall consider "the size of the business…, the gravity of the offenses, the person's good faith, and the history of previous violations". *Id.; In re Lee Roach and Pool Laboratories* et al., 51 Agric. Dec. 252 (1992).

The offenses are grave in that they represent willful violations of the Act that directly affect the welfare of animals. However, the violations that I have found supported by the evidence are not of the gravity alleged by Complainant. There is no evidence that the Key Respondents have a history of previous violations of the Act, and there is no evidence of Respondents' bad faith. In addition, as the result of their failure to handle Tubbs carefully, USDA confiscated the animal, thereby depriving Respondents of a valuable animal, estimated to be worth $30,000.00. Tr. at 196.

Respondents disagree with Complainant's contention that their animal exhibition business is large. Respondents operate a traveling circus that employs between 36 to 38 individuals. Tr. at 2217. The record is devoid of evidence regarding, and little argument has been advanced about, what determines the size of a business. According to regulations governing the Small Business Administration, a "small business" is defined as a

place of business in the United States that operates primarily in the U.S. or makes a significant contribution to the U.S. economy; that is independently owned and operated; and that is not dominant in its field on a national basis. 13 C.F.R. Part 121. In addition, whether a concern is a "small business" depends on the average number of employees it retains in the past 12 months, or the average annual receipts it earns over the prior three years. Id.

There is insufficient evidence of record to determine the size of Respondents' business, and I therefore find that Complainant has failed to meet its burden of proof. However, I find that this issue is immaterial, as I decline to impose monetary penalties, since my determination that Respondent's license should be suspended shall undoubtedly result in financial hardship during their period of inactivity, and the loss of their valuable animal is the equivalent of a civil money penalty.

3. Cease and Desist

The Secretary may also make an order that such person shall cease and desist from continuing such violation. 7 U.S.C. § 2149 (b). Such Order is appropriate in these circumstances.

4. Defenses

a. Vagueness of the Act

As my authority is limited to the consideration of those principles embraced by the Administrative Procedures Act, 5 U.S.C. § 551 et seq. ("APA"), I decline to address Respondents' defenses regarding the vagueness of the AWA and its implementing regulations.

5. Confiscation

Although I sympathize with Respondents' argument regarding the lack of due process involved in the confiscation of Tubbs, I am without authority to make a determination regarding their arguments. My authority is limited by the APA and the AWA and its implementing regulations. 7 U.S.C. § 2149(a), (b), (c).

6. Findings of Fact

1. Key Equipment Company, Inc is. an Oklahoma corporation, number 1900657188, doing business as "Culpepper & Merriweather Circus" ("the Circus"), with a home address in Hugo Oklahoma.

2. Respondent Key Equipment Company, Inc. held Animal Welfare Act license number 73-C-0144 during the periods relevant to this adjudication, and they operated as an exhibitor under the Act at all pertinent times.

3. Respondent Eugene "Trey" Key, III, is the President of Key Equipment Company, Inc. and Manager of the Circus operations of Respondents' animal exhibition at all times pertinent to this adjudication.

4. Respondents operate an animal exhibition business for profit, viz., a circus, which employs between 36 to 38 people, and in 2008 owned three exotic animals and leased other animal acts.

5. During 2007 and early 2008, Respondents' tigers and lion were housed at a specially built compound at a facility in Kaufman, Texas owned by the Terranova Respondents.

6. Sometime after December, 2007, the Terranova Respondents entered into a verbal agreement with the Perry Respondents to provide camel and elephant rides at the Iowa State Fair in August, 2008, in connection with Mr. Perry's contract with the Fair.

7. Respondents also entered into an agreement with the Terranova Respondents to include Terranova's elephants in the Culpepper & Merriweather Circus.

8. In April, 2008, the Terranova Respondents' former employee, Sloan Damon, traveled with the elephants to the site of the Circus.

9. Sloan Damon was responsible for caring for and handling the elephants and he helped with Respondents' large cats.

10. Although Respondents' tigers were meant to be separated at the Terranova facility in Texas, they were allowed time together, and apparently mated without the knowledge of their caretakers.

11. On May 2 or May 3, 2008, Respondents' female tiger gave birth to three tiger cubs.

12. Sloan Damon volunteered to hand raise the three tiger cubs.

13. Tiger cubs that are denied colostrum by their mother are at additional risk for illness and death.

14. One of the cubs died within days of its birth, and a second cub suffered seizures and died on May 12, 2008.

15. Necropsy of the second dead cub established septicemia and a widespread e-coli infection as the cause of its death.

16. Examination of the surviving cub by Dr. Gary West of the Kansas State University of Veterinary Medicine on May 12, 2008 revealed hypoglycemia, hyponatremia and hypochloridemia, which are conditions associated with improper diet.

17. Mr. Sloan rejected feeding advice offered by Mr. Terranova, and failed to weigh the tiger daily as recommended by Dr. West, leading to the tiger being underweight.

18. Veterinarians who examined the cub found it healthy, and no reports mention an unhealed wound on its nose.

19. On June 5, 2008, while exhibiting in WaKeeney, Kansas, the Terranova Respondents failed to handle elephants as carefully as possible, resulting in their escape after severe winds blew a slide in their vicinity. One elephant needed to be tranquilized before it was recaptured.

20. In August, 2008, Mr. Damon brought the elephants to the Iowa State Fair, where he met with Mr. Terranova and set up an elephant ride amusement near the Perry Respondents' exhibit.

21. Mr. Damon brought the surviving tiger cub with him to the Fair.

22. While at the Fair, the surviving tiger cub was housed in the cab of the Terranova Respondents' elephant trailer, where it was kept at times in a dog carrier, while at other times was allowed to roam inside the truck. The cub spent nights in a large outdoor kennel, where it was free to play with a dog that Mr. Damon had acquired.

23. The tiger cub's diet was inadequate for its age and species, resulting in it being underweight.

24. USDA confiscated the tiger cub and relocated it to a facility chosen by APHIS.

H. Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Key Equipment and Eugene Key III in his capacity as President of Key Equipment and Manager of the Circus, operated as exhibitors as that term is defined by the Act and regulations.

3. Pursuant to 7 U.S.C. § 2139, Eugene Key III's acts, omissions or failures are deemed to be his own as well as those of the corporate entity.

4. The Terranova Respondents' employee Sloan Damon assumed responsibility to raise tigers belonging to the Key Respondents, and accordingly, entered into a consensual agency relationship with the Key Respondents.

5. Complainant has failed to meet the burden of proving the following violations brought against the Key Respondents by the preponderance of the evidence, and they are therefore dismissed:

a. Violations of 9 C.F.R. §§ 2.40(a) and (b)(2), alleging failure to have attending veterinarian, and failure to establish and maintain adequate veterinarian care (allegations regarding the Terranova animals).

b. Violations of 9 C.F.R. § 2.131(b)(1), alleging failure to handle animals as carefully as possible (female tiger Delia and newborn tiger cubs).

c. Violations of 9 C.F.R. §§2.131(e); 3.126(a); 3.126(b); 3.128, pertaining to the housing of the tiger cub at the Fair and the environmental conditions of the housing.

d. Violations of 9 C.F.R. §§ 2.40(b)(1) and (b)(4), alleging failure to maintain a program of adequate veterinary care including proper escape and capture plan and equipment (regarding elephants in WaKeeney, Kansas).

e. Violations of 9 C.F.R. §§ 2.131(b)(1); 2.40(b)(1) and (b)(4), alleging failure to handle animals as carefully as possible and failure to provide adequate trained personnel to safely handle elephants in (elephants in WaKeeney, Kansas).

f. Violations of 9 C.F.R. §§ 2.40(a)(1) and (2); (b)(1) through (b)(3) alleging failure to have tiger cub examined by qualified veterinarian while at the Fair.

6. Respondents failed to develop a plan of veterinary care and failed to have an attending veterinarian provide adequate care to animals in willful violation of 9 C.F.R. §§ 2.40(a)(1) and (2); (b)(1) through (b)(3).

7. During the period from May 12, 2008 through August 15, 2008, Respondents failed to handle animals as carefully as possible in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort in willful violation of 9 C.F.R. § 2.131(b)(1), in that the surviving tiger cub's diet was insufficient for proper growth and nutrition.

8. During the period from May 12, 2008 through August 15, 2008, Respondents failed to provide to a young tiger food of sufficient quantity

and quality appropriate for the animal's age, species, size and condition in willful violation of 9 C.F.R. § 3.129(a).

9. During the period from May 12, 2008 through August 15, 2008, Respondents failed to handle animals as carefully as possible to prevent trauma and behavioral stress, physical harm and discomfort when Respondents failed to provide care and treatment to a tiger cub for a wound on its nose in violation of 9 C.F.R. § 2.131(b)(1).

10. The Administrator's determination that Respondents' AWA license should be revoked is not warranted, considering that Complainant failed to prove that Respondents are liable for violations relating to the Terranova Respondents' elephants, and failed to prove that Respondents' actions resulted in the death of two tiger cubs.

11. Respondents' willful neglect and disregard for the Act and regulations warrant a suspension of Respondents' activities under the Act for a period not to exceed six (6) months.

12. The Administrator's proposed civil money penalty is not warranted, considering the gravity and numerosity of offenses, the lack of evidence establishing the size of Respondents' business, the absence of bad faith, my imposition of a suspension of the license, and the fact that USDA confiscated Respondents' sole surviving tiger cub, which was estimated to be valued at $30,000.00.

13. An Order directing Respondents to cease and desist from violating the Act and regulations is warranted.

ORDER

1. The Key Respondents, their agents, employees, successors and assigns, directly or indirectly through any corporate or other device are ORDERED to cease and desist from further violations of the Act and controlling regulations.

2. The Key Respondents are hereby prohibited from engaging in any activities contemplated by a license issued under the AWA for a period not to exceed six (6) months, beginning with the date that this Order becomes final.

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

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

Entered this day of , 2011 at Washington, DC.

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TERRANOVA ENTERPRISES, INC d/b/a ANIMAL ENCOUNTERS, INC.; DOUGLAS KEITH TERRANOVA; WILL ANN TERRANOVA; FARIN FLEMING; CRAIG PERRY d/b/a PERRY'S EXOTIC PETTING ZOO; EUGENE ("TREY") KEY, III; AND KEY EQUIPMENT COMPANY, INC. d/b/a CULPEPPER & MERRIWEATHER CIRCUS.
AWA-Docket Nos. 09-0155 and 10-0418.
Decision and Order.
Filed December 20, 2011

AWA

Colleen Carroll, Esq. for APHIS.
Bruce Mornning, Esq. Derek Shaffer. Esq. Vincent Colatriano, Esq. and Michael Weitzner, Esq for Respondents.
Decision and Order by Administrative Law Judge Janice K. Bullard.

DECISION AND ORDER (CRAIG PERRY d/b/a PERRY'S EXOTIC PETTING ZOO; PERRY'S WILDERNESS RANCH & ZOO, INC.)

I. INTRODUCTION

The above captioned matters involve administrative disciplinary proceedings initiated by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"; "Complainant"), against Terranova Enterprises Inc., Douglas Terranova, Will Ann Terranova, Farin Fleming ("Terranova Respondents")[1]; Craig Perry ("Perry

[1] I have issued separate Decisions and Orders addressing the charges against the other named Respondents.

Respondent"); and Eugene "Trey" Key, III, and Key Equipment Company, Inc. (" Key Respondents"). Complainant alleges that Respondents violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131- 2159; "the Act"), and the Regulations and Standards issued under the Act (9 C.F.R. §§ 1.1-3.142; "Regulations and Standards").

A. Procedural History

In a Complaint filed on July 23, 2009, amended on June 8, 2010, Complainant alleged that the Terranova, Key and Perry Respondents[2] willfully violated the Act and the Regulations on multiple occasions between 2005 and 2008. Complainant filed another Complaint on September 7, 2010, charging the Terranova Respondents with additional violations of the Act. Generally, the Complaints allege that Respondents failed to properly handle and care for a variety of animals; failed to maintain proper records and facilities; failed to allow access to inspectors; and exhibited animals without proper licenses.

The two Complaints were consolidated, but in deference to the joint request of the Key and Perry Respondents, I found it appropriate to partition the hearing between the allegations raised in the 2009 Complaint and those raised in the 2010 Complaint. The events allegedly underlying the 2009 Complaint were addressed in a hearing that commenced on February 17, 2011 and continued through February 25, 2011, held in person in Washington, D.C., and through audio-visual equipment located in Texas, Iowa and Missouri. Events involving the Terranova Respondents alone were addressed at a hearing that was held on June 1 and 2, 2011 in Dallas, Texas.

Complainant is represented by Colleen A. Carroll, Esq., Office of the General Counsel, Washington D.C. The Terranova Respondents are represented by Bruce Monning, Esq.; the Perry Respondents are represented by Larry Thorson, Esq.; and the Key Respondents are represented by Derek Shaffer, Esq. and Michael Weitzner, Esq. At the hearings, the testimony of witnesses was transcribed, and I received into

[2] The Complaint also named an individual Sloan Damon as a Respondent, but Complainant and Respondent Damon entered into a Consent Decision dismissing Mr. Damon from the cause of action, which was filed with the Hearing Clerk for OALJ on January 31, 2011. Accordingly, I shall not address charges against Mr. Damon in this Decision and Order.

evidence[3] the parties' exhibits. At the hearing that commenced on February 17, 2011, I admitted to the record Complainant's exhibits identified as CX-1 through CX-67; Terranova Respondents' exhibits TX-1 through TX-1; Key Respondent exhibits KX-1 through KX-30; and Perry Respondents' exhibits PX-1 through PX-8. In addition, the parties entered into stipulations, regarding the admissibility and authenticity of the documentary evidence with the exception of certain photographic and holographic evidence. Tr. at 90-140.

The hearing that commenced on June 1, 2011, pertained to violations brought against the Terranova Respondents, and the Perry and Key Respondents declined to attend. Pursuant to my Order of June 28, 2011 the parties submitted corrections to the transcript, which I adopted by Order issued August 8, 2011. The parties submitted written closing argument pursuant to my Order of June 28, 2011. The instant decision[4] is limited to the Perry Respondents, and is based upon consideration of the record evidence; the pleadings, arguments and explanations of the parties; and controlling law.

II. ISSUES

1. Did the Perry Respondents violate the Animal Welfare Act, and if so, what sanctions, if any, should be imposed because of the violations?
2. Is Mr. Perry personally liable for acts of the corporation PWR?
3. Are the Perry Respondents responsible for acts of other exhibitors who performed at the Iowa State Fair upon Mr. Perry's invitation?

III FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Admissions

The Perry Respondents admit that Perry's Wilderness Ranch & Zoo, Inc. (PWR) is an Iowa corporation that holds an AWA license in the corporate name.

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[3] I excluded from the record CX 23. Tr. at 116.

[4] In this decision, exhibits shall be denoted as follows: Complainant's shall be "CX-#"; Terranova Respondents' shall be "TX-#"; Perry Respondent shall be "PX-#"; Key Respondents shall be "KX-#". References to the transcript of the hearing shall be denoted as "Tr. at [page] #".

B. Summary of Factual History

During the period encompassed by the instant causes of action, all of the Respondents were in the business of exhibiting animals. Craig Alan Perry has been involved with exotic animals since he was sixteen years of age. Tr. at 1700. He has exhibited animals as an individual and through the auspices of a corporation, "Perry's Wilderness Ranch & Zoo, Inc.", which is licensed by USDA. Tr. at 1700-1701; PX-1; Attachments to Answer filed September 9, 2009. PWR owns a number of different animals, including bobcats, servals, lynx, leopards, mountain lions, tigers, lions; and animals shown in a "petting zoo", such as zebras, kangaroos, goats, cattle, and water buffalo. Tr. at 1701. The petting zoo has been in operation for many years and is not a separate entity from PWR, but rather exhibits certain animals under the name of "Perry's Exotic Petting Zoo". Tr. at 1702.

From 1987 until sometime in 2010, Douglas Keith Terranova trained animals under contract with their owners, and presented instructional programs at fairs and facilities using animals that he owned. Tr. at 2509; 2511; 2517-18. He also provided animals to circuses and production crews for television shows and films and acted with his animals. Tr. at 2517-2518. Mr. Terranova owns many different animals, including a number of tigers, camels, a cougar, and spider monkeys. Tr. at 2518-2523. He owned two elephants, Kamba and Congo, until he donated them to the Dallas zoo in 2009. Tr. at 2801.

Eugene Key, III, familiarly known as "Trey", manages the Culpepper and Merriweather Circus ("the Circus"). Tr. at 2217. Mr. Key is President of Key Equipment Company, which bought the Circus approximately ten years ago. Tr. at 2217. The Key Respondents hold an exhibitor's license, and Mr. Key to uses animals owned by Key as well as subcontracts other acts. Tr. at 1222. He performs in his circus with two tigers, Delia and Solomon, and a lion named Francis. Id.

In December, 2007, Respondent Perry executed a contract with the Iowa State Fair ("the Fair") to provide entertainment in the form of a petting zoo and animal rides during the August, 2008 Fair. PX-3; Tr. at 1709. Seeking to enhance the quality of his services, Mr. Perry arranged for horse and camel rides, and engaged the Terranova Respondents to provide elephant rides. Tr. at 1707-1712; 2654-2657; 2660. Mr. Perry provided the equipment for camel rides and the Terranova Respondents

provided the camels, which they had recently purchased from PWR[5]. Tr. at 1706; 2654-2656; 2657-8. Mr. Terranova also provided two zebu for Mr. Perry's petting zoo. Tr. at 2666.

It was anticipated that the elephants would be brought to the Fair from the Circus, where they were performing under an agreement between the Terranova and Key Respondents[6]. Tr. at 2553. The Circus travels to different venues from Chicago and the Mississippi to the West Coast, putting on two daily shows under "the Big Top". Tr. at 2218-19. Mr. Terranova could not show the elephants himself because of personal circumstances, and he therefore hired Mr. Sloan Damon upon a friend's recommendation. Tr. at 2557-2559. Mr. Damon hired Mr. Childs to drive the semi-trailer that was used to transport the animals. Tr. at 231; 238. 230; 239. Mr. Damon also looked after Mr. Key's cats because Mr. Damon had large cat experience. Tr. at 2228.

On August 3, 2008, Mr. Damon left the Circus to travel to the Fair under the arrangement between the Perry and Terranova Respondents. Tr. at 2259. Mr. Damon set up the elephant ride arena in an area close to the Petting Zoo and camel rides. Tr. at 259-260; CX-35 at p. 4. He also brought with him a tiger cub named Tubbs that belonged to Mr. Key, which Damon kept in the cab of the elephant tractor-trailer. Tr. at 270-273. The cub was the lone survivor of a litter of three cubs that Mr. Key's tiger named Delia gave birth to in April, 2008 while the Circus was on the road. Nearby, Mr. Damon erected a large outdoor pen where Tubbs spent some time with a dog that Mr. Damon had found in his travels. Tr. at 272.

Mr. Perry wanted to make a good impression at the Fair, and in order to present a professional appearance, he asked Mr. Terranova and his employees to wear shirts that he provided, which had Perry's logo on the front. Tr. at 1711-1712; CX-35 at p. 92. Mr. Perry compared the circumstances to working as a contractor at a zoo and wearing the zoo's logo. Tr. at 1712. Mr. Perry had no authority over any of the people working the rides except for his employees. Tr. at 1713. According to the agreement between Mr. Perry and Mr. Terranova, the Petting Zoo's ticket booth also sold tickets to the elephant and camel rides, but the

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[5] The camels belonged to Perry in April, 2008, when arrangements were made with Terranova to provide camel rides at the Fair, but the Terranova Respondents owned the camels by the time the Fair took place in August, 2008. Tr. at 2049.

[6] The facts pertaining to allegations regarding tiger cubs are not material to the Perry Respondents, and therefore, are largely omitted.

money was not mingled and settlement of the ride proceeds was made daily. Tr. at 1828. The elephants were brought to the Fair upon Mr. Perry's recommendation, and the Terranova Respondents did not have a separate agreement with the Fair officials to exhibit the elephants. Tr. at 1826.

On August 13, 2008, APHIS inspectors Dr. Zeigerer and Dr. Sofranko, together with APHIS investigator Mike Booth, arrived at the fairgrounds to inspect the facilities and animals. Tr. at 1715; 2536; 1919; CX-35; 45; 46. Mr. Perry learned of the inspection from his helper, Kathy Miller, who called him at another Fair exhibit to report the presence of people who were taking photographs. Tr. at 1716-1717. Mr. Perry testified that in his experience, inspectors usually identify themselves and tour the premises with him, but by the time he arrived at the petting zoo at the Fair, the inspectors "had pretty much been everywhere". Tr. at 1718.

The inspectors wanted to see his paperwork (Tr. at 1730) and his animal feed, as they had seen animal feces in hay in a trailer (Tr. at 1718). Mr. Perry stores his hay on pallets under tarps in his trailer, after the animals and equipment are offloaded, which the inspectors commended. Tr. at 1719-1720; 1731. The trailers belonging to PWR and Terranova were parked in close proximity, and the trailer that contained fecal matter belonged to Doug Terranova. Tr. at 1721-1722; CX-35 at p. 70. Mr. Perry testified that there was a lot of rain during the Fair, and yet the pictures taken of the Petting Zoo and adjacent attractions show a clean environment. Tr. at 1723; CX-35.

Mr. Perry told the inspectors that they needed to see Mr. Terranova about the elephant and camel rides, and that he had only provided a stand for the camel rides because Mr. Terranova did not have room in his truck for that equipment. Tr. at 1731-1733. His people were not allowed to be in the elephant area because of safety reasons. Tr. at 1742. Mr. Perry asked the inspectors if he would get a report reflecting compliance, and understood from Dr. Sofranko that she would give him a copy of the report after using the copier from her car. Tr. at 1734. He asked the inspectors to tell his volunteer, Ms. Miller, to contact him so that he could meet them for an exit interview. Tr. at 1735-1736. Mr. Perry did not get a report on that first day, August 13, 2008. Tr. at 1737.

The following day, Mr. Perry saw the inspectors reviewing the elephant area, and he asked for his inspection report. Tr. at 1738. He was concerned that the inspection was continuing, and he recalled Dr.

Sofranko telling him that the ongoing inspection did not concern him and that he was not in violation of anything. Tr. at 1739. Mr. Perry was concerned that Drs. Zeigerer and Sofranko would interfere with how the elephant rides were being conducted, because they were asking the elephant handlers to demonstrate behaviors, even while rides were being given. Tr. at 1744-1746. Mr. Perry did not receive a report that day, although he asked the inspectors for it several time on August 14, 2008. Tr. at 1740.

At some point Mr. Perry talked to Inspector Mike Booth, who told him that the report was not going to be good. Tr. at 1741. Mr. Perry asked for a report again on August 15, 2008 when he saw the inspectors on site, and did not get one. Tr. at 1747. Mr. Perry told the inspectors that he had to leave on the 17th, and he still did not get a report. Tr. at 1755. His helper Mike Pacek was given a copy of a report dated August 17, 2008, on the morning of August 18, 2008, and Mr. Pacek had refused to sign for it because it cited violations regarding Terranova's elephants. Tr. at 1756-1780. Mr. Perry was surprised and upset that he was cited for violations pertaining to the care, housing and handling of the elephants that belonged to Mr. Terranova. Tr. at 1781.

Mr. Perry described how the inspectors arrived on site on the night of August 16, 2011, accompanied by security and the police, to confiscate the tiger. Tr. at 1765-1775. At about 6:00 p.m., the police shut down the petting zoo and animal ride attractions, and he could not re-open until after the Fair was just about closed. Id. Mr. Perry's business realized a significant loss of income, as the shut-down occurred on one of the busiest nights of the Fair, the final Saturday night. Id. He had been upset to see the tiger, and wanted nothing to do with it. Tr. at 1785-1786. Mr. Perry resented having his business closed over a matter that did not concern him. Tr. at 1786.

Mr. Perry believed that some APHIS inspectors did not agree with the decision to cite him for the elephants, and he described a meeting at his home with Dave Watson and Mike Boothe that lasted for hours. Tr. at 1772-1773. Mr. Perry was advised to ask USDA for information about the inspection under the Freedom of Information Act, and he took notes about the topics discussed at the meeting. Tr. at 1772-1775.

On December 15, 2009, Mr. Perry was called away from his place of business to respond to a medical emergency suffered by his long-time friend and volunteer, Michael Pacek. Tr. at 1776-1782. Mr. Pacek was hospitalized after a heart attack, and Mr. Perry tried to visit him. Tr. at

1782. When Mr. Perry was denied access to his friend, he returned home to find that an inspector had been there to inspect his facility. Tr. at 1782. He called the inspector and explained the circumstances, and was advised to have his attorney respond to the citation. Tr. at 1783.

Mr. Boothe lacked any independent recollection of the events involved in the 2008 Fair, and the meeting at Mr. Perry's home. He could not recall exactly what he saw at the Fair, or why he was invited to participate with two other inspectors at the inspection, although he allowed that it was unusual to have so many inspectors. He did not recall leaving the Fair before the other inspectors because he was ill. Tr. at 1978-1995.

C. Prevailing Law and Regulations

The purpose of the Animal Welfare Act, as it relates to exhibited animals, is to insure that they are provided humane care and treatment (7 U.S.C. § 2131). The Secretary of Agriculture is specifically authorized to promulgate regulations to govern the humane handling and transportation of animals by (7 U.S.C. §§ 2143(a), 2151). The Act requires exhibitors to be licensed and requires the maintenance of records regarding the purchase, sale, transfer and transportation of regulated animals. 7 U.S.C. §§2133, 2134, 2140. Exhibitors must also allow inspection by APHIS inspectors to assure that the provisions of the Act and the Regulations and Standards are being followed. 7 U.S.C. §§ 2142, 2143, 2143 (a)(1) and (2), 2146 (a).

Violations of the Act by licensees may result in the assessment of civil penalties, and the suspension or revocation of licensees. 7 U.S.C. § 2149. The maximum civil penalty that may be assessed for each violation was modified under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note) and various implementing regulations issued by the Secretary. Though the Act originally specified a $2,500 maximum, between April 14, 2004 and June 17, 2008 the maximum for each violation was $3,750. In addition, 7 U.S.C. § 2149(b), was itself amended and, effective June 18, 2008, the maximum civil penalty for each violation had been increased to $10,000.

The Act extends liability for violations to agents, pursuant to 7 U.S.C. §2139, which states, in pertinent part: "the act, omission, or failure of any person acting for or employed by . . . an exhibitor or a person licensed as . . . an exhibitor . . . within the scope of his employment or

office, shall be deemed the act, omission or failure of such . . . exhibitor as well as of such person." 7 U.S.C. §2139.

Regulations promulgated to implement the Act provide requirements for licensing, recordkeeping and attending veterinary care, as well as specifications for the humane handling, care, treatment and transportation of covered animals. 9 C.F.R. Chapter 1, Subchapter A, Parts 1 through 4. The regulations set forth specific instructions regarding the size and environmental specifications of facilities where animals are housed or kept; the need for adequate barriers; the feeding and watering of animals; sanitation requirements; and the size of enclosures and manner used to transport animals. 9 C.F.R. Chapter 1, Subchapter A, Part 3, Subpart F. The regulations make it clear that exhibited animals must be handled in a manner that assures not only their safety but also the safety of the public, with sufficient distance or barriers between animals and people. Id.

D. Discussion

1. Did PWR, Craig Perry, and/or Perry's Exotic Petty Zoo engage in conduct that violated the AWA?

a. Failure to allow access to facilities for inspection

Exhibitors must also allow inspection by APHIS inspectors to assure compliance with provisions 2142, 2143, 2143 (a)(1) and (2), 2146 (a) of the Act. The regulations provide that "a responsible adult shall be made available to accompany APHIS officials during the inspection process". 9 C.F.R. §2.126(b). It is undisputed that Mr. Perry was not on site on December 15, 2009, when an inspector arrived to inspect the facilities where he kept his animals. CX-60. No one was at Mr. Perry's facilities to allow access to the inspector, as a medical emergency that resulted in the hospitalization of Mr. Perry's primary volunteer and replacement, Mike Pacek, was the reason for Mr. Perry's absence.

I credit Mr. Perry's testimony that his absence was of short duration, and in response to an emergency. Mr. Pacek testified that he was Mr. Perry's long-time friend and volunteer animal caretaker, and had been hospitalized for a cardiac emergency in December, 2009. Tr. at 2008. I also credit Mr. Perry's testimony that he contacted the inspector immediately to explain his absence and advise that he was back at his business. I accord further weight to Mr. Perry's testimony that other

inspections conducted in 2008 revealed no issues resulting in complaints. PX-5 and PX-6.

Although the record reflects that inspections were not consistently conducted, and were not conducted in a consistent manner, this finding is immaterial to the question of whether the Perry Respondents failed to allow an inspection. Inspectors have latitude in the method and manner in which inspections are conducted, so long as they are not disruptive to business[7]. *In re Sema, Inc*., 49 Agric. Dec. 176 (1990). Further, it has been held that agency policies may change without notice to those affected. *In re Jerome Schmidt*, 66 Agric. Dec. 159 (2007). The inspection that was attempted on December 15, 2009 was conducted at a reasonable time of day at the Perry Respondents' home facility, and Mr. Perry was absent and had failed to appoint a responsible person to replace him. Unforeseen emergencies are predictable events, and the Act and prevailing regulations provide no exemption for the need to have a responsible individual on site in the eventuality of emergency absences. The Perry Respondent's home facility was left unattended and an inspection could not be conducted. The violation is sustained.

b. Exhibiting without a license issued by USDA

Complainant alleges that Respondent Craig Perry acted on his own behalf during the period underlying the instant complaint, and failed to hold a valid exhibitor's license. Over the years, APHIS has issued licenses to entities associated with Mr. Perry and to Mr. Perry as an individual and as owner of PWR. The record establishes that in 2002 the corporate entity PWR renewed AWA license No. 42-C-0101 in its own name and held the license at all times pertinent to this adjudication. PX-1, 2. Perry's Exotic Petting Zoo is part of PWR, and was operated by Mr. Perry. Tr. at 1678-1701.

Neither the Act nor regulations require employees of a licensee to be licensed, although USDA has the power to impose such a requirement. See, *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996). In addition, APHIS is not restricted from issuing multiple licenses to entities whose ownership and directorship overlap, such as a corporation

[7] The Perry Respondents have argued through Mr. Perry's testimony that the APHIS inspectors spent an undue amount of time at the Fair, and interfered with business. I find no other evidence of record to support this allegation, although it is axiomatic that closing exhibitions to confiscate a tiger cub did interfere. However, those circumstances were unique, and only tangentially related to the inspection.

and a partnership. *Longhi v. APHIS*, 165 F. 3d 1057 (6th Cir. 1999). However, the Judicial Officer for USDA dismissed a complaint against an individual cited for failure to obtain an exhibitor's license while finding that the corporate entity was required to be licensed. *In re Daniel J. Hill and Montrose Orchards Inc*., 67 Agric. Dec. 196 (2008). In addition, in *In re John F. Cuneo*, 64 Agric. Dec. 1318 (2005), it was determined that an independent contractor hired to handle and train elephants did not need a separate license. *Cuneo*, supra.

Complainant argues that "Perry insurance coverage for Kamba and Congo at Iowa State Fair" (CX-30) and the "Perry contract with Iowa State Fair" (CX-40, 45; PX-3) demonstrate that Mr. Perry operated as an exhibitor without a license. Complainant misstates the evidence in the case of the insurance policy, which was taken by Terranova and additionally insured Craig Perry and Perry's Wilderness Ranch & Zoo. CX-30. Since it was not Perry's policy, this document fails to demonstrate anything about how the Perry Respondents' perceived their corporate structure. Furthermore, Complainant's allegation is not supported by the statutory scheme, which establishes that the acts of a corporation's officers, agents, employees, may be considered their own.

Therefore, Complainant's allegation regarding Mr. Perry's joint liability for violations of the Act may be demonstrated without requiring Mr. Perry to maintain an individual license in addition to the one issued to PWR. The Act specifically states that actions of any person involving the exhibiting of animals are imputed to the corporate entity. Perry's own acts and omissions may similarly make him culpable as an individual. In the absence of persuasive contrary authority, I find that employees of PWR, including Mr. Perry, were not required to hold an individual license in addition to the license issued to the corporate entity. Accordingly, I dismiss this charge.[8]

c. Violations arising from association with Terranova at the Fair

Before considering whether the record demonstrates that the alleged violations involving the Fair occurred, I must determine whether the

[8] If the gravamen of this allegation is to suggest that Perry himself needed a license because he was exhibiting Terranova's elephants, the evidence does not establish that the Perry Respondents perceived themselves as being in that position, and therefore would not have sought a license for that purpose.

Perry Respondents are bound to the Terranova Respondents so as to be jointly liable for any violations involving Terranova's activities.

As best as I can interpret, Complainant's theory of the case, which is neither fully articulated nor artfully argued, is that because the Perry Respondents invited Terranova and the elephants to the Fair, the Perry Respondents are responsible for any violations involving the elephants. Complainant refers to a contract or joint venture between Perry and Terranova. Complainant's Proposed Findings of Fact, page 3. The Act provides the method for determining joint liability for activities that lead to violations under the theory rubric of a principal-agent relationship.

The AWA in pertinent part states: "[w]hen construing or enforcing the provisions of this chapter, the act, omission, or failure of any person acting for or employed by …an exhibitor or a person licensed as…an exhibitor…..shall be deemed the act, omission or failure of such exhibitor…[or] licensee…as well as of such person". 7 U.S.C. § 2139. The language specifically provides a statutory method for "piercing the corporate veil", since the "the term 'person' includes any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity." 7 U.S.C. § 2132(a). Since Complainant has declined to cite to cases describing what may be perceived as a joint venture[9] under the AWA, and since the AWA provides for joint liability under a theory of agency, I find it appropriate to focus on the specific statutory language.

There is little precedent for determining whether two licensed exhibitors who exhibit their animals in close proximity at the same attraction may be held jointly liable for the care and handling of each other's animals when one exhibitor's presence is at the behest of the other. In the absence of controlling precedent, I turn to court adopted common law principals of agency for guidance.

The common law of Agency was adopted by the United States Supreme Court in *U.S. v. Goodry*, 25 U.S. 460 (1827). Subsequently, in considering whether an agency relationship exits, courts have looked at the Restatement of Agency, and concluded that the parties, a principal and his agent, must manifest their assent to create the relationship. *Jade*

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[9] Parenthetically, it would be unlikely that a theory of contract or joint venture could be applied in circumstances where there is no written agreement between the parties, there is no evidence of joint effort in providing exhibitions, and only Perry was responsible to the Fair for the obligations set forth in the written agreement between Perry and the Fair Authority.

Trading LLC v. U.S., 81 Fed. Ct. 173 (2008); Restatement of Agency, 3d, 1.01. In addition to consent to act, an agency relationship requires the right of the principal to control the means and details of the acts that the agent performs on behalf of the principal. *Meyer v. Holley*, 537 U.S. 280, 283 (2003); *Northwinds Abatement, Inc. v. Employer's Insurance of Wausau*, 258 F.3d 345, 351 (5th Cir. 2001). In the absence of the principal's control or mutual consent, common law does not generally recognize an agency relationship. Restatement of Agency, 3d. An agency relationship imposes upon the agent a fiduciary duty to act in the principal's interests. *Id*.

Even absent control, principals are liable for acts performed by their agents within the scope of their authority. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). Whether an act is within an agent's authority depends upon facts such as whether the agent was authorized, or apparently authorized, and whether the agent's actions arose from the agency relationship. Rest. 3d, 3.04. Unless a principal has expressly or impliedly made an agent his representative, the principal is not liable for the acts of another who assumes to represent him, and a person dealing with an agent cannot hold the principal liable for any act or transaction of the agent not within the scope of his actual or apparent authority. *Leach & Co. v. Peirson*, 275 U.S. 120 (U.S. 1927). The knowledge of an agent may be imputed to the principal where it is relevant to the agency and to the matters entrusted to the agent.. *Fleming v. United States*, 648 F.2d 1122 (7th Cir. Wis. 1981). The vicarious liability implicit in an agency relationship attaches to the corporate entity, and not officers or directors. *Meyer v. Holley*, supra.

In determining whether an agency relationship exists, courts have looked at factors such as compensation to the agent from the principal; whether agent is designated in writing; whether agent's activities are subject to the principal's approval; whether the agent transfers funds to the principal; whether the principal indemnifies and insures the agent; whether the agent is financially accountable to the principal; whether the manner and means of the agent's activities are subject to the principal's control; the skill required of the agent; the source of instrumentalities and tools; the location of the agent's performance; the duration of the relationship between the parties; the role of the principal in hiring personnel for the agent's use; whether the principal has the right to assign additional projects to agent; the extent of the agent's discretion over when and how long to work; the method of payment; whether the

work is part of the regular business of the principal; whether the agent receives employee benefits; how the agent is taxed. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989); *Nationwide Mut. Ins. Co. v. Darden*, 508 U.S. 318 (1992); Centillon Data Systems, LLC v. Qwest Communications Int'l Inc., 2011 WL 167036 (Fed. Cir. 2011); *Akami Technologies Inc. v. Limelight Networks, Inc*., 629 F.3d 1311 (Fed. Cir. 2010); *Lubetzky v. U.S.*, 393 F.3d 76 (1st Cir. 2004); *Vizcaino v. Microsoft Corp.*, 142 F. Supp 2d 1299 (W.D. Wash, 2001); aff'd 290 F. 3d 1043 (9th Cir. 2002).

In the instant matter, there is little dispute that but for Perry's invitation, Terranova and the elephants would not have exhibited at the Iowa State Fair in August, 2008. The Agreement between the Perry Respondents and the Fair does not require the provision of elephant rides, although I fully credit Mr. Perry's testimony that the presence of the elephants was sanctioned by Fair officials. PX-3; Tr. at 1708. There is no evidence that Terranova entered into a contract with the Fair regarding the elephants, and the record establishes that Terranova verbally agreed to bring elephants to the Fair to provide rides in tandem with Perry's Petting Zoo exhibition. Id. Therefore, at least superficially, Terranova's presence at the Fair was as Perry's agent.

Additional indicia of an agency relationship between Perry and Terranova lies in the fact that Terranova provided the camels that the agreement with the Fair required, PX-3, at paragraph A; Tr. at 1730-1731. The camels belonged to Terranova, but Perry provided the camel ride platform. Tr. at 1730. Mr. Terranova brought two zebu to the Fair that Mr. Perry used in his petting zoo. The elephants were housed on the grounds within the space provided by the Fair under the Agreement. Id., Tr. at 1721-1722; CX-35. In addition, the individuals working the elephant rides, including Mr. Terranova, wore tee shirts with the logo "Perry's Exotic Petting Zoo" when they were working, at Mr. Perry's request. Tr. 1710-1711; CX-35 at p. 92. Customers for camel rides, elephant rides, and the petting zoo bought tickets at the same ticket booth, which was manned by a volunteer for the Perry Respondents. Tr. 1714; CX-35.

On the other hand, Perry had no contractual obligation to the Fair to provide elephants. See, CX-33; PX-3. He extended an invitation to Mr. Terranova to bring elephants, but had no written agreement with Terranova. Tr. at 1708. If Terranova had declined to bring the elephants, Mr. Perry would have satisfied his contractual duties. Terranova did not

believe that it was indemnified by Perry for Terranova's activities at the Fair because Terranova secured its own insurance, naming Perry as an additional insured, in consideration of Perry's invitation for Terranova to exhibit at the Fair. CX-30.

There is no evidence that Perry exercised control over Terranova to a degree anticipated by an agency relationship. There is no evidence that Perry shared the fee paid by the Fair with Terranova. Tr. at 1827. The income from the parties' activities at the Fair was segregated; each amusement was identified by a different color ticket, and Terranova was paid only for the receipts from the sale of tickets for camel and elephant rides. Tr. at 1828. After figuring the Fair's take of the gate, each party then received the net from the sale of tickets for the amusements each party operated. Tr. at 1825- 1830. Mr. Perry was uncertain whether he provided Terranova and his employees with wristbands[10] to enter the fairgrounds or with a parking permit, but he did not believe so. Tr. at 1820-1822. Mr. Terranova credibly testified that he acquired his own parking permits and wrist bands directly from a representative of the Fair. Tr. at 2664. Mr. Perry did not pay Terranova's employees, and he had no control over them. Tr. at 1731-1732. Perry's employees and volunteers were restricted from entering the elephant area for purposes of their safety. Tr. at1742. Mr. Terranova's employees did not work for Mr. Perry in any manner. Tr. at 1795-1796.

Other than agreeing to arrange for the appearance of the elephants and camels, Perry did not in any other manner take responsibility with Fair officials for their presence and well-being. Tr. at 1732; 1811-1812. Perry had sold the camels to the Terranova Respondents and loaned his camel platform to Mr. Terranova for convenience sake. Tr. at 1731-1732. The Perry Respondents' lack of control over how Terranova exhibited the elephants and camels, and how their housing and other facilities were maintained is the most significant factor demonstrating the lack of an agency relationship. Although Mr. Perry assumed control over Terranova's zebu used in his exhibit, there is insufficient evidence regarding that arrangement to infer an agency relationship on that basis. It is clear that the only violations regarding care and handling of animals leveled against Perry involve Terranova's elephants. See, amended Complaint.

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[10] Under Agreement with the Fair, Perry was promised eight wristbands and three parking spaces for campers. PX 3 at B.7 and B. 8.

For the foregoing reasons, I conclude that Terranova's activities at the Fair were conducted without Perry's control or consent. Even though the elephants were at the Fair at Perry's invitation, their care was not within the scope of Perry's control. Had Mr. Perry anticipated that he would be charged with violations pertaining to the elephants, he could have directed Terranova's activities so as to avoid being cited. It is clear that Perry had never intended to make Terranova his agent in fact.

The lack of the Perry Respondents' control over Terranova's activities is further evidenced by Perry's lack of "paperwork" regarding the legal or medical status of the elephants. Tr. at 1811-1812. I note that as agent, Terranova would have had the fiduciary duty to provide all required documentation to Fair officials regarding the health and welfare of the elephants, pursuant to Perry's agreement with the Fair, which required him to comply with federal permit and licensing requirements. PX-3 at C. However, the record is devoid of any evidence reflecting that Perry directed Terranova to provide documentation to Fair officials, or otherwise directed Terranova's actions with respect to licensing requirements for the elephants. I therefore find that Terranova acted on his own behalf when he provided the Fair with paperwork regarding the elephants.

The record establishes that Perry and Terranova exhibited at the Fair for a limited time on a single occasion. There is no evidence that they filed joint tax returns, or reported each other's income from the Fair as taxable income. Pursuant to Perry's agreement with the Fair, Perry alone was paid compensation for his services at the Fair. CX-33; PX-3. Although Terranova's employees wore tee shirts with Perry's logo, Perry had agreed to provide a "clean, courteous staff" (PX-3; CX-33), and considering the lack of laundry facilities at the Fair (Tr. at 332), it was not unreasonable for Mr. Perry to ask for a measure of uniformity to achieve that goal.

Perry testified that he complained to APHIS inspectors about being cited for violations concerning Terranova's elephants. Tr. at 1774. I fully credit Mr. Perry's testimony that inspector Boothe advised him to request information under FOIA from APHIS officials, and accept that the handwritten notes in evidence represent the notes he made contemporaneously to his meeting with inspectors Mike Boothe and Dave Watson in September, 2008. Tr. at 1773-1778. Inspector Boothe 's testimony reflected an appalling failure to recollect anything about a meeting of several hours of duration involving an inspection that he was

personally involved in. Mr. Boothe lacked any recall about anything that had not been committed to writing, although he reluctantly admitted that he may have discussed the events at the Iowa Fair, and may have given advice to Mr. Perry about requesting information from USDA. Tr. at 1945-1952. He could not recall the reason for visiting Mr. Perry at his home the month after the Fair inspection, though he conceded that he may have gone with Mr. Watson to get an affidavit from Mr. Perry about the Fair. Id. I find that Mr. Boothe's testimony on the whole was unaccountably vague and unreliable, considering the length of the meeting and the unusual circumstances involved in the Fair inspection[11]. Mr. Walker's testimony is similarly unreliable. I accord substantial weight to Mr. Perry's contemporaneously made notes. PX-8.

The preponderance of the evidence establishes that Terranova's appearance at the Fair at Perry's invitation did not constitute a principal-agent relationship as contemplated by the AWA. Complainant's attempts to broaden the specific language of the Act to implicate exhibitors for each other's activities is not warranted in this case, and the Perry Respondents are not liable for the activities of the Terranova Respondents, which are the subject of the violations charged in the inspection report of August 13, 2008 (CX-41).

2. Is Mr. Perry personally liable for the acts performed on behalf of the corporation PWR?

As sole corporate officer, and sole employee of PWR, it is difficult for Mr. Perry to distance himself from acts of PWR. All acts of the corporate entity in these circumstances arose out of decisions made by Mr. Perry. It has been settled that individuals who direct licensee's activities are individually liable pursuant to 7 U.S.C. §2139. See, In *re Coastal Bend Zoological Ass'n, etc. et al*, 67 Agric. Dec. 154 (2008). I find that Mr. Perry may be held personally liable for acts he performed on behalf of PWR. A corporation and the individual who exercised sole control over corporate activities are jointly assessed penalties under 7 U.S.C. § 2149 pursuant to the operation of 7 U.S.C. § 2139. *Irvin Wilson and Pet Paradise Inc. v. U.S.D.A.*, 54 Agric. Dec. 111 (1995)

[11]Although witnesses are not in agreement regarding how long they met in Mr. Perry's home, the consensus is that the meeting exceeded an hour.

E. Sanctions

The purpose of assessing penalties is not to punish actors, but to deter similar behavior in others. *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997). In assessing penalties, the Secretary must give due consideration to the size of the business, the gravity of the violation, the person's good faith and history of previous violations. *In re Lee Roach and Pool Laboratories** 51 Agric. Dec. 252 (1992).

The sole violation of the Act by the Perry Respondents that is supported by the preponderance of evidence is his failure on one occasion to allow access to his facility to inspectors. Most of the charges against the Perry Respondents involve actions pertaining to the Terranova Respondents at the Fair in 2008. I credit Mr. Perry's testimony that he has not been inspected while exhibiting at the Iowa State Fair since 2008, and that other inspections at his facility disclosed no violations. I also credit Mr. Perry's testimony that he contacted inspectors to advise that he was at his facility after he returned from the hospital, as I find that consistent with his testimony that he repeatedly asked inspectors for the results of the Fair inspection. I find no evidence of a pattern of refusal to allow inspections, and I find no evidence of willfulness in the one violation that occurred on December 15, 2009. As the incident that led to Mr. Perry's absence is unlikely to recur, sanctions would not reasonably provide a deterrent effect.

F. Loss of Business Due to Confiscation

The Perry Respondents have expressed concern and frustration in the manner that USDA confiscated the Key Respondents' tiger cub. The cub was taken at approximately 6:00 p.m. on the closing night of the Fair, which traditionally was a busy and profitable night. The presence of a large number of security personnel and police resulted in the forced closing of the petting zoo, which could not be re-opened before closing time for the Fair.

Although I sympathize with Respondents' contentions and speculate as to the necessity of the time, place and manner of the confiscation, I nevertheless have no authority to determine whether USDA's actions were inappropriate. Neither the Administrative Procedures Act, 5 U.S.C. part 551 et seq. nor the AWA invest me with authority to determine losses caused by government action and order reimbursement. I note that

the confiscation was not a routine inspection, and therefore, USDA was not bound by its policies regarding time and manner of inspections.

G. Findings of Fact

1. Craig A. Perry is an individual whose business address is located in, Center Point, Iowa 52213.

2. Perry's Wilderness Ranch & Zoo, Inc.(PWR) is an Iowa corporation that has AWA license No. 42-C-0101 beginning in 2002.

3. Craig A. Perry did not hold an AWA license in his name at any time relevant to the instant adjudication, although he had held licenses in his name in the past.

4. PWR exhibits under the name of "Perry's Exotic Petting Zoo".

5. On December 21, 2007, Craig Perry, on behalf of PWR, entered into an agreement with the Iowa State Fair Authority to provide an exotic petting zoo, camel rides, pony rides and photographs to the Iowa State Fair in 2008.

6. pondents to provide camel and elephant rides, and two zebu at the Iowa State Fair in August 2008.

7. Perry provided a platform for the camel rides for Mr. Terranova's use.

8. Mr. Terranova brought two zebu to the Fair for the petting zoo exhibit.

9. The Perry and Terranova exhibitions were located in close proximity at the Fair.

10. All individuals working at the Fair for Mr. Perry and Mr. Terranova wore shirts with Perry's logo at Mr. Perry's request.

11. Inspection of the elephants and their facilities resulted in alleged violations of the AWA that were charged to both the Perry and Terranova Respondents

12. On December 15, 1009, no one was at the Perry Respondents' home facility to allow access to an APHIS inspector.

H. Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. In his capacity as corporate officer and director of PWR, Craig Perry operated as an exhibitor as that term is defined by the Act and regulations.

3. Pursuant to 7 U.S.C. § 2139, Craig Perry's acts, omissions or failures in his capacity as corporate officer and director are deemed to be his own as well as those of the corporate entity.

4. Because of the operation of 7 U.S.C. §2139 and 2149, Craig Perry did not need a separate license under the AWA.

5. Although Terranova exhibited elephants and camels at the Fair upon the Perry Respondents' invitation, and brought zebu for Perry's use, no agency relationship existed as the result of the exhibition.

6. The following violations that were brought against the Perry Respondents and that arose out of association with Terranova at the Fair are dismissed:

a. Violations of 9 C.F.R. 2.40(b)(2), alleging failure to establish and maintain adequate veterinarian care

b. Violations of 9 C.F.R. 2.131 (c)(1) and (d)(2), alleging failure to handle animals with minimal risk of harm to public and with sufficient barriers.

c. Violations of 9 C.F.R. 3.125(a) and (c), alleging failure to provide safe facilities for animals and feed.

d. Violations of 9 C.F.R. 3.127(a), alleging failure to provide shade

7. On December 15, 2009, the Perry Respondents failed to allow APHIS officials access to their place of business to conduct an inspection, in violation of 7 U.S.C. §2146(a) and 9 C.F.R. § 2.126(a) and (b).

8. There is no evidence of a pattern of violations, or that failure to allow access to facilities to an inspector was willful.

9. No sanction need be imposed for the sole technical violation of the Act to promote the Act's remedial purposes.

10. An Order instructing Respondents to cease and desist conduct that violates the Act and regulations is appropriate.

ORDER

1. The Perry Respondents, their agents, employees, successors and assigns, directly or indirectly through any corporate or other device are ORDERED to cease and desist from further violations of the Act and controlling regulations.

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

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

TERRANOVA ENTERPRISES, INC. d/b/a ANIMAL ENCOUNTERS, INC.; DOUGLAS KEITH TERRANOVA; WILL ANN TERRANOVA; FARIN FLEMING; CRAIG PERRY d/b/a PERRY'S EXOTIC PETTING ZOO; PERRY'S WILDERNESS RANCH & ZOO, INC.; EUGENE ("TREY") KEY, III; AND KEY EQUIPMENT COMPANY, INC. d/b/a CULPEPPER & MERRIWEATHER CIRCUS.
AWA-Docket Nos. 09-0155 and 10-0418.
Decision and Order.
Filed December 20, 2011.

AWA

Colleen Carroll, Esq. for APHIS.
Bruce Mornning, Esq. Derek Shaffer. Esq. Vincent Colatriano, Esq. and Michael Weitzner, Esq for Respondents.
Decision and Order by Administrative Law Judge Janice K. Bullard.

DECISION AND ORDER (TERRANOVA ENTERPRISES, INC. d/b/a ANIMAL ENCOUNTERS INC. and DOUGLAS KEITH TERRANOVA)

I. INTRODUCTION

The above captioned matters involve administrative disciplinary proceedings initiated by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"; "Complainant"), against Terranova Enterprises Inc., d/b/a Animal Encounters, Inc.; Douglas Terranova; Will Ann Terranova; Farin Fleming ("Terranova Respondents")[1]; Perry's Wilderness Ranch and Zoo, Inc., d/b/a Perry's Exotic Petting Zoo; Craig Perry ("Perry Respondents"); Eugene "Trey"

[1] I have issued separate Decisions and Orders addressing the charges against the other named Respondents.

Key, III; and Key Equipment Company, Inc. ("Key Respondents"). Complainant alleges that Respondents violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131- 2159; "the Act"), and the Regulations and Standards issued under the Act (9 C.F.R. §§ 1.1-3.142; "Regulations and Standards").

Procedural History

In a Complaint filed on July 23, 2009, amended on June 8, 2010, Complainant alleged that the Terranova, Key and Perry Respondents[2] willfully violated the Act and the Regulations on multiple occasions between 2005 and 2008. Complainant filed another Complaint on September 7, 2010, charging the Terranova Respondents with additional violations of the Act. Generally, the Complaints allege that Respondents failed to properly handle and care for a variety of animals; failed to maintain proper records and facilities; failed to allow access to facilities for inspection by inspectors; and exhibited animals without proper licenses.

The two Complaints were consolidated, but in deference to the joint request of the Key and Perry Respondents, I found it appropriate to partition the hearing between the allegations raised in the 2009 Complaint and those raised in the 2010 Complaint. The events allegedly underlying the 2009 Complaint were addressed in a hearing that commenced on February 17, 2011 and continued through February 25, 2011, held in person in Washington, D.C., and through audio-visual equipment located in Texas, Iowa and Missouri. Events involving the Terranova Respondents alone were addressed at a hearing that was held on June 1 and 2, 2011 in Dallas, Texas.

Complainant is represented by Colleen A. Carroll, Esq., Office of the General Counsel, Washington D.C. The Terranova Respondents are represented by Bruce Monning, Esq.; the Perry Respondents are represented by Larry Thorson, Esq.; and the Key Respondents are represented by Derek Shaffer, Esq. and Michael Weitzner, Esq. At the

[2] The complaint also named an individual, Sloan Damon, as a Respondent, but Complainant and Respondent Damon entered into a Consent Decision dismissing Mr. Damon from the cause of action, which was filed with the Hearing Clerk for OALJ on January 31, 2011. Accordingly, I shall not specifically address charges against Mr. Damon in this Decision and Order.

hearings, witnesses testified and I received into evidence[3] the parties' exhibits. At the hearing that commenced on February 17, 2011, I admitted to the record Complainant's exhibits identified as CX-1 through CX-67; Terranova Respondents' exhibits TX-1 through TX-41; Key Respondent exhibits KX-1 through KX-30; and Perry Respondents' exhibits PX-1 through PX-8. In addition, the parties entered into stipulations regarding the admissibility and authenticity of the documentary evidence, with the exception of certain photographic and holographic evidence. Tr. at 90-140.

At the hearing that commenced on June 1, 2011, I admitted to the record exhibits CX-68 through 93, and TX-42, 43. I granted Respondent's objection to the testimony of Margaret Whittaker. Tr. at 3162 - 3206. The witness was called by Complainant to provide opinions regarding what she believed to be the best training methods for working with elephants, which may have led her to conclude that Respondents did not use the best methods to handle animals. However, Ms. Whittaker had not reviewed the evidence regarding the incidents involved in the instant matter, and could formulate no opinion regarding whether the animals at issue had been handled properly in the incidents underlying the alleged violations. Tr. 3187 -3190. Though I credit Ms. Whittaker's training and expertise, I concluded that the proffered testimony regarding her opinion on the best methods to use to train animals in general is not material to my inquiry, as the Act and controlling regulations do not specify a particular method to train and handle animals. Moreover, Ms. Whittaker is not a fact witness, and was given no evidence relating to the events of this case to allow her to formulate an expert opinion that could be rebutted by Respondent.

Pursuant to my Order of June 28, 2011 the parties submitted corrections to the transcript, which I adopted by Order issued August 8, 2011. The parties submitted written closing argument pursuant to my Order of June 28, 2011. The instant decision[4] is limited to Terranova Enterprises Inc., d/b/a Animal Encounters Inc. and Douglas Terranova, and is based upon consideration of the record evidence; the pleadings, arguments and explanations of the parties; and controlling law.

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[3] I excluded from the record CX-23. Tr. at 116.

[4] In this decision, exhibits shall be denoted as follows: Complainant's shall be "CX-#"; Terranova Respondents' shall be "TX-#"; Perry Respondent shall be "PX-#"; Key Respondents shall be "KX-#". References to the transcript of the hearing shall be denoted as "Tr. at [page] #".

II. ISSUES

1. Did the Terranova corporate Respondents violate the Animal Welfare Act, and if so, what sanctions, if any, should be imposed because of the violations?

2. Is Douglas Keith Terranova personally liable for acts of the corporate Respondents?

3. Are the Terranova Respondents responsible for any violations of the Act pertaining to tiger cubs owned by the Key Respondents?

III FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Admissions

In its Answer to the Amended Complaint filed July 23, 2010, Respondents admitted that Terranova Enterprises, Inc. is a Texas corporation doing business as "Animal Encounters, Inc.", corporate Number 159995901. The corporation's registered agent, President, and director is Douglas Keith Terranova, whose residential address in Kaufman, Texas 75142 is also the corporation's registered address. The corporate charter was forfeited during the period from February 11, 2005 until on or about November 30, 2005, for failure to file or pay state franchise taxes. The charter was again forfeited for noncompliance with state tax law for the period July 25, 2008 through March 11, 2009. Terranova Enterprises, Inc. and Mr. Terranova continued to operate as an exhibitor and held Animal Welfare Act license number 74-C-0199 during the periods relevant to this adjudication.

Terranova admitted to operating a moderately-sized animal exhibition business. They are aware that the Perry Respondents operate a business that exhibits exotic and farm animals and that Terranova Enterprises contracted with the Perry Respondents to provide animal exhibition services at the Iowa State Fair. Terranova Respondent believed that Key Equipment operates a circus under the name Culpepper & Merriweather Circus and that Key Respondents had leased space at Terranova's property in Kaufman, Texas where the Key animals were lodged during the winter.

Terranova admitted that elephants that it owned appeared in a parade at a circus festival in Baraboo, Wisconsin in June, 2005 and that they

exhibited animals at the Circus World Museum in Baraboo on June 15, 2006, where a camel was tangled in a rope for a short time. Terranova Enterprises exhibited animals at a circus in Landover, Maryland in June, 2007, where a mountain lion was inadvertently sprayed with fresh water while its cage was being cleaned.

The Terranova Respondents admitted that the Key tiger Delia delivered three cubs that she refused to nurse, and that one died shortly after its birth, while a second died a few days later. Veterinary advice and care were sought and followed. Sloan Damon had the surviving tiger cub in a kennel at the Iowa State Fair in August, 2008. The cub was seen by Fair veterinarians who declared him healthy, but USDA confiscated the cub on August 16, 2008.

The Terranova Respondents exhibited two elephants at WaKeeney, Kansas in June, 2008 when winds caused an inflatable slide to be blown near the elephants, thereby instigating their escape. The elephants were recaptured after one was sedated. The Terranova Respondents exhibited elephants at the Iowa State Fair in August 2003, and inspections revealed that their feet and skin were in less than desirable condition. In addition, a coaxial cable and a mooring rod were present in the area where the elephants were penned, but were immediately removed. A broken light frame was repaired. No injuries occurred to the elephants.

The Terranova Respondents admitted that no one was available at their home facility in Kaufman Texas to allow access to inspectors on June 9 and 10, 2008.

B. Summary of Factual History

During the period encompassed by the instant causes of action, all of the Respondents were in the business of exhibiting animals. From 1987 until sometime in 2010, Douglas Keith Terranova trained animals under contract with their owners, and presented instructional programs at fairs and facilities using animals that he owned. Tr. at 2509; 2511; 2517-18. He also provided animals to circuses and production crews for television shows and films and acted with his animals. Tr. at 2517-2518. Mr. Terranova owns many different animals, including a number of tigers, camels, a cougar, and spider monkeys. Tr. at 2518-2523; CX-68. He owned two elephants, Kamba and Congo, until he donated them to the Dallas zoo in 2010. Tr. at 2801.

Craig Alan Perry has been involved with exotic animals since he was sixteen years of age. Tr. at 1700. He has exhibited animals as an individual and through the auspices of a corporation, "Perry's Wilderness Ranch & Zoo, Inc." ("PWR"), which is licensed by USDA. Tr. at 1700-1701; PX-1, 2; Attachments to Answer filed September 9, 2009. PWR owns a number of different animals, including bobcats, servals, lynx, leopards, mountain lions, tigers, lions; and animals shown in a "petting zoo", such as zebras, kangaroos, goats, cattle, and water buffalo. Tr. at 1701. The petting zoo has been in operation for many years and is not a separate entity from PWR, but rather exhibits certain animals under the name of "Perry's Exotic Petting Zoo". Tr. at 1702.

Eugene Key, III, familiarly known as "Trey", manages the Culpepper and Merriweather Circus ("the Circus"). Tr. at 2217. Mr. Key is President of Key Equipment Company, which bought the Circus approximately ten years ago. Tr. at 2217. The Key Respondents hold an exhibitor's license, and Mr. Key performs in the Circus with Respondents' two tigers, Delia and Solomon, and a lion named Francis. Tr. at 1222.

In December, 2007, Respondent Perry executed a contract with the Iowa State Fair ("the Fair") to provide entertainment in the form of a petting zoo and animal rides during the August, 2008 Fair. PX-3; Tr. at 1709. Seeking to enhance the quality of his services, Mr. Perry arranged for horse and camel rides, and engaged the Terranova Respondents to provide elephant rides. Tr. at 1707-1708; 2654-2657; 2660. Mr. Perry provided the equipment for camel rides and the Terranova Respondents provided camels that they had purchased from the Perry Respondents[5]. Tr. at 2654-2656; 2657-8. Mr. Terranova provided two zebu for Mr. Perry's petting zoo. Tr. at 2666.

It was anticipated that the elephants would be brought to the Fair from the Circus, where they were performing under an agreement between the Terranova and Key Respondents. Tr. at 2553. The Circus travels to different venues from Chicago and the Mississippi to the West Coast, putting on two daily shows under "the Big Top". Tr. at 2218-19. Mr. Key performs in the Circus with two tigers, Solomon and Delia, and a lion, Francis, which the Circus acquired in 2005. Tr. at 2207. The

[5] The camels belonged to Perry in April, 2008, when arrangements were made with Terranova to provide camel rides at the Fair, but the Terranova Respondents owned the camels by the time of the Fair. Tr. at 2049.

tigers are of the golden tabby variety and were litter mates. Tr. at 2213-2214.

Before the 2008 circus season began, the Key Respondents' big cats were housed in a compound on Mr. Terranova's facility. Tr. at 2222; 2551-2. The compound was built to ensure separation of Delia from Solomon when necessary, and Mr. Terranova agreed with Mr. Key that the tigers should not be allowed to breed considering the risk of genetic mutation in offspring of litter mates. Tr. at 2223- 2225. Mr. Terranova supervised the care of the cats in Mr. Key's absence, and Mr. Key was not at the Terranova property to confirm that the tigers were kept apart when Delia was "in heat". Tr. at 2224; 2551-2552. The cats did socialize together at times. Id.

At the start of the 2008 circus season, Terranova's elephant handler delivered the Key cats and Kamba and Congo to the Circus, but he soon returned to the Terranova facility with the elephants and quit his job. Tr. at 2556. Mr. Terranova could not show the elephants himself because of personal circumstances, and he therefore hired Mr. Sloan Damon upon a friend's recommendation. Tr. at 2557-2559. Mr. Damon trained under Mr. Terranova's supervision at his home for about two weeks before taking the elephants back to the Circus with Richard Childs. Tr. at 233; 2561-2562. Mr. Damon hired Mr. Childs to drive the semi-trailer that was used to transport the animals. Tr. at 231; 238. 230; 239. The semi-trailer was partitioned to transport the elephants in the front and the cats in the rear. Tr. at 239. Mr. Damon and Mr. Childs traveled with the animals in the semi until sometime in June or July, when Mr. Key purchased a truck to carry the cats. Tr. at 239. Mr. Damon also looked after Mr. Key's cats because Mr. Damon had large cat experience. Tr. at 2228.

Shortly after he joined the Circus, Mr. Damon noticed that Mr. Key's female tiger was exhibiting behavior associated with pregnancy, although she did not appear to be expecting cubs. Tr. at 241; 2225-7. While the Circus was in Glasgow, Missouri on May 3, 2008, Delia delivered three cubs, which Mr. Damon found outside the mother's cage. Tr. at 2229-2230. It was presumed that the cubs were the offspring of Delia and her sibling. Id. Mr. Damon alerted Mr. Key to the births and Mr. Key observed as Mr. Damon replaced the cubs in the cage with Delia, who pushed them away. Tr. at 2232. Mr. Damon was reluctant to expose the cubs to further rejection from their mother, and Mr. Key gave him approval to hand-raise the cubs. Tr. at 2233. Mr. Key was a risk to

the newborns' immune systems because he lived with house cats, and he relied upon Mr. Damon's experience with large cats and his reassurance that he had hand-raised tigers in the past. Tr. at 2233; 226-230. A local veterinarian, Dr. Miller, was called to the site to examine the cubs on the night they were born. Tr. at 180-184; 2236. The doctor helped supply kitten milk replacer ("KMR") and vitamins for the cubs, and injected Delia with antibiotics. Tr. at 185-188; CX-7.

Although the cubs appeared to be flourishing with hand feedings, the smallest died on May 6, 2008. Tr. at 246; 2239. It was buried at the Circus site, and the Circus moved to its next engagement in Kansas. Tr. at 2240. When one of the remaining cubs refused to eat on May 12, 2008, Mr. Key authorized Mr. Damon to make an appointment to take the cubs to the Kansas State University Veterinary School for examination. Tr. at 247; 2241. The cub soon showed signs of a seizure and Mr. Damon drove both cubs to the Veterinary School. Tr. at 247-248; 2242. By the time they arrived for examination by Dr. Gary West, the ailing cub had suffered additional seizures and was confirmed dead on arrival. Tr. at 248; 2242; 680; CX-9. Dr. West ordered a necropsy, and placed the surviving cub in intensive care for observation. Tr. at 2243; Tr. at 680-1; CX-9; CX-12, duplicated at CX-44(a). The following day, the doctor discharged the survivor, a male that Mr. Damon named "Tubbs", with a prescription for dietary changes. Tr. at 692-4; 2244; CX-12. Mr. Damon continued to feed and care for Tubbs, who was kept in a transport carrier in the cab of the truck used to transport the elephants and adult tigers. Tr. at 269-272.

On August 3, 2008, Mr. Damon left the Circus to travel to the Fair under the arrangement between the Perry and Terranova Respondents. Tr. at 2259. Mr. Damon set up the elephant ride arena in an area close to the Petting Zoo and camel rides. Tr. at 259-260; CX-35 at p. 4. He kept the semi, with Tubbs in the cab, parked away from the public. Tr. at 270-273; CX-35 at pp. 121, 122, 127. Nearby, Mr. Damon erected a large outdoor pen where Tubbs spent some time together with a dog that Mr. Damon had found in his travels. Tr. at 272; CX-35 at p.128.

On August 13, 2008, APHIS inspectors Dr. Zeigerer and Dr. Sofranko, together with APHIS investigator Mike Booth, arrived at the fairgrounds to inspect the facilities and animals. Tr. at 1715; 2536; 1919; CX-38, 39. The trailers belonging to Perry and Terranova were parked in close proximity, and were inspected, as were the Petting Zoo, and the elephant and camel ride areas. Tr. at 1721; CX-38, 39. The inspectors

continued to visit the Respondents over the course of several days at the Fair, and on the second day of their inspection, they observed Tubbs in the cab of Terranova's trailer. Tr. at 2602; 2612-13; CX-35 at pp. 121, 122. Mr. Damon did not have a written plan of veterinary care[6] (Tr. at 233-234) and the inspectors instructed Mr. Damon to have Tubbs examined by a qualified veterinarian (Tr. at 288; 2612-4).

Mr. Terranova asked the Fair veterinarians to examine the cub, and Dr. Clothier, Dr. Lucien and two veterinary school students examined Tubbs. Tr. at 2614-2615. Dr. Clothier brought the other vets with her because it was an opportunity to see an exotic species, and Dr. Lucien had a lot of experience with a variety of animals. Tr. at 2101-2103. Dr. Clothier physically examined the cat, reviewed his history of prior veterinarian examinations, and expressed concerns about a worming regimen. Tr. at 2104-2107. She made some recommendations about diet, based upon Mr. Terranova's description of the cub's nutrition. Tr. at 2108. Dr. Clothier produced a certificate of health in which she basically concluded that Tubbs was healthy. Tr. at 2106; 2109; 2113; CX-32.

Dr. Clothier met with Drs. Zeigerer and Sofranko, and spoke with USDA's veterinarian Dr. Gage. Tr. at 2116-2121. Based upon her discussions with Dr. Gage, Dr. Clothier revised her dietary recommendations for Tubbs. Tr. at 2121; CX-32. Dr. Clothier's examination report was provided to the inspectors on August 15, 2008. Tr. at 2119-2121; 2629; CX-32.

Meanwhile, the inspectors were concerned about the cub's welfare, as they believed the cab of the truck where he was kept during the day was too hot; that his container was too small; that he was underweight due to an inappropriate diet; and that his living conditions were unsanitary. CX-38, 39, 48, 49. The inspectors conferred with other USDA personnel, in particular Dr. Gage, USDA's large cat expert. Id. It was decided that Tubbs' interests would be best served if he were confiscated by the inspection team and relocated to another facility. CX-50 . The confiscation was effected on Saturday, August 16, 2008, after which the cub was transported to a USDA approved facility, the Blank Park Zoo, where he was examined by Dr. June Olds. CX-52; CX-54; CX-55, 55(a), 55(b). Dr. Olds concluded that the cub had worn an ill-fitting harness

[6] I infer that the Key Respondents had not developed a written plan for veterinary care of their big cats,, since Mr. Key had asked Dr. West to draft one, and Dr. West declined on the basis of potential conflict of interest. Tr. at 2550-2552.

that caused skin abrasions, that he was underweight, and had suffered a wound near his right eye. CX-54, 55. X-rays needed to be highlighted to see the tiger's bone structure, but Dr. Olds did not have enough experience reading X-rays to say whether they depicted normal or abnormal tiger cub bones. Tr. at 573; CX-53.

The inspectors cited all of the Terranova and Key Respondents with violations of the Act regarding the care of the tiger cubs. CX-48, 49. The inspectors cited the Terranova and Perry Respondents with violations pertaining to the care, feeding and housing of the elephants, who were inspected on Saturday morning at the Fair in August 2008. Tr. at 2630-2631. Terranova and Perry Respondents were also charged with failure to handle the elephants in a manner sufficient to avoid harm, and with failure to provide sufficient barriers between the public and elephants during elephant rides. Terranova was also charged with failure to provide adequate veterinary care and maintain a program of adequate care for the elephants.

APHIS investigator Rodney Walker traveled to the Fair from Kansas as part of his investigation into reports that Terranova's elephants had escaped on June 4, 2008, while traveling with the Circus in WaKeeney, Kansas. Tr. at 427; 439; CX-21. Strong winds were present and although Mr. Key denied awareness of tornado advisories for the area, the weather was uncommonly changeable. Tr. at 252-254; 430; 2347. Mr. Key monitored the weather before determining that the Circus could be set up. Tr. at 252; 2344-2346. Mr. Damon had unloaded the elephants, but they were not prepared to conduct rides or show them because the weather was questionable. Tr. at 253-254. He was concerned about leaving the animals in the truck for too long. Tr. at 253. Although Mr. Damon said the decision to conduct the rides was his, he also testified that he would consult Mr. Key, who could override him. Id.

At some point it was decided that that the worst of the weather would bypass the Circus site, and the Circus began to set up attractions. Tr. at 253; 2279. The wind suddenly picked up, and the elephants spooked when a large inflatable amusement slide was blown toward[7] them, and they escaped from their handler. Tr. at 254. They wandered onto nearby

[7] There is conflicting testimony regarding whether one of the elephants was struck by the inflatable device or whether the device was blown near the elephants. I need not determine which version is accurate because the significance of the event is that it precipitated the elephants' escape.

private property and were reclaimed only after one was tranquilized. Tr. at 255-256; CX-18, 21, 22, 26. Apparently, the elephants suffered no permanent injury as the result of this incident in June, because they continued to work at the Circus with Mr. Damon and travel with him to the Fair in August. Tr. at 234. There is conflicting evidence regarding whether Mr. Damon was injured by an elephant during this incident. See, Mr. Damon's testimony, cf. CX-26.

After the Iowa Fair, Mr. Damon rejoined the circus with the elephants, but he quit his job in September, 2008. Tr. at 234. Mr. Terranova took over the work of handling the animals and was with them on November 4, 2009, at the Family Fun Circus in Enid, Oklahoma, when Kamba escaped and ran onto a highway where she was struck by a vehicle. Tr. at 3483 -3514; CX-70. She sustained various injuries, including lacerations on her right side, a fractured tarsal bone, a broken tusk, bruised trunk, and numerous abrasions. CX-74 through 76. When Mr. Terranova and his employee Carlos Quinones gave chase to Kamba, they left the other elephant, Congo, unattended for a period of time. Tr. at 3141. Kamba's injuries were treated at the Oklahoma State University School of Veterinary Medicine on the following day. CX-74 through 76. Kamba recovered from her injuries, and in approximately February, 2010, Terranova sold her and Congo to the Dallas Zoo. Tr. at 3517-3520. Mr. Terranova worked at the Zoo until February, 2011, when he resigned following negative publicity involving this case. Tr. at 3520.

Inspections of Terranova's exhibitions at other facilities were conducted and resulted in citations of violations of the Act. It is undisputed that spider monkeys on display at the Circus World Museum in Baraboo, Wisconsin in June, 2005 were provided a variety of foodstuffs and entertainment, but there was no formal enrichment program for primates in place. CX-1. Other inspections revealed that on June 15, 2006, a camel became entangled in a loose rope barrier that separated Terranova's camels and elephants at the Circus World Museum (Tr. at 88; CX-2) and inspections further found that two camels were left unattended on that day (Tr. at 3444; CX-2). In addition, it was determined that there were insufficient distance and insufficient perimeter fencing at the Circus World Museum in July, 200. Tr. at 3449; CX-4.

The record reflects that on June 5, 2007, an APHIS Veterinary Medical Officer ("VMO") observed Terranova's mountain lion being inadvertently sprayed with water and exposed to detergent during the

cleaning of his cage at the Universoul Circus in Landover, Maryland. CX-3.

Terranova admittedly failed to provide a written program of veterinary care and other records required by the Act while exhibiting at Turner Field in Atlanta, Georgia in February, 2008. CX-6. Further, on June 9 and 10, 2008 no one was available to allow inspection of the Terranova home facility in Kaufman, Texas. CX-6.

C. Prevailing Law and Regulations

The purpose of the Animal Welfare Act, as it relates to exhibited animals, is to insure that they are provided humane care and treatment (7 U.S.C. § 2131). The Secretary of Agriculture is specifically authorized to promulgate regulations to govern the humane handling and transportation of animals by (7 U.S.C. §§ 2143(a), 2151). The Act requires exhibitors to be licensed and requires the maintenance of records regarding the purchase, sale, transfer and transportation of regulated animals. 7 U.S.C. §§2133, 2134, 2140. Exhibitors must also allow inspection by APHIS inspectors to assure that the provisions of the Act and the Regulations and Standards are being followed. 7 U.S.C. §§ 2142, 2143, 2143 (a)(1) and (2), 2146 (a).

Violations of the Act by licensees may result in the assessment of civil penalties, and the suspension or revocation of licensees. 7 U.S.C. § 2149. The maximum civil penalty that may be assessed for each violation was modified under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note) and various implementing regulations issued by the Secretary. Though the Act originally specified a $2,500 maximum, between April 14, 2004 and June 17, 2008 the maximum for each violation was $3,750. In addition, 7 U.S.C. § 2149(b), was itself amended and, effective June 18, 2008, the maximum civil penalty for each violation was increased to $10,000.

The Act extends liability for violations to agents, pursuant to 7 U.S.C. §2139, which states, in pertinent part: "the act, omission, or failure of any person acting for or employed by . . . an exhibitor or a person licensed as . . . an exhibitor . . . within the scope of his employment or office, shall be deemed the act, omission or failure of such ... exhibitor as well as of such person." 7 U.S.C. §2139.

Regulations promulgated to implement the Act provide requirements for licensing, record keeping and attending veterinary care, as well as

specifications for the humane handling, care, treatment and transportation of covered animals. 9 C.F.R. Chapter 1, Subchapter A, Parts 1 through 4. The regulations set forth specific instructions regarding the size and environmental specifications of facilities where animals are housed or kept; the need for adequate barriers; the feeding and watering of animals; sanitation requirements; and the size of enclosures and manner used to transport animals. 9 C.F.R. Chapter 1, Subchapter A, Part 3, Subpart F. The regulations make it clear that exhibited animals must be handled in a manner that assures not only their safety but also the safety of the public, with sufficient distance or barriers between animals and people. Id.. Exhibitors are also required to engage a veterinarian and develop a written plan of veterinary care appropriate for each species of animal exhibited.

The burden of proof on Complainant is the preponderance of the evidence. *In re John Davenport, d/b/a King Royal Circus*, 57 Agri. Dec. 189 (1998).

D. Discussion

Before determining whether Complainant has established that Terranova's activities constitute violations of the AWA and prevailing regulations, I must determine the extent, if any, to which the Terranova Respondents are responsible for alleged violations relating to tigers owned by the Key Respondents. Respondents have admitted the jurisdiction of the Secretary in this adjudication, and I have considered that no one raised the defense that the Act should not apply to the tiger cubs, who had not been exhibited in any manner. Accordingly, I find that activities related to the tiger cubs born at the Circus are subject to the AWA.

Complainant contends that the Terranova Respondents are jointly responsible with the Key Respondents for any violations involving the Key's tigers and lion. The principal-agent relationship established by the AWA provides the foundation for Complainant's position, in that the statute states, in pertinent part: "[w]hen construing or enforcing the provisions of this chapter, the act, omission, or failure of any person acting for or employed by …an exhibitor or a person licensed as…an exhibitor…shall be deemed the act, omission or failure of such exhibitor…[or] licensee…as well as of such person". 7 U.S.C. § 2139. The language specifically provides a statutory method for "piercing the

corporate veil", since the "the term 'person' includes any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity." 7 U.S.C. § 2132(a).

The common law of Agency was adopted by the United States Supreme Court in *U.S. v. Goodry*, 25 U.S. 460 (1827). Subsequently, in considering whether an agency relationship exits, courts have looked at the Restatement of Agency, and concluded that the parties, a principal and his agent, must manifest their assent to create the relationship. *Jade Trading LLC v. U.S.*, 81 Fed. Ct. 173 (2008); Restatement of Agency, 3d, 1.01. In addition to consenting to act, an agency relationship requires that the principal retain the right to control the means and details of the acts that the agent performs. *Meyer v. Holley*, 537 U.S. 280, 283 (2003); *Northwinds Abatement, Inc. v. Employer's Insurance of Wausau*, 258 F.3d 345, 351 (5th Cir. 2001). In the absence of the principal's control or mutual consent, common law does not generally recognize an agency relationship. Restatement of Agency, 3d. An agency relationship imposes upon the agent a fiduciary duty to act in the principal's interests. *Id*.

Principals are liable for acts performed by their agents within the scope of their authority. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). Unless a principal has expressly or impliedly made an agent his representative, the principal is not liable for the acts of another who assumes to represent him, and a person dealing with an agent cannot hold the principal liable for any act or transaction of the agent not within the scope of his actual or apparent authority. *Leach & Co. v. Peirson*, 275 U.S. 120 (U.S. 1927). The knowledge of an agent may be imputed to the principal where it is relevant to the agency and to the matters entrusted to the agent. *Fleming v. United States*, 648 F.2d 1122 (7th Cir. Wis. 1981).

In determining whether an agency relationship exists, courts have looked at factors such as compensation to the agent from the principal; whether the agent is designated in writing; whether the agent's activities are subject to the principal's approval; whether the agent transfers funds to the principal; whether the principal indemnifies and insures the agent; whether the agent is financially accountable to the principal; whether the manner and means of the agent's activities are subject to the principal's control; the skill required of the agent; the source of instrumentalities and tools; the location of the agent's performance; the duration of the relationship between the parties; the role of the principal in hiring personnel for the agent's use; whether the principal has the right to

assign additional projects to agent; the extent of the agent's discretion over when and how long to work; the method of payment; whether the work is part of the regular business of the principal; whether the agent receives employee benefits; and how the agent is taxed. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989); *Nationwide Mut. Ins. Co. v. Darden*, 508 U.S. 318 (1992); *Centillon Data Systems, LLC v. Qwest Communications Int'l Inc.*, 2011 WL 167036 (Fed. Cir. 2011); *Akami Technologies Inc. v. Limelight Networks, Inc*., 629 F.3d 1311 (Fed. Cir. 2010); *Lubetzky v. U.S*., 393 F.3d 76 (1st Cir. 2004); *Vizcaino v. Microsoft Corp.*, 142 F. Supp 2d 1299 (W.D. Wash, 2001); aff'd 290 F. 3d 1043 (9th Cir. 2002).

There is no documentary evidence that establishes an agency relationship between the Key and Terranova Respondents. No written contracts or other memorialized indicia regarding compensation, obligations owed to each other, or agreed damages for breach are of record. Complainant alleged in Part A ¶ 2 at page 2 of the Amended Complaint that "Respondent Key Equipment Company, Inc. on its 2007, 2008 and 2009 AWA license renewal applications identified Doug Terranova as its agent and/or person "authorized to conduct business" for respondent Key Company, Inc." See, Complaint. Such documentation would clearly establish an agency relationship, and it is disconcerting that Complainant withdrew[8] Key's corporate and licensing records, which were originally identified as Complainant's exhibit CX-58[9]. Nevertheless, there is ample evidence that Terranova Enterprises Inc. acted as the Key Respondents' agent with respect to the Key's adult tigers and lion in certain circumstances, and over a period of years. There is also evidence of instances where the Terranova Respondents acted as the Key Respondents' agent regarding tiger cubs.

The Key big cats were housed at a compound specially built at Terranova's property for that purpose. Tr. at 2684. Mr. Terranova trained the Key cats while at the Circus World Museum in 2007. Tr. at

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[8] Such conduct would merit the contemplation of sanctions under the Federal Rules of Civil Procedure 11(b), in that it represents factual contentions and allegations which have no evidentiary support. Since I have found the existence of an agency relationship on the strength of other evidence, this conduct is merely offensive.

[9] CX-68 represents Terranova's AWA license application dated January 5, 2009, which identifies Doug Terranova as the person authorized to conduct business for Terranova Enterprises, Inc.

3450-3451. Terranova's employee Sloan Damon transported the cats in a vehicle owned by Terranova when they traveled to and with the Circus. Tr. at 238. The Key Respondents paid the Terranova Respondents for using the elephants at the Circus, and Mr. Damon was paid out of those funds. Tr. at 237. Mr. Terranova approved Mr. Damon raising the Key tiger cubs while simultaneously handling Terranova's elephants. Tr. at 242. Mr. Damon "answered to" both Mr. Terranova and Mr. Key. Tr. at 323. Mr. Terranova provided advice about caring for the cubs. Tr. at 242, 307-308; Tr. at 2701. 2707-2708; CX-65. Mr. Damon secured the paperwork to transport the elephants and the cub to the Fair (Tr. at 285-285) and listed the surviving cub, "Tubbs", as Terranova's animals for economic reasons (Tr. at 309; CX-44). Mr. Terranova sought out a veterinarian to examine Tubbs at the Fair. Tr. at 2724; 2733; CX-32. Mr. Terranova offered to take Tubbs from the Fair to his home facility in Kaufman, Texas, and also offered to house all the cubs after they were born. Tr. at 2708, 339. Mr. Terranova interacted with APHIS inspectors at the Fair with respect to the cub. Tr. at 2734.

Each of these activities signifies the exercise of control over animals, and to that extent, Mr. Terranova acted as agent for the Key Respondents. Although Mr. Terranova explained that he failed to advise inspectors of Tubbs' presence at the Fair because he wanted to avoid additional problems, the fact that he could anticipate that he might be implicated for problems is tantamount to an admission of his involvement with Key's cub. Because Terranova employee Sloan Damon became primary caretaker of the cubs with Mr. Terranova's knowledge and consent, Terranova Enterprises, Inc. is responsible for the activities of its employee under the Act.

1. Did Terranova Enterprises Inc. violate the AWA

The Terranova Respondents are charged with violations of the Act that fall within several general categories: access to records and facilities; maintenance of facilities and food supply; maintaining sufficient barriers; handling and care of animals; retaining veterinarians and a plan of care; and providing veterinary care. The Complaint includes every violation cited against the Terranova Respondents since 2005, even though it is clear that many of the violations would not have generated a Complaint under the Act against Terranova. In addition, Terranova was charged

with certain violations that I find are not supported by the evidence. The allegations and evidence are summarized as follows:

a. **Access to Records and Facilities**

Plan of environmental enhancement for primates

I accord substantial weight to the testimony of Cynthia Neis regarding the results of her inspections of Terranova exhibitions at the Circus World Museum in Baraboo, Wisconsin, which were admitted by Mr. Terranova. Tr. at 3442-3444. On June 23 through 25, 2006, Inspector Neis' inspection showed that Terranova failed to maintain a written plan of environmental enhancement for two spider monkeys. CX-1. I credit Inspector Neis' testimony that despite the lack of a documented plan, she observed evidence of environmental enhancement for the monkeys' psychological well-being. Tr. at 3029-3030. Inspector Neis allowed Terranova ninety days to implement a written plan (CX-1) which suggests that she did not find that this violation required immediate correction.

Failure to have plan of veterinarian care

Terranova was cited for failure to have an attending veterinarian and adequate veterinary care while exhibiting animals at Turner Field in Atlanta, Georgia on February 26, 2008. CX-6. Inspector Rhudy Ayers testified that the original inspection report cited the incorrect violation, and that the problem he had observed was the failure to have proper paper work, not the failure to have an attending veterinarian. Tr. at 2995-2998. Inspector Ayers prepared additional corrective reports that charged Terranova with failure to allow examination of required records. Id.; CX-6.

Inspector Donovan Fox, who conducted regular inspections of Terranova's home facility, was aware that Terranova had a plan for veterinary care and he confirmed his familiarity with the plan that Mr. Terranova produced as evidence. Tr. at 3064-3065; TX-21. Inspector Fox further testified that he could not say whether Inspector Ayers had contacted him to confirm whether Terranova had a plan in place in February, 2008. Tr. at 3064-3067. I fully credit Inspector Ayer's testimony and the corrected inspection reports that reflect that Terranova was cited for a paperwork violation, and not for failure to have a plan of veterinary care. Tr. at 2696-2698; CX-6. The preponderance of the

evidence establishes that Terranova employed a veterinarian, and had a written plan of veterinary care at all times relevant to this adjudication. TX-19, 21, 28; c.f., Complainant's Proposed Findings of Fact, etc. at page 4, ¶ A.16. Therefore the charge regarding the failure to maintain a veterinarian is dismissed.

Inspection of Kaufman, Texas facility

Exhibitors must also allow inspection by APHIS inspectors to assure compliance with Sections 2142, 2143, 2143 (a)(1) and (2), 2146 (a) of the Act. The regulations provide that "a responsible adult shall be made available to accompany APHIS officials during the inspection process". 9 C.F.R. §2.126(b). It is undisputed that Mr. Terranova was not on site on June 9, 2008 and again on June 10, 2008, when Inspector Donovan Fox arrived to inspect the Terranova facilities in Kaufman, Texas. Tr. at 3056-3058; CX-27; Respondents' admissions. Mr. Fox did not know which, if any, of the animals owned by Terranova were on site at the time of his attempted inspections. Tr. at 3064. Mr. Fox had inspected Terranova facilities in the past, and had found no problems with them. Tr. at 3062-3063.

Although I credit Mr. Terranova's testimony that he was absent from his facility for only a brief time on both occasions (Tr. at 3463-3464), the regulations require exhibitors to have a responsible individual available during business hours to allow access to inspectors. Mr. Terranova testified that individuals were on site, as he was hosting children from China, (Tr. at 3463) but these individuals were obviously not responsible as anticipated by the regulation. On the application to renew Respondents' license, no other individual but Doug Terranova is listed as authorized to represent the Terranova Respondents. CX-68. The evidence establishes violation of the regulations regarding access for inspection.

b. Maintenance of Barriers

Unattended camels at Circus World

Inspector Neis observed that on June 15, 2006, Terranova's two camels were left unattended, and one became entangled in ropes separating the elephant and camel areas. Tr. at 3031. Only the rope barrier separated the camels from the public area, and although the inspector did not observe any members of the public in the vicinity at the

time, she explained that the public had free access to the area where the camels were kept. Tr. at 3033. Without the presence of handlers, the rope barrier was insufficient to prevent direct contact by the public with the camels. Tr. at 3034. It is undisputed that the camels were left in the care of employees who abandoned them, and that Mr. Terranova credibly testified that he was upset with the employees. Tr. at 3445-3447. This charge is substantiated.

Lack of perimeter fencing at Circus World

On July 24, 2007, Inspector Neis found that outdoor housing facilities in Baraboo had no perimeter fence at the enclosure where Terranova kept two tigers and a lion. CX-4; Tr. at 3034-3036. Inspector Neis cited Terranova for inadequate barrier between the animals and public areas, because she considered Terranova to be other than a temporary exhibitor, having been on site since June 1, 2007. Tr. at 3034. The only fence was shorter than eight feet, and the lack of a perimeter fence created a hazard in containing animals escaping from the primary enclosure. Tr. at 3035-3036. Terranova was given until September 7, 2007 to correct the issue. CX-4.

Mr. Terranova respected Inspector's Neis conclusion that temporary fencing rules should not have applied in those circumstances, but he noted that the area in question was secured from the public. Tr. at 3448. Mr. Terranova further testified that he had used that same area with the same stationery permanent fencing constructed by the Circus World Museum, and a large hill and river bed as barriers, in addition to tents around the tiger area in other years without being cited for violations. Tr. at 3448-3450. Terranova believed that Inspector Neis wanted to encourage Circus World to construct a perimeter fence for future exhibitors, and he recalled discussing the matter with Circus World officials together with Inspector Neis. Tr. at 3452. Mr. Terranova had no authority to construct a fence at that facility, and since he did not return to that area after 2007 , he does not know if a fence was constructed. Tr. at 3452-3453. This technical violation is established.

Inadequate barrier between elephants and public at State Fair

Inspectors at the Iowa State Fair observed on August 13, 2008, that elephant rides were conducted in a manner that they concluded did not

provide sufficient distance between the animals and the public[10]. CX-41. Relying upon photographs taken at the Fair, Dr. Zeigerer testified that people riding one elephant could easily reach out and touch the other in the center of the ring. Tr. at 1166. Mr. Damon worked on the ride, and he believed that the elephants were sufficiently under the control of the three individuals working at the exhibition. Tr. at 318-319. The elephant not carrying people was separated by a rope in the center of the ring. Tr. at 319. Mr. Terranova disagreed with the assessment that there was insufficient barrier, but he nevertheless abided by the inspectors' instructions to chain the elephant that wasn't working when she was left in the center of the work ring. Tr. at 2538-2539.

I accord equal weight to the contradictory evidence regarding the barriers. It is axiomatic that an elephant ride amusement will bring the public in close contact with the animals, and the question of proper barrier is within the judgment and expertise of the handler. Since neither Dr. Zeigerer nor Dr. Sofranko have any experience with handling animals, I decline to accord additional weight to their opinions. Accordingly, the evidence regarding this allegation is in equipoise, and the allegation is dismissed.

Elephants at Family Fun Circus

Respondents are charged with failure to maintain sufficient barriers between the public and the elephants during an exhibition on November 4, 2009 in Enid, Oklahoma. It is not entirely clear from the evidence or Complainant's argument exactly which incidents at the Family Fun Circus are involved in this allegation. I infer from the preponderance of the evidence that this charge arises from Mr. Terranova's failure to maintain control over the elephants as he led them into the ring without any assistance from other personnel, leading to Kamba's escape and Congo's solitary walk around the circus ring.

I accord substantial weight to the testimony of experienced elephant handler Tim Hendrickson, who opined that "you have to be in the elephant's head" to control the animal, which is "too big, too strong and too fast" to otherwise control. Tr. at 3258-3259. Mr. Terranova described a scenario where he was distracted and responding to unexpected circumstances. As the primary barrier between the public

[10]The Perry Respondents were also charged with this alleged violation, and by separate Decision relating to the Perry Respondents only, I have found that the y are not liable for any charges related to the elephants.

and the elephants during a circus act is the handler, it is clear that Mr. Terranova did not provide a sufficient barrier between the elephants and the public in Enid, Oklahoma. Congo walked around the circus ring alone, and Kamba escaped. The preponderance of the evidence establishes that Respondents failed to have sufficient barriers, in the form of trained personnel, to control the elephants, thereby putting them and the public at risk of harm. Indeed, members of the public were actually harmed when their car collided with Kamba on the highway.

Respondents are further charged with failure to enclose outdoor housing facilities by an adequate perimeter fence. It is clear that there was no separate perimeter fence at the facilities used by the Family Fun Circus. TX-42, 43. The existence of an additional fence may have thwarted Kamba in her journey to the highway, and thereby prevented her injury, as well as the injury[11] to the occupants in the vehicle. This allegation is sustained.

c. Maintenance of Facilities and Food Supply

Fencing at Circus World

Inspector Neis issued another citation to Terranova at Baraboo on June 11, 2008, for dilapidated fencing that could have harmed his camels. CX-29; Tr. at 3036. Terranova's employee had made the repairs when the inspector returned to conduct her exit interview. Tr. at 3037. This allegation is substantiated.

Facilities at State Fair

An August 13, 2008 inspection of the facilities used to transport and house elephants at the Iowa State Fair revealed lengths of cable within the elephants' outdoor enclosure; a 15 to 18 inch metal protrusion from the ground in the enclosure; and a sharp edged piece of metal within their trailer. CX-42; CX-35 at pp. 53; 79-85; 1169. Inspector Michael Booth testified that all of potential hazards were repaired or removed. Tr. at 1925.

The inspection at the Fair also revealed fecal matter in an area where hay was stored. CX-35 at pp. 35-37. Mr. Damon testified that he kept the feed hay separated and above the ground, to keep it clean and dry. Tr.

[11] I decline to draw any conclusions regarding the severity of injuries on which insurance was paid, particularly given the paucity of reliable evidence on this issue. See, Tr. at 3433-36.

at 319-320. Photographs clearly show that the vehicle where the hay was stored belonged to Mr. Terranova. CX-24, 77. Mr. Terranova explained that the feed hay was stacked on wooden pallets, and was separate from areas where animals were kept. Tr. at 2546-2548. He said that a zebu had been enclosed in that area and that the area had not yet been cleaned at the time of the inspection. Tr. at 2770. I accord substantial weight to the opinions of the exhibitors, both of whom credibly explained that the animals' feed was not exposed to fecal matter. The preponderance of the evidence fails to establish that the fecal matter was mixed with animal feed.

Insufficient shade for elephants

At the Fair in August, 2008, inspectors observed that elephants were left in the sun when they were not being used in the elephant ride amusement. CX-42. Dr. Zeigerer testified that no shade was provided during the elephant rides at the Fair. Tr. at 1169-1171. This is undisputed, as the rides were conducted with the non-working elephant restrained in the middle of the ring that the other animal walked around with a rider. Id.

d. Handling of Animals

Unattended camels at Circus World

As noted above, on June 15, 2006, Terranova's two camels were left unattended at Circus World in Baraboo, Wisconsin. I credit Mr. Terranova's testimony that confusion among his employees caused the problem (Tr. at 3444-3446), but such a lapse reflects failure to handle animals as carefully as possible to prevent harm, injury, or distress. One of the camels was entangled in a loose rope, which could have caused harm. I credit Mr. Terranova's testimony that his elephants were with him and therefore, find no violation with respect to the handling of the elephants on June 15, 2006.

Water sprayed mountain lion at Universoul Circus

While conducting a routine inspection of Terranova's exhibition at the Universoul Circus, APHIS inspector Dr. Gloria McFadden observed a mountain lion sprayed with water and exposed to cleaning detergent during the cleaning of its cage by Terranova's employee Carlos

Quinones[12]. Tr. at 3008-3013; CX-3. The lion demonstrated its discomfort by growling, turning its back to people, and not responding to its handler. Tr. at 3012; 3014-15 Dr. McFadden discussed the cleaning method with Mr. Quinones, and when she returned to the site on the following day, Mr. Quinones had changed the procedure so that animals were not in cages during the cleaning process. Tr. at 3017. Mr. Terranova was not at the site during this incident. Tr. at 3447. Although the amount of distress suffered by the mountain lion is indeterminate, I accord substantial weight to Dr. McFadden's opinion, considering her credentials as a licensed veterinarian, and find that this violation has been established. CX-3; Tr. at 3006.

Elephants in WaKeeney, Kansas

On June 5, 2008, those responsible for handling Terranova's elephants failed to handle the elephants as carefully as possible, resulting in their escape. Severe weather was in the area, resulting in uncertainty about whether the Circus would perform. Tr. 253. Mr. Damon was placed in a tenuous position on this date, as he needed to let the elephants out of their trailer to avoid them being unduly confined, which would have violated the Act. Tr. at 287. However, considering Mr. Damon's credible testimony about Mr. Key's surveillance of weather forecasts (Tr. at 252-253), Mr. Damon's decision to unload the elephants presented risks related to the unpredictable state of the weather that appear to outweigh any risk presented by their confinement to the semi.

Although weather can pose unpredictable hazards, the forecast on June 5, 2008 included predictions of high winds, resulting in the delay of the Circus. Tr. at 253-254. Although it is unlikely that anyone could have foreseen that wind would blow an inflatable amusement slide close enough to the elephants to provoke a stampede, and high winds always portend the risk of bodily injury and property damage. Mr. Damon's decision to expose the elephants to fluctuating severe weather conditions jeopardized their safety.

The peril was compounded by Mr. Damon's relatively outdated experience with handling elephants and his limited experience with the elephants at issue. Before joining Terranova, Damon's most recent work was with big cats, although he worked with elephants in the 1970's and 1980's. Tr. at 222-224. He trained with Terranova's elephants for about

[12] Mr. Quinones speaks Spanish as his first language, and testified with the aid of an interpreter. See, Transcript June 1, 2011.

two weeks before taking them to the Circus. Tr. at 226, 306. Mr. Childs had no special experience with elephants and his training was limited to helping Mr. Damon. CX-5, CX-18. Mr. Childs helped during exhibitions by walking with Mr. Damon and the elephants into the Circus ring, and despite Mr. Damon's opinion that Mr. Childs was competent to handle the elephants, the record does not establish a basis for that opinion. See, Tr. at 232, 311-312. There is evidence that Mr. Damon had been injured by his charges on several occasions[13], including an incident where he allegedly suffered broken teeth and ribs. CX-26; Tr. at 250-251.

Considering Mr. Damon's history of problems from the elephants, the potential for severe weather should have inspired extra caution from the handler. Although the event ended with no long-term negative implications, the elephants were out of their handler's control for hours, and one had to be tranquilized before being restrained, which most certainly represents harm and stress to an animal.

The preponderance of the evidence establishes that Terranova failed to exercise sufficient care when assigning Mr. Damon full responsibility to travel and care for elephants on the road. I fully credit the testimony of elephant handler Tim Hendrickson, who believed that training and adequate personnel are crucial when working with elephants. Tr. at 3258-3275. This violation is sustained.

Elephants at Family Fun Circus

On November 4, 2009, as Mr. Terranova prepared to enter the circus ring to exhibit the elephants, a confluence of unexpected mishaps converged and created a catastrophe. Mr. Terranova was not totally prepared to enter the ring when he heard the signal for his act, as earlier in the day, a horse act had preceded his. Tr. at 3486-3487. When he heard the music signaling the start of the elephant act, Mr. Terranova rushed to the entrance of the tent without first ascertaining that Mr. Quinones was with him and the elephants. Tr. at 3487. Mr. Terranova was between the elephants, at Congo's rear, and expected the entrance to be lit and opened, ready for his entrance. Tr. at 3488. To his dismay, the light was out, and the tent flap was lowered, requiring Mr. Terranova to wait for the person responsible for opening the tent to arrive. Tr. at 3489-3491. The boy came running by the elephants, and Mr. Terranova

[13] There is contradictory evidence regarding whether Mr. Damon was injured on June 5, 2008. CX-26; CX-18.

warned him to stop running. Tr. at 3492. Mr. Terranova speculated that the boy startled Kamba, who turned around and left the tent site, while Congo proceeded unaccompanied into the ring. Tr. at 3493. Mr. Terranova was left with the choice of securing Congo, who was alone in a ring with hundreds of people, or chasing Kamba. Id.

Mr. Terranova admitted full responsibility for the series of poor decisions that led to Kamba's tragic collision with a vehicle on a highway some distance from the circus site. CX-71, 72; Tr. at 3547. I accord substantial weight to the testimony of elephant handler and expert Tim Hendrickson, who stressed the importance of having adequate personnel on hand when handling elephants. Tr. at 3273. Mr. Terranova did not have the assistance of a skilled elephant handler with him in Enid. In June, 2011 Mr. Quinones described himself as a tiger handler, who had worked in the field for five years. Tr. at 3121. Mr. Quinones testified that in November 2009, he was a "tiger trainer and elephant assistant". Tr. at 3121. His training with respect to working with elephants involved "basically maintenance duties, like cleaning. Just how to call them, how to approach them." Tr. at 3122. Mr. Quinones had never exhibited the elephants in the circus ring. Id. The other two employees with Mr. Terranova in Enid were casual laborers. Tr. at 3540-3542.

Mr. Quinones corroborated Mr. Terranova's description of the events in Enid, Oklahoma. Mr. Quinones was feeding the tigers and unexpectedly heard music that indicated that the elephants were next to enter the circus ring. Tr. at 3131. The order of acts in the show changed from time to time, but he did not expect the elephants to appear when they were called. Id. Mr. Quinones dropped what he was doing and hurried to join the elephants and Mr. Terranova, only to see Kamba turn away from Terranova, who was in front with Congo. Tr. at 3131-3132. He called to Mr. Terranova to wait, but saw that Kamba kept moving past her trailer, while Congo and Mr. Terranova entered the circus ring. Tr. at 3132-3134. Mr. Quinones was familiar with Mr. Terranova's protocol in the event of an escape, even though it was written in English, and he understood that he needed to try to catch Kamba and keep her away from people. Tr. at 3135-3136. The escape plan anticipated that the police would be called, but Mr. Quinones did not have a phone. Tr. at 3138.

Mr. Quinones tried to stop Kamba by using his ankus on her shoulder, but she continued to walk, and he stayed with her, talking to her to try to convince her to stop. Tr. at 3136-3137. She proceeded onto the

highway, where Mr. Quinones watched as she was struck by a vehicle. Tr. at 3138-3139. After the collision, Kamba left the highway and hid in some trees, where Mr. Quinones stayed watching over her. Tr. at 3139. Another employee of Mr. Terranova, Joe Miller, joined them, and Mr. Quinones denied that Kamba struck Mr. Miller with her trunk. Tr. at 3140. Mr. Terranova arrived on the scene, having left Congo alone, but secured, for five to ten minutes. Id. Mr. Quinones left Kamba with Mr. Terranova and Mr. Miller, and returned to watch over Congo. Tr. at 3141. Mr. Quinones believed that Kamba escaped because only Mr. Terranova was with the elephants, and he was in front of them. Tr. at 3145. Usually he is behind them, but on that night, Mr. Quinones believed there was time to feed the tigers before he expected the elephants' show to start. Tr. at 3146.

I credit Mr. Hendrickson's testimony that elephants who have escaped are likely to escape again. Tr. at 3284. Considering the fact that the elephants had already escaped at least once, Mr. Terranova's decision to proceed to the ring alone represents disregard for the potential of an escape. The events in WaKeeney demonstrated that those who handled Kamba and Congo needed to be prepared for the unexpected. I find that the series of mistakes that Mr. Terranova made on November 4, 2009 represent failure to handle the elephants as carefully as possible, in a manner consistent with their good health and well being.

Elephants at the Fair

Complainants have alleged that the elephant rides that were conducted at the Fair did not provide for adequate safety for the animals and the public. I accord substantial weight to the opinions of the handlers, who believed that the elephants were sufficiently controlled by the three people involved in the exhibition. Tr. at 318-319; CX-35 at p. 58. Dr. Sofranko testified that the handler was not between the elephants and individuals riding on the working elephant, noting that the handler would not be able to see what the center elephant was doing. Tr. at 1416; 1448-1449; CX-35 at pp. 64-69; 89-91. Dr. Zeigerer testified similarly. Tr. at 1164-1165.

Mr. Damon worked on the ride, and he believed that the elephants were sufficiently under the control of the three individuals involved in the exhibition. Tr. at 318-319. The elephant not carrying people was separated by a rope in the center of the ring, and Mr. Damon maintained eye contact with that elephant at all times. Tr. at 319. Mr. Terranova

disagreed with the assessment that the center elephant was not well controlled. Tr. at 2538-2539. Unlike the incidents in WaKeeney, Kansas and Enid, Oklahoma, three individuals were involved in close proximity to the elephants during the duration of the elephant ride amusement.

I accord equal weight to the contradictory evidence. The opinions of a licensed, well experienced handler are of equal weight to those of the inspectors in this instance. Dr. Zeigerer's experience with elephants was limited to training and previous inspections in the four years of her employment with USDA (Tr. at 1206) and Dr. Sofranko, although extremely knowledgeable about elephants, had no hands on experience handling them (Tr. at 1457). Her expertise developed as the result of her work as a veterinary inspector for the USDA. Tr. at 1405-1408. I also question whether the inspectors considered the ride to be particularly unsafe, as they did not point out their concerns when they first observed them, but waited for days to deliver their inspection report to the Respondents. Tr. at 1209-1210.

Mr. Damon testified that at some point in the summer of 2008, a child almost slipped from an elephant when it continued to walk from a loading platform. Tr. at 279. I fully credit Mr. Damon's account of the incident, as it is not contradicted. Dr. Sofranko's testimony about "an injury" involving a child is unsubstantiated. See, Tr. at 1421-1422. I further note that the incident described by Mr. Damon did not involve the risk that individuals astride an elephant could physically interact with the elephant in the center of the ring, as the inspectors feared. Additionally, Mr. Terranova heeded the inspectors' advice and chained the elephant in the center, which did not result in more space between the elephants and the public.

I assign equal weight to the opinions of the handlers and the inspectors, neither of whom had hands on experience handling elephants. The evidence is in equipoise on this issue, and fails to establish the existence of a violation.

Allegations of failure to handle animals as carefully as possible relating to Delia's pregnancy, and birth and death of cubs

On May 2 or 3, 2008, the Key's female tiger, Delia, gave birth to three cubs while traveling with the Circus in Glasgow, Missouri. Tr. at 239. I fully credit Mr. Damon's testimony that although Delia exhibited

behaviors compatible with some discomfort, she did not have the appearance of pregnancy. Tr. at 241. Delia and her litter mate were generally kept separated when housed at the Terranova facility to avoid the chance of their mating because offspring of litter mates are predisposed to genetic mutations, as Dr. Gage conceded. Tr. at 2224-2234; 2683-2694; 952; 241. Dr. Mohr issued a certificate of veterinary inspection of his examination of Delia on February 29, 2008 before she was transported to the Circus, and did not note that she was pregnant. KX-6; TX-25. The preponderance of the evidence demonstrates that Delia's pregnancy was not apparent and not known until ten or so days before she gave birth. The surprise birth of her cubs while traveling with the Circus does not constitute mishandling of Delia. Mr. Key's authorizations for veterinary care for Delia and the tiger cubs that were eventually born demonstrate his attention to the well-being of the animals.

Mr. Key testified that Delia appeared eager to exercise and workout in her regular routine after the birth of the cubs. Tr. at 2307. I accord weight to his opinion, considering his familiarity with the tiger. In addition, there is no evidence that Delia's activity posed a risk of harm or discomfort to her. I cannot say from the record before me whether Delia participated in Circus acts after her pregnancy was suspected.

Respondents acted in a responsible manner after Delia rejected the cubs following their birth. Mr. Damon and Mr. Key immediately contacted a veterinarian, Dr. Stephen Miller, who examined her and administered antibiotics. Tr. at 185; CX-7. Dr. Miller found no evidence of stress, physical harm or discomfort. Id. Dr. Miller also examined the newborn cubs and provided kitten milk replacement (KMR), as it was apparent that Delia had rejected them and would not nurse them. Tr. at 186-188. Dr. Gage agreed with Mr. Damon that it was not uncommon for tigers to reject their first litter, and in such event cubs would be hand reared. Tr. at 951; 888; 358.. Although Mr. Damon acknowledged that raising cubs by human hand may make them easier to train (Tr. at 358), I credit his testimony that he reintroduced them to their mother before volunteering to raise them (Tr. at 358-359).

The record establishes that the Respondents exercised care in handling the newborn cubs. They were examined by a licensed veterinarian within hours of their birth, and they followed his advice about nutrition. Although the smallest of the cubs died within days of birth, it has been generally acknowledged that newborns who do not have

the benefit of colostrum are likely to have compromised immune systems. Tr. at 189; 690-699;895-898. Although a necropsy was not performed on the first cub who died, the regulations do not require such, and the early death of rejected cubs is not uncommon. KX-26.

On May 12, 2008, one of the remaining male cubs developed seizures, and Mr. Damon took the survivors to Kansas State University, where Dr. Gary West, a veterinarian with large felid experience, examined them. Tr. at 681; CX-8; 9; 9a; 12. The seizing cub had died before he could be examined, and necropsy revealed that the animal was immuno-compromised and had suffered from a fatal e-coli infection. Id. The lone survivor was kept for observation, and Dr. West found evidence of hypoglycemia, hyponatremia and hypochloridema, which he related to improper diet. Tr. at 684-680; CX-9, 12. Dr. West released the cub the following day with a prescription for proper nutrition and the recommendation that the cub be weighed daily. Tr. at 692-695.

Respondents' newborns slept in a laundry basket lined with blankets over an electric heater. Tr. at 194; CX-7. They were kept in the cab of the semi that was used to transport the elephants and tigers from site to site. Tr. at 270-272. At the Fair, Tubbs was fed with a recycled soda pop bottle. CX-44. I credit Mr. Key's testimony that Mr. Damon was provided help with laundry, food, and living quarters when he was with the Circus, and that he disapproved of Tubbs' living conditions at the Fair. Tr. at 2380; 2384; See, CX-47. I further credit Mr. Key's explanation that he turned over the care of the tiger cubs to Mr. Damon because Mr. Key's association with house cats presented an additional risk to the cubs. Tr. at 2230-2233; 891. The record supports the testimony that Mr. Key authorized veterinary care for the cubs from the time of their birth. CX-12; KX-7; KX-9; KX-11.

The contrast between Dr. Gage's description of best practices for raising newborn tigers and the living quarters of Delia's cubs could not be starker. I fully credit Dr. Gage's opinion regarding the best care that could have been provided to cubs whose mother rejected them before they had the benefit of colostrum. Dr. Gage testified that in the facility where she worked, newborn cubs who are hand raised are kept in the equivalent of sterile surroundings, in specially designed water warmed isolettes. Tr. at 891-894. Every care is taken to keep too many people from handling the cubs, in order to minimize risks from exposure to disease on their delicate immune systems. Tr. at 891-892; 896-900. Dr. Gage expressed her surprise that the cub survived the conditions of its

surroundings, which she found unsanitary. Tr. at 930-950. She testified that the dirty conditions of a truck, and the potential risk of burns from heating pads, were evidence of unsafe handling. She believed that more sanitary and better physical facilities would possibly have saved the lives of the other cubs.

I have no doubt that Respondents could have provided a cleaner environment and better equipment, had they been prepared for the birth of cubs, which was unexpected. The question is whether the Act and regulations required Respondents to do more than they were able to improvise. Neither the Act nor regulations define the level of care suggested by USDA. There is no bright line rule that defines how animals are to be "handled as carefully as possible". Dr. Gage described best practices in an idyllic setting[14], but there is no evidence that her recommendations constitute the standard of care for the typical animal exhibitor. As the 6th Circuit Court of Appeals observed in *Hodgins v. U.S.D.A.*, 59 Agric. Dec. 534 (6th Cir. 2000) the regulations do not contemplate "utopian conditions". *Hodgins*, supra. Dr. West observed that newborns in zoos are not kept in sterile incubators, and so long as the surroundings were "fairly clean" and isolated from other animals, cubs should thrive. Tr. at 731-732.

In addition, although Dr. Gage saw pictures of the cubs shortly after their birth, the bulk of the pictures in evidence depict the conditions of Tubbs' living arrangements at the Fair. The record establishes that when Mr. Damon was traveling with the Circus he had help that was unavailable at the Fair. Moreover, Dr. Gage admitted that the best of care was not enough to prevent disease in cubs that were raised under her supervision (Tr. at 923-924) and further admitted that "[s]ometimes animals will die through no fault of anyone" (Tr. at 986). Although Dr. Gage would have prescribed Ebisilac, Dr. West, who has experience with large felids, recommended that the surviving cub continue to take the KMR that had been prescribed by Dr. Miller. CX-8, 9; 12. Tubbs was seen by a number of veterinarians who pronounced him healthy. The consensus of the medical opinions of record is that hand reared cubs are hard to raise under the most sterile and supportive conditions. Dr. Gage's opinion that cleaner facilities may have prevented the death of

[14] It is axiomatic that animals born at a zoo with research facilities and a host of volunteers will have more luxurious surroundings and better equipment than an animal born at a traveling circus.

the two cubs is speculative and not fully supported by the evidence, most persuasively, the survival of one of the cubs.

The preponderance of the evidence fails to demonstrate that the newborn cubs were mishandled from the time of their birth until the events that led them to Dr. West at Kansas State University. They were immediately examined by a veterinarian, who prescribed a diet that the Respondents followed, although it is difficult to determine how carefully Respondents adhered to the instructions. There is agreement among the veterinarians of record that cubs who do not nurse are at heightened risk of developing problems, as the lack of colostrum compromises their immune systems. The cubs were at further risk because of their heritage as offspring of sibling tigers.

Although no necropsy was performed on the first cub that died, she was at risk due to her size and compromised immune system. The second death was due to an infection that the cub's compromised immune system could not ward off. Dr. West had seen hand raised cubs succumb to secondary infections. The record does not support the conclusion that the cubs died because of unsanitary conditions. I credit Dr. West's testimony "that septicemias can occur in the cleanest of conditions" and "that the mortality rate for hand raised carnivores is fairly high". Tr. at 708; 712. It is significant that Dr. West observed that cubs who have received colostrum may still fall to bacterial infection. Tr. at 712. Dr. West did not attribute the death of either cub to actions of any of the Respondents, and he was satisfied that Mr. Damon had acted appropriately on behalf of the animals. Tr. at 732.

I conclude that Respondents' care of Delia and her cubs, both before and immediately after they were born, constitutes safe handling of animals under the Act, with the exception of providing adequate nutrition.

Tubbs' nutrition

Mr. Damon took on the demanding job of hand rearing tigers amidst his other duties relating to exhibiting the Terranova elephants. Although Mr. Damon may have successfully hand reared many tiger cubs in his career, he testified that he had last hand raised a cub from birth in 1984. Tr. at 257. He used his own feeding formula, which was based on estimates. Tr. at 228-230; 249. Mr. Damon rejected Mr. Terranova's advice, and did not carefully follow Dr. West's prescription, and as a result, Tubbs' growth and well-being were compromised. Laboratory

tests conducted by Dr. West at his examination of Tubbs on May 12, 2008, when Tubbs was 10 or 11 days old, revealed hypoglycemia, hyponatremia and hypochloridema, which the doctor related to improper diet. CX-9; 12. Dr. West released the cub the following day with a prescription for proper nutrition and the recommendation that the cub be weighed daily. Id.

Although Mr. Damon may have believed that he fed Tubbs in a manner consistent with Dr. West's prescription, Mr. Damon admittedly failed to weigh the cub daily, lacking a scale, and presumably failing to ask Mr. Key to buy one[15]. Tr. at 2321. When consulted after the birth of the cubs, Mr. Terranova made recommendations of a diet that more closely resembled that endorsed by Dr. Gage. CX-67 (email from Terranova dated May 6, 2008). Mr. Damon relied upon his own formula instead, which failed to keep up with Tubbs' nutritional needs. Photographs relating to Mr. Damon's preparation of Tubbs' meals depict a less than scientific approach to volumes and measures. CX-47. He also had not supplemented the cat's diet with meat until advised to do so at the Fair. I credit Mr. Damon with making adjustments to Tubbs' diet at certain times, but the record conclusively establishes that the cub was underweight by a significant proportion. Tr. at 556.

I decline to speculate whether Tubbs would have suffered metabolic bone disease had Mr. Damon continued the dietary regime in place. There is no definitive diagnosis of that condition, even though X-rays needed to be highlighted to reveal the cub's bone structure. Tr. at 650 . I note that ground turkey meat had been added to the diet sometime during the Fair[16], and that Dr. Clothier intended to share a more rigorous diet plan with Mr. Damon that was recommended by Dr. Gage. Dr. Gage testified that metabolic bone disease was reversible with sufficient calcium. Tr. at 909; CX-40(a). Therefore, it is possible that Tubbs' dietary deficiencies would have been corrected. Regardless, the haphazard approach to Tubbs' nutrition resulted in the cub being significantly underweight, which constitutes a failure to handle an animal carefully.

Adequacy of Tubbs' living facilities and restraints

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[15] Mr. Damon testified that Mr. Key had never refused to pay for anything requested for Tubbs' care. Tr. at 288.

[16]The meat was added to the cub's diet at the Fair after Mr. Terranova's discussion with Dr. Clothier. Tr. at 2759.

Respondents are charged with housing Tubbs in a small dog carrier in an overly hot transport truck, with insufficient ventilation. I accord weight to Mr. Damon's testimony that Tubbs was free to roam the entire interior of the truck's cab, and was confined to the carrier for limited periods of time during the day. Tr. at 271-272. The carrier allowed the cub to fully stand and turn, contrary to testimony from inspectors. See, CX-47. Respondents provided a large outdoor pen where Tubbs was allowed to exercise. Tr. at 273; CX-47. Mr. Damon kept Tubbs in the pen at night, while he slept nearby. Id.

APHIS inspectors did not observe the cub for an entire day and night, and were unable to render a reliable opinion regarding how long and where he spent his time. There is no credible testimony demonstrating how Tubbs suffered from confinement for periods of time in a dog carrier that was the size of one used to restrain him when the government confiscated him and transported him to a distant facility. In addition, the inspectors' opinion totally disregarded the evidence involving the outdoor kennel, and the likelihood that he was free to roam the cab of the truck at times. This charge is not supported by the preponderance of the evidence.

Additionally, the record does not substantiate that the cab of the truck was routinely unventilated and overly hot. Mr. Damon kept the windows and vents open and ran a fan constantly when Tubbs was in the truck. Tr. at 271-272. I accord substantial weight to Mr. Damon's testimony that during their inspection, one of the inspectors, either Dr. Sofranko or Dr. Zeigerer, asked him to turn off the fan that he otherwise ran continually. Id.; Tr. at 281. A kestrel recorded the interior of the cab without the fan, and the temperature registered above that recommended by Dr. West for the comfort of a tiger cub. CX-47. However, there is no evidence of the temperature of the cab while the fan was running. Mr. Damon testified that the inspectors wanted the fan off to "get an accurate reading" (Tr. at 281), but the accurate temperature would have been taken in the conditions in which Tubbs was kept, i.e., with a fan circulating the air. I fully credit Mr. Damon's testimony on this issue, noting his general concern for Tubbs' welfare.

Dr. Gage testified that Tubbs would not be comfortable at high temperatures all day long, but could tolerate them for a time. Tr. at 931. Overall, as I credit the testimony that the cub was free to roam the entire cab and was allowed outside intermittently to spend time in a large kennel, I am unable to conclude that he was consistently confined in an

area with unhealthy temperatures[17]. Even crediting the somewhat unreliable evidence regarding the temperature of the cab, there is no meaningful explanation of record as to why exposure to a high temperature for a portion of the day posed a hazard to the cub. I decline to give additional weight to Drs. Sofranko and Zeigerer, who have no special experience with tigers. I accord some weight to the article entitled Survey of the Transport Environment of Circus Tigers (KX-27) but am unable to equate the conditions of tigers described therein to Tubbs' confinement in the truck cab.

Furthermore, the inspectors appeared to have no immediate concerns for the temperature of the enclosure, as the inspectors did not provide Respondents with the opportunity to resolve the issue immediately. Respondents were not advised of the alleged violation until late at night on August 14, 2008. Tr. at 290. Therefore, it is inappropriate to conclude that Respondents failed to take measures to alleviate any impact from the climate inside the truck.

Similarly, there is no credible evidence that Respondents played loud music to mask the tiger's cries, as alleged by Dr. Gage. Tr. at 926. Dr. Sofranko testified that Mr. Damon told her and Dr. Zeigerer that he had the radio on so people would not hear the tiger. Tr. at 1558. Mr. Damon testified that he wasn't trying to hide Tubbs, but he "did not want him on display". Tr. at 328. Dr. Sofranko did not offer any evidence regarding the volume of the radio, and only asserted that Mr. Damon turned it off when the inspectors approached the truck. Tr. at 1558. Dr. Zeigerer testified that she did not recall whether she heard a radio as she approached the truck. Tr. at 1219. Dr. Gage was not at the Fair during the relevant period, and based her opinion on a conversation with Dr. Sofranko. CX-34. The preponderance of the evidence does not establish that a radio was played loudly to camouflage Tubbs' vocalizations. Whether loud music played or not, there is no evidence about how that condition would pose harm or stress to the tiger, as Dr. Gage merely testified that it "did not sound like a good situation" to her. Tr. at 926. That opinion is less than academic and is insufficient to sustain this allegation.

The photographic evidence of the cab of the truck is decidedly aesthetically unpleasing. CX-47. However, there is no credible

[17] Parenthetically, there is no evidence of the outdoor temperatures at the Fair in Iowa in August.

evidence[18] demonstrating that the presence of trash in a slovenly kept truck represented anything but an eyesore to the inspectors. The record fails to establish how the truck was unsanitary to the point of representing harm or imposing stress on a growing tiger[19], considering the fact that the cub had survived until August, 2008, and a number of veterinarians considered him healthy. Although I credit Dr. Gage's testimony about the benefits of sanitation, particularly for an immuno-compromised animal, the record does not support that Tubbs' health was adversely affected by his dirty surroundings. I have already concluded that the physical surroundings of the infant tigers while at the Circus were cleaner than at the Fair, relying upon Mr. Key's reliable testimony. This charge is dismissed.

Respondents are charged with keeping Tubbs in a harness that was too small and that caused discomfort that was evidenced by the condition of the tiger's skin. Dr. Olds believed that a growing cat could quickly outgrow a harness, and she found that Tubbs had chafed skin under his axilla Tr. at 553-554. Photographic evidence depicts areas under the tiger's legs that appear pink. CX-59. Dr. Clothier did not believe that the tiger's skin was chafed, noting that the animal had very little hair in the areas where the strap met the skin. Tr. at 2144. Although Dr. Clothier did not inspect the tiger's underarms, she was able to examine him without removing the harness, and assured herself that it was not too tight by placing her fingers between the strap and the animal. Tr. at 2143-2144. In any event, any problem posed by a too tight harness would have been easily remedied by removing it, as Dr. Olds acknowledged, and which the inspectors failed to advise Respondents. I find that the evidence on this issue is in equipoise and Complainant has not met its burden of proof.

Wound treatment

Mr. Damon told Mr. Key that Tubbs suffered a scratch wound to his nose when exposed to his seizing sibling during the ride to Kansas State Veterinary School. Tr. at 2244-2245. Mr. Key testified that

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[18] Although it is common knowledge that unsanitary conditions can lead to certain diseases, I decline to take official notice that the conditions of the truck posed a health risk to Tubbs. This conclusion requires a medical opinion, which has not been proffered.

[19] Or growing children, for that matter. As a parent of three children who survived adolescence, I take official notice that a slovenly bedroom does not ipso facto represent unhygienic conditions.

Tubbs' nose "wound healed terribly slowly". Tr. at 2245. Although Mr. Key stated that doctors told Mr. Damon that it would have been inappropriate to dress the wound, there is no record in veterinarians' records of the wound. It appears that Respondents did little but wait for time to heal the wound, and I find that the failure to seek affirmative treatment for the wound represents failure to handle Tubbs carefully.

e. Adequate Veterinary Care and Attending Veterinarian

Plan of veterinary care relating to Terranova owned animals

There is no reliable evidence that Respondents failed to develop and maintain an adequate plan of veterinary care. Inspector Ayers made it clear that he cited Respondents for a record keeping violation because they did not have the plan at an exhibition in Georgia. Tr. at 2997. Inspector Fox testified that a plan was in place during the years that he inspected Terranova's facilities in Kaufman, Texas. Tr. at 3065-3066. Neither the Act nor regulations require that Respondents' regular attending veterinarian be on site with the animals in order to fulfill Respondents' obligation regarding attending veterinarian. In both instances where the elephants escaped, a local veterinarian was on hand to examine the animals, and in the WaKeeney incident, administer a tranquilizing agent to Kamba. Kamba was examined by a veterinarian in Oklahoma who called to the scene of the accident.

The record further demonstrates that Respondents had in place a capture and restraint plan. TX-19; Tr. at 256; Tr. at 3477-3479. When the elephants escaped in WaKeeney, Kansas, they were followed, contained, and captured according to the plan. Id. In the case of the WaKeeney, Kansas incident, although Mr. Damon did not travel with a tranquilizer, there is no evidence that he was trained to administer such a potentially dangerous medication to an elephant. Terranova's plan prudently called for a trained veterinarian to administer tranquilizer agents in circumstances where the handler realized the elephants were otherwise non-responsive to usual methods of recapture.

Regrettably, things did not go quite as well in Enid, Oklahoma. Although Mr. Quinones was unable to read the plan prepared by Mr. Terranova because it is written in English, he testified that he knew what to do in the event of an escape. Tr. at 3133-3134. Mr. Quinones' quick wits and calm demeanor demonstrate his familiarity with and ability to execute Respondents' escape plan. In both instances, the escape of the

elephants and the trauma of being tranquilized and struck by a vehicle are directly related to mishandling of the animals, and not the failure to have in place a plan.

Both incidents involving elephants escaping demonstrate the consequences of having an inadequate number of trained personnel to deal with crises. The escape and rescue plan may have been more rapidly and efficiently carried out had more trained individuals been available and involved. Charges related to the failures in handling and failure to have adequate personnel are supported by the record. The preponderance of the evidence establishes that the Terranova Respondents had an attending veterinarian in Kaufman, Texas, and had an adequate plan of veterinary care. TX-21; 28. Accordingly, charges related to failure to have an adequate plan of care are hereby dismissed.

Adequate veterinary care for Terranova owned animals

Dr. Sofranko took issue with the appearance of the elephants' foot pads during her inspection at the Fair. CX-51. Dr. Sofranko believed that they needed to be trimmed, noting that they were exposed to foreign material that could get imbedded in the foot. Tr. at 1431-1441; CX-51. She and Mr. Terranova discussed the issue, and Mr. Terranova explained that he generally trimmed the elephants' feet twice a year and had done them before the elephants went to the Circus. Tr. at 2565; 2684. Kamba required specialized foot care, and Mr. Terranova was uncomfortable allowing Mr. Damon to trim the feet. Tr. at 2566. He had anticipated that the elephants would be back at his facility after the Circus was over and he expected to do their foot care then. Tr. at 2567. In deference to Dr. Sofranko's concerns, he trimmed the elephants' feet in September, 2008. Tr. at 2781.

I accord weight to Dr. Sofranko's opinion, based upon her experience with elephants in general, and her position as USDA's elephant specialist CX-39. Although, I fully credit Mr. Terranova's concern about Mr. Damon's experience trimming the feet, he acquiesced to Dr. Sofranko's opinion regarding the state of his elephants' feet, and took care of them within the time provided by the citation. Accordingly, this charge is sustained.

Mr. Terranova freely admitted that he was unhappy with the condition of the elephants' skin, as he expected that Mr. Damon would have taken better care of the animals, given his experience. Tr. at 2563-2564. I accord substantial weight to Dr. Sofranko's concern about the origins of

discolored skin on Kamba's back and legs, and the failure to address the accumulation of dead skin. Tr. at 1441-1443; CX-51. Dr. Zeigerer testified that an accumulation of dead skin could give rise to infections. Tr. at 1224-1226. Respondents failed to obtain and apply adequate veterinary care with respect to the elephants' skin.

Allegations regarding animals owned by Key Respondents

Terranova Respondents are charged with failure to provide adequate veterinary care and attending veterinarians with respect to Mr. Key's tigers. Although I have imputed responsibility for handling the tigers to the Terranova Respondents, I decline to extend all responsibility under the Act to the agents of a principal who was on site with the tigers, in control of compensating veterinarians, and who had the ability to engage a veterinarian to develop a plan of care.

Agents are responsible for acts that they consent to undertake and there is no evidence that Mr. Damon assumed responsibility for developing a plan of veterinary care. The evidence demonstrates the opposite: Mr. Damon consulted with Mr. Key and not Mr. Terranova regarding veterinary care for the tigers[20]; he followed veterinary advice that Mr. Key paid for; and appeared to take an ad hoc approach to consulting veterinarians, relying upon Mr. Key's direction. I decline to hold the Terranova Respondents responsible for acts outside the scope of the responsibilities they assumed when agreeing to raise the newborn cubs.

Tubbs was seen shortly after his birth by Dr. West, a veterinarian with large felid experience, and he was later seen by a number of other veterinarians of unknown backgrounds (KX-7; KX-9) and by Dr. Clothier (CX-32). However, there is no record that anyone engaged a primary veterinarian for Tubbs' care, or that the Circus had a veterinarian on staff. Indeed, Tubbs' care followed no demonstrable pattern. The preponderance of the evidence establishes that the Key Respondents alone were responsible for developing a plan and providing for adequate veterinary care, and that they failed to do so.

However, once Mr. Terranova arrived at the Fair and acted on behalf of the Key Respondents by asking the Fair veterinarians to examine Tubbs, the Terranova Respondents became responsible for providing Tubbs with adequate veterinary care. I do not find Mr. Terranova's guarded answers to questions about ownership of the tiger represent bad

[20] Indeed, Mr. Damon ignored Mr. Terranova's early advice about hand-raising the cubs.

faith, but rather concluded that his responses reflect that he was concerned about the inspectors' perceptions of his involvement with Tubbs. Since I have concluded that Terranova's consent to Mr. Damon's raising the tiger was tantamount to consenting to be the Key Respondents' agent, that caution was misplaced. Further, there was no effective way to hide the tiger from the inspectors, considering that it was listed as Terranova's animal on Terranova's certificate of veterinary inspection (CX-44), and was visible in the truck cab and outdoor kennel.

Complainant contends that the examination provided by Dr. Clothier did not meet the standards of adequate veterinary care, as she had no large felid experience, other than observing large cats during veterinary school. Tr. at 2092. However, Dr. Clothier's credentials are at least equivalent to those of the inspectors who were on site at the Fair. Dr. Clothier is a licensed veterinarian, an adjunct professor, and in addition to being an accredited, licensed DVM, Dr. Clothier holds a PhD in epidemiology. Tr. at 2085-2093; CX-32. In addition to working with the United States Department of Justice, Dr. Clothier was selected as one of the attending veterinarians at the Iowa State Fair in 2008. Tr. at 2088, 2093-2095.

The Fair inspectors relied upon the opinions of Dr. Gage, who looked at pictures and made assessments about the cub's well being. Dr. Gage's credentials with respect to large felids are superlative, and it was sensible for the comparatively inexperienced inspectors to consult her. CX-34(a). However, despite Dr. Gage's opinion that the cub was poorly cared for, undernourished, and poorly treated, she did not have the benefit of examining the cub, as did Dr. Clothier. The regulations do not specify that a veterinarian must be experienced with the species being examination in order to be qualified. If that is the case, then Dr. Zeigerer was not qualified to inspect elephants, and neither she nor Dr. Sofranko were qualified to inspect a tiger cub.

Although the record establishes that there was no attending veterinarian for the Key Respondents' tigers and lion, and no plan for veterinary care, the animals were seen by vets. Tubbs had been seen by a number of veterinarians during the few months he lived with Mr. Damon, all of whom found him healthy.

There is no doubt that Tubbs' diet was less than optimum, a condition that was in the process of being reversed at the Fair, when he was introduced to meat. Dr. Gage believed that more calcium was needed, and she provided a diet plan to Dr. Clothier, who did not have the

opportunity to share it with Respondents because Tubbs was confiscated by USDA. CX-32; Tr. at 2126. The deficiencies in Tubbs' diet represents lack of attention to his care by his handler, and not inadequacy of veterinary care. The preponderance of the evidence establishes that Tubbs was seen by qualified veterinarians[21].

2. Did Terranova exhibit animals without a license issued by USDA

Complainant notes that at times relevant to this adjudication, Respondent Terranova Enterprises Inc. had forfeited its corporate charter for state tax irregularities. Although there does not appear to be an allegation in the Complain that specifically charges Terranova Enterprises Inc.[22] with exhibiting without a license, or with failure to comply with any regulation pertaining to the AWA because of lapses in its corporate charter, I see no other reason for Complainant including this information. Ergo, in an abundance of caution, I address these factual circumstances.

Complainant makes no argument, nor cites to any law standing for the proposition that a lapse of corporate charter invalidates an otherwise valid license issued under the AWA. Accordingly, I decline to reach that conclusion. The record establishes that at all times pertinent to this adjudication, Terranova Enterprises Inc. held AWA license number 74-C-0199.

In addition, neither the Act nor regulations require employees of a licensee to be licensed. *In re Daniel J. Hill and Montrose Orchards Inc*., 67 Agric. Dec. 196 (2008). The statutory scheme of the AWA obviates the need for individual licenses, as the Act mandates that the conduct of a corporation's officers, agents, and employees may be considered the acts of the corporate entity in addition to the acts of the individual. Therefore, any suggestion that Douglas Terranova needed his own license is not supported by the plain language of the Act, or by judicial interpretations of the AWA. Mr. Terranova and Terranova Enterprises, Inc. may be held jointly liable for violations of the Act because of the statute's plain

[21] It appears from the record that even if Dr. Clothier had first hand experience with tiger cubs, APHIS officials would not have been impressed, as the decision to confiscate Tubbs appears to have been made before they received the report of her examination.

[22] Complainant has charged the Key Respondents with this violation. See Amended Complaint, ¶D.2; Complainant's Proposed Findings of Fact, page 3, ¶A.11.

language. See, 7 U.S.C. § 2139. I dismiss any charge by Complainant that Mr. Terranova himself needed a license.

3. Is Mr. Terranova personally liable for the acts performed on behalf of Terranova Enterprises Inc., and the Key Respondents?

All acts of the corporate entity in these circumstances arose out of decisions made by Mr. Terranova. It has been settled that individuals who direct licensee's activities are individually liable pursuant to 7 U.S.C. §2139. See, In *re Coastal Bend Zoological Ass'n, etc. et al*, 67 Agric. Dec. 154 (2008). I find that Mr. Terranova may be held personally liable for acts he performed on behalf of Terranova Enterprises, Inc. A corporation and the individual who exercised sole control over corporate activities are jointly assessed penalties under 7 U.S.C. § 2149 pursuant to the operation of 7 U.S.C. § 2139. *Irvin Wilson and Pet Paradise Inc. v. U.S.D.A.*, 54 Agric. Dec. 111 (1995)

E. Willfulness

The Administrative Procedures Act, 5 U.S.C. § 558 (c) provides for the:

Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefore, the licensee has been given -

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

5 U.S.C. § 558 (c).

Willfulness under the AWA has been defined as "an act done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements". *In re Pet Paradise*, 51 Agric. Dec. 1047, 1067 (Sept. 16, 1992). A willful violation occurs when a prohibited act is intentionally performed without regard to motive or erroneous advice, or is performed with careless disregard of statutory requirements. *In re Terry Lee & Pamela Sue Harrison*, 51 Agric. Dec. 234 (1992). Pursuant to 7 U.S.C. § 2149 (a), the only requirement for the suspension or revocation of an exhibitor's license is willfulness of at least one violation. *In re Big Bear Farm, Inc. et al.*,, 55 Agric. Dec. 1107 (1996); *In re Cecil Browning, d/b/a Alligatorland Safari Zoo, Inc*., 52 Agric. Dec. 129 (1993). Willfulness is not required for cease and desist order or for monetary fine. *Id*.

This case illustrates the tension inherent in commercial use of animals and their welfare, as many of the incidents that led to violations of the Act could have been avoided with additional help and some forethought about the consequences. Overall, the Terranova Respondents appeared to care for the health and safety of animals that they owned, but the extent of that care depended on the exigency of circumstances presented to Respondents.

Mr. Terranova hired Mr. Damon when his trained elephant handler quit at the start of the Circus season. Mr. Damon was recommended based upon his decades old experience with elephants, and after a mere few weeks of training by Mr. Terranova, Mr. Damon was sent to the Circus to handle two elephants with no other trained help. When the elephants were startled by a large inflatable slide in WaKeeney, Kansas, Mr. Damon could not control them alone. Mr. Childs was not trained to handle or control the elephants, although he was able to help Mr. Damon perform some tasks relating to the elephants' under Damon's supervision and helped recapture them.

When the tiger cubs were born, Mr. Terranova agreed that Mr. Damon could raise them, apparently without much thought about how the added burdens of hand feeding newborn, immuno-compromised cubs would affect the care of the elephants. This is particularly troubling considering that Mr. Terranova had himself raised tigers and was uniquely situated to predict the trials involved in the enterprise. The condition of the elephants' skin and feet at the Fair showed lack of attention to their care on the road with the Circus. Visual inspection of temporary facilities for animals by Mr. Terranova appeared less than thorough, judging by misshapen fencing in Baraboo, and the deficiencies of facilities at the Fair.

Mr. Terranova's laissez-faire supervision led to camels being left unattended and the series of poor decisions that led to Kamba's escape and injury in Enid, Oklahoma. He acted personally, and through Mr. Damon, as the Key Respondents' agent vis-a-vis the tiger cubs, without considering the impact of the responsibilities that he assumed. It is clear to me that additional trained personnel and more attention to decision making could have averted or mitigated some of the unfortunate events that led to two elephant escapes and the less than optimum care and nutrition of the lone surviving tiger cub of a litter of three.

Mr. Terranova's lack of attention to the requirements of the Act and regulations is also apparent in his failure to maintain proper records, to travel with a plan of veterinary care, and his decision to leave his facilities in Kaufman, Texas unattended. No one else was designated to act on Mr. Terranova's behalf, although it is clear that he could not be expected to be on site 24 hours a day, particularly when he had child care responsibilities and the animals needed to be fed. CX-68. Although some of the violations disclosed by inspections were beyond Mr. Terranova's ability or authority to fix, such as the perimeter fence in Baraboo and the way his employee cleaned the cats' cages in Maryland, taken in the aggregate, Terranova's actions represent a pattern of careless disregard of the Act and regulations that led to harm, discomfort and risk to his animals, and actual harm to members of the public.

I do not doubt that Mr. Terranova is well-intentioned regarding the health and safety of his animals. When a risk factor was pointed out, he fixed it. However, as has been observed, "while corrections may be taken into account when considering sanctions, even immediate correction does not eliminate the fact that the violation occurred". *Volpe Vito, Inc., d/b/a Four Bears Water Park and Recreation Area*, 56 Agric.

Dec. 166 (1997). Considering the preponderance of the evidence, I find that the Terranova Respondents willfully violated the AWA, prevailing regulations and standards.

F. Sanctions

1. License Revocation

The purpose of assessing penalties is not to punish actors, but to deter similar behavior in others. *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997). The Secretary may revoke or suspend the license of an exhibitor for violations of the Act. 7 U.S.C. § 2149(a). APHIS has recommended that Respondents' license be revoked, relying in large part upon the serious lapses that led to two elephant escapes. APHIS acknowledged that the sale of the elephants protected them from future risk of harm from the Terranova Respondents, but pointed out that Respondents continue to exhibit dangerous animals.

Mr. Terranova's decision to sell his elephants was an immediate reaction to his concerns about the fate of Kamba and Congo. He testified, "[i]n fact, my decision was to put them in a place where [an accident] would never happen again." Tr. at 3588-3589. I do not doubt that Mr. Terranova was motivated at least in part because of the elephants' welfare, but it would be difficult for an animal owner to have witnessed a confiscation of an animal without wondering whether his actions would result in similar treatment by USDA. Nevertheless, I fully credit that the decision was difficult to make, on many levels. Mr. Terranova realized some income from their sale to the Dallas Zoo, but he lost forever the future income that exhibiting them would have brought him, in addition to their companionship.

The sole violation pertaining to Terranova's conduct respecting his own large cats involves the incident in Maryland when the cougar was inadvertently sprayed by water during the cleaning of his cage[23]. Mr. Terranova related an incident concerning Mr. Terranova's injury by the cougar (Tr. at 3216). However, there are few specifics regarding the severity of the injury, or even when it occurred. I have inferred from the evidence that it occurred before Mr. and Mrs. Terranova separated in 2006. Tr. at 3224. In any event, that incident did not constitute a violation of the Act. In addition, Mr. Quinones, and not Mr. Terranova,

[23] I do not consider the anecdote regarding Mr. Terranova's injury from his cougar as reliable evidence.

primarily exhibits Respondents' large cats. Tr. at 3472. The evidence does not demonstrate that the Terranova Respondents and employees are less than competent to safely handle the large cats that they own.

The record does establish that Respondents willfully handled elephants in a manner that led to actual harm to them and to persons. Mr. Damon was injured several times, and the individuals involved in the collision with Kamba were paid insurance benefits for personal injuries suffered in the accident. Considering the series of violations regarding Respondents' care and handling of the elephants, I would not want them to ever have the opportunity to engage in any activity with respect to elephants that meets the definitions of "exhibitor" under the Act. 7 U.S.C. § 2132(h). The sale of the elephants has diminished that risk significantly, and in further consideration of Respondents' reduced ability to profit from the elephants, I find that the revocation of Respondents' license would be punitive, rather than remedial.

I have given considerable weight to APHIS' recommendation, but find that the record does not reflect a single violation regarding the safe care and handling of the cats owned by Terranova, with the exception of a cougar being inadvertently sprayed with fresh water and exposed to detergent during cage cleaning. Other cited incidents that posed potential risk of harm to animals or the public can be mitigated, if not eliminated altogether, by Respondents employing adequate personnel. The recommendations of a sanction by an administrative officer charged with enforcing statutory purposes is entitled to weight, but not controlling weight, and circumstances may support a different outcome. *In re Judie Hansen*, 57 Agric. Dec. 1072 (1998); *In re Marilyn Shephard*, 57 Agric. Dec. 242 (1998).

All violations regarding the care of the Key tigers are imputed to the Terranova Respondents only through the operation of the law of agency. If Mr. Terranova were an individual inclined to reflect upon the consequences of his actions, I doubt that he would have authorized Mr. Damon to assume responsibility, and thereby liability, for the care and upbringing of the Key tiger cubs. Mr. Terranova had no opportunity to supervise Mr. Damon's activities regarding the cubs, including his decision to ignore Mr. Terranova's advice on nutrition, which I have found resulted in the most serious violations concerning Tubbs' care. Mr. Terranova's recommended diet for the cub was similar to that approved by USDA experts. It would be nothing more than punitive to revoke the Terranova Respondents' license largely because of Mr.

Damon's poor decisions and the Key Respondents' relative disregard for the care and well-being of the cat they owned[24].

For the foregoing reason, I find that it is not appropriate to revoke the Terranova Respondents' license, particularly where Respondents voluntarily relinquished the elephants, who were at the heart of the most serious violations directly related to the Terranova Respondents' actual handling.

Although I have found that the circumstances do not support the revocation of the Terranova Respondents' AWA license, I find that all future license approvals shall be conditioned upon the Terranova Respondents not owning, handling, or exhibiting elephants as contemplated under the Act, and further conditioned upon Respondents having sufficient personnel on site, and at the home facility, to aid in the handling and caring for animals.

2. Civil Money Penalties

Pursuant to 7 U.S.C. § 2149 (b), an exhibitor that violates the AWA, regulations or standards may be assessed a civil penalty of not more than $2,500 per violation. 7 U.S.C. § 2149 (b). When considering the propriety of assessing civil penalties for violations of the Act, the Secretary shall consider "the size of the business…, the gravity of the offenses, the person's good faith, and the history of previous violations". *Id.; In re Lee Roach and Pool Laboratories* et al., 51 Agric. Dec. 252 (1992).

The record reflects that Respondents operate a moderately-sized animal exhibition business, reporting custody of some twenty animals in 2008. CX-68; Respondents' Admissions. Although there is no record evidence demonstrating Respondents' annual income, I infer from their admission and the fact that they owned two elephants during the period under consideration, that their business was at least of moderate size. The evidence has established that the Terranova Respondents have a history of previous violations of the Act. An ongoing pattern of violations establishes a history of previous violations under 7 U.S.C. § 2149(b). *In re Jane E. Stephens and Water Wheel Exotics, Inc.*, 58 Agric. Dec. 149 (1999).

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[24] Parenthetically, I find the proposed sanction of revocation somewhat offensive, considering USDA's total forbearance against Mr. Damon, whose personal actions directly led to the deficits in Tubbs' diet and care.

The violations are grave, in that they involve the direct care and handling of animals. The gravest of the violations involve the escape of elephants on two occasions, which resulted in harm to them and to the public. Although Mr. Terranova's good faith in dealing with USDA has been questioned because of his less than forthright answers to questions regarding the provenance of the tiger cub at the Fair, the cub was listed on a report of veterinary inspection, and was in plain sight during the inspection. Tr. at 1217-1218. Mr. Terranova cooperated with the inspection, which ran into several days. Accordingly, I decline to find that the Terranova Respondents acted in bad faith.

In consideration of the gravity and numerosity of offenses, the size of the business, the absence of bad faith, and my determination that license revocation would be overly punitive, I find that APHIS' recommendation of civil money penalties in the amount of $25,000.00 is appropriate.

3. Cease and Desist

The Secretary may also make an order that such person shall cease and desist from continuing such violation. 7 U.S.C. § 2149 (b). Such Order is appropriate in these circumstances.

4. Selective Enforcement

I have considered and rejected Respondents' contention that they were subjected to selective enforcement of the Act and regulations. Consent decisions in other cases have no weight when assessing the propriety of sanctions in cases that are litigated. *In Re Thompson*, 50 Agric. Dec. 392, 4078 (1991). Respondents imply that at least one APHIS inspector did not agree with the direction of the enforcement action taken against Respondents. See, Tr. at 330, 331. Although Complainant's implication of all Respondents for each other's actions represents a novel theory of liability under the Act, the preponderance of the evidence reflects that violations occurred, and the proposed monetary sanctions are consistent with those recommended in other actions litigated under the Act.

G. Findings of Fact

1. Terranova Enterprises, Inc. is a Texas corporation doing business as "Animal Encounters, Inc.", whose registered agent is Douglas Keith

Terranova. The registered office of Respondent is 6962 S. FM 148, Kaufman, Texas 75142.

2. Douglas Keith Terranova is President, registered agent and director of Terranova Enterprises, Inc., whose mailing address is 6962 S. FM 148, Kaufman, Texas 75142.

3. At all times pertinent to this adjudication Respondents operated as an exhibitor as that term is defined in the Act and regulations, whose moderately sized business involves exhibiting animals to the public and leasing animals for exhibition and use.

4. On June 23 through 25, 2005 while exhibiting at the Great Circus Parade and Festival in Baraboo, Wisconsin, Respondents failed to have a documented plan for environmental enhancement designed to promote the psychological well-being of two spider monkeys.

5. On June 15, 2006, at the Circus World Museum in Baraboo, Wisconsin, Respondents left two camels unattended, which resulted in a camel to become tangled in a loose barrier rope.

6. On June 5, 2007, at the Universoul Circus in Landover, Maryland, Respondents' mountain lion was inadvertently sprayed by fresh water and exposed to liquid dish detergent during the cleaning of its cage by its handler.

7. On June 24, 2007, outdoor housing facilities at Baraboo were not enclosed by a perimeter fence.

8. During 2007 and early 2008, Respondents housed the Key tigers and lion at a specially built compound at its facility in Kaufman, Texas.

9. Sometime after December, 2007, Respondents entered into a verbal agreement with the Perry Respondents to provide camel and elephant rides at the Iowa State Fair in August, 2008, in connection with Mr. Perry's contract with the Fair.

10. Respondents also entered into an agreement with the Key Respondents to provide elephants for the Key's exhibition, the Culpepper & Merriweather Circus.

11. On February 28, 2008, Respondents failed to provide inspectors with their plan for veterinary care while exhibiting at Turner Field in Atlanta, Georgia.

12. On June 11, 2008, fencing in Respondents' camel area was curled upwards, thereby posing a threat to the well-being of the camels.

13. In late March, 2008 or early April, 2008, Respondents' former employee traveled with Respondents' elephants and the Key cats to the site of the Key's Circus.

14. In late March, 2008 or early April, 2008, Sloan Damon replaced the former employee and trained at Respondents' facility to be the elephants' handler while travelling with the Circus.

15. In April, 2008, Sloan Damon transported the elephants to the Circus, where he was responsible for their care and where he helped with the Key large cats.

16. Although the Key cats were meant to be separated at Respondents' facility in Texas, they were allowed time together, and apparently mated.

17. On May 2 or May 3, 2008, Key's female tiger gave birth to three tiger cubs.

18. Respondents' employee Sloan Damon volunteered to hand raise the three tiger cubs.

19. Tiger cubs who are denied colostrum by their mother are at additional risk for illness and death.

20. One of the cubs died within days of its birth, and a second cub suffered seizures and died on May 12, 2008.

21. Necropsy of the second dead cub established septicemia and a widespread e-coli infection as the cause of its death.

22. Examination of the surviving cub by Dr. Gary West of the Kansas State University of Veterinary Medicine on May 12, 2008 revealed hypoglycemia, hyponatremia and hypochloridemia, which are conditions associated with improper diet.

23. Mr. Sloan rejected feeding advice offered by Mr. Terranova, and failed to weigh the tiger daily as recommended by Dr. West, leading to the tiger being underweight.

24. Veterinarians who examined the cub found it healthy, and no reports mention an unhealed wound on its nose.

25. On June 5, 2008, while exhibiting in WaKeeney, Kansas, Respondents failed to handle elephants as carefully as possible, resulting in their escape after severe winds blew a slide in their vicinity. One elephant needed to be tranquilized before it was recaptured.

26. On June 5, 2008, Respondents failed to provide adequate personnel to care for two elephants.

27. On June 9 and 10, 2008, Respondents failed to allow access to their premises to USDA inspector.

28. Sometime during the summer of 2008, Respondents failed to provide adequate veterinary medical treatment and care to two elephants,

leading to the overgrowth of foot pads and accumulation of dead skin on their heads, backs and ears.

29. In August, 2008, Mr. Damon brought the elephants to the Iowa State Fair, where he met with Mr. Terranova and set up an elephant ride amusement near the Perry Respondents' exhibit.

30. Mr. Damon brought the surviving tiger cub with him to the Fair.

31. On August 13, 2008, Respondents kept elephants at the Fair in an outdoor enclosure where a 15" to 18" metal rod protruded from the ground, and coaxial cable was on the ground. A broken light fixture in the elephants' trailer exposed them to sharp metal.

32. Respondents did not provide adequate shade to elephants during the elephant rides at the Iowa State Fair in August, 2008.

33. While at the Fair, the surviving tiger cub was housed in the cab of Respondents' elephant trailer, where it was kept at times in a dog carrier, while at other times was allowed to roam inside the truck. The cub spent nights in a large outdoor kennel, where it was free to play with a dog that Mr. Damon had acquired.

34. The tiger cub's diet was inadequate for its age and species, resulting in it being underweight.

35. On or about August 16, 2008, USDA confiscated the cub and relocated it to a facility that was approved by APHIS.

36. On November 4, 2009, at the Family Fun Circus in Enid Oklahoma, Douglas Terranova proceeded to exhibit the elephants in a circus act without adequate personnel, and with inadequate physical conditions (lack of light; lack of perimeter fence), resulting in one elephant being unattended inside the circus tent which was occupied by spectators, and the other elephant escaping onto a highway where it was struck by a vehicle.

37. As a result of the collision, Kamba suffered a broken tusk, a fractured carpal bone, multiple skin abrasions and a bruised trunk, while the vehicle was damaged and its occupants sustained unknown injuries.

38. After the incident in Enid, Kamba recovered and Respondents sold both elephants to the Dallas Zoo.

H. Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. In his capacity as corporate officer and director of Terranova Enterprises Inc., Douglas Keith Terranova operated as an exhibitor as that term is defined by the Act and regulations.

3. Pursuant to 7 U.S.C. § 2139, Douglas Keith Terranova's acts, omissions or failures in his capacity as corporate officer and director are deemed to be his own as well as those of the corporate entity.

4. Because of the operation of 7 U.S.C. §2139 and 2149, Douglas Keith Terranova did not need a separate license under the AWA.

5. Although Terranova exhibited elephants and camels at the Fair upon the Perry Respondents' invitation, no agency relationship existed between those entities as the result of the exhibition.

6. Terranova's employee Sloan Damon assumed responsibility to raise tigers belonging to the Key Respondents, and accordingly, entered into a consensual agency relationship with the Key Respondents that is imputed to the Terranova Respondents.

7. Complainant has failed to meet the burden of proving the following violations brought against the Terranova Respondents by the preponderance of the evidence, and they are therefore dismissed:

a. Violations of 9 C.F.R. §§ 2.40(a) and (b)(2), alleging failure to have attending veterinarian, and failure to establish and maintain adequate veterinarian care (allegations regarding the Key animals).

b. Violations of 9 C.F.R. §§ 2.40(a) and (b)(2), alleging failure to have Tubbs examined by a qualified veterinarian at the Fair.

c. Violations of 9 C.F.R. § 2.131 (c)(1) and (d)(2), alleging failure to handle animals with minimal risk of harm to public and with sufficient barriers (elephants at the Fair).

d. Violations of 9 C.F.R. §3.125(a) and (c) alleging failure to provide safe facilities for animals and feed (alleged fecal matter in hay).

e. Violations of 9 C.F.R. § 2.131(b)(1), alleging failure to handle animals as carefully as possible (Key female tiger Delia and newborn tiger cubs).

f. Violations of 9 C.F.R. §§2.131(e); 3.126(a); 3.126(b); 3.128, pertaining to the housing of the tiger cub at the Fair.

g. Violations of 9 C.F.R. §§ 2.40(b)(1) and (b)(4), alleging failure to maintain program of adequate veterinary care including proper escape and capture plan and equipment (regarding elephants in WaKeeney, Kansas and Enid, Oklahoma).

8. The Terranova Respondents violated 9 C.F.R. § 2.100(a) by failing to have a written plan of environmental enhancement for spider

monkeys, which is a technical violation considering that the inspector found environmental enhancements in place.

9. On June 15, 2006, the Terranova Respondents willfully violated 9 C.F.R. §§2.131(b)(1) and (c)(1) by leaving two camels unattended, resulting in one getting tangled in a loose rope that was the only barrier between the camels and the public.

10. On June 5, 2007, 9 C.F.R. §2.131(b)(1) was violated when a mountain lion was sprayed with water and exposed to liquid dish detergent during the cleaning of its cage, an inadvertent and non-willful violation that was immediately corrected.

11. On June 24, 2007, Respondents failed to enclose outdoor facilities for two tigers and one lion with a perimeter fence, which was not a willful violation of 9 C.F.R. § 3.127, as Respondents had no authority to erect fencing or other barriers in the non-public space of the Baraboo Circus World.

12. On February 28, 2008, Respondents failed to show an inspector its plan of veterinary care, which was well known to Respondents' home facility inspector, and constitutes a technical violation of 9 C.F.R. §2.126(a).

13. On June 5, 2008, Respondents willfully failed to handle animals as carefully as possible and failed to provide adequate trained personnel to safely handle elephants in violation of 9 C.F.R. §§ 2.131(b)(1); 2.40(b)(1) and (b)(4) (elephants in WaKeeney, Kansas).

14. On June 11, 2008, Respondents failed to ensure that fencing near camels was structurally sound and in good repair in violation of 9 C.F.R. § 3.125(a).

15. On June 9, and 10, 2008 Respondents failed to allow APHIS officials access to their place of business to conduct an inspection, in violation of 7 U.S.C. §2146(a) and 9 C.F.R. § 2.126(a) and (b).

16. In the summer of 2008, Respondents failed to provide adequate veterinary and medical care and treatment to its elephants, whose feet were overgrown and whose skin was neglected in violation of 9 C.F.R. §§ 2.40(a); 2.40(b)(1) and (b)(2).

17. In August, 2008, while at the Fair, Respondents failed to meet minimum standards with respect to facilities by failing to ensure that the area where elephants were kept was structurally sound and in good repair in violation of 9 C.F.R. § 3.125(a), and by failing to provide sufficient shade in violation of 9 C.F.R. § 3.125(c).

18. During the period from May 12, 2008 through August 15, 2008, Respondents failed to handle animals as carefully as possible in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort in willful violation of 9 C.F.R. § 2.131(b)(1), in that the surviving tiger cub's diet was insufficient for proper growth and nutrition.

19. During the period from May 12, 2008 through August 15, 2008, Respondents failed to provide to a young tiger food of sufficient quantity and quality appropriate for the animal's age, species, size and condition in willful violation of 9 C.F.R. § 3.129(a).

20. During the period from May 12, 2008 through August 15, 2008, Respondents failed to handle animals as carefully as possible to prevent trauma and behavioral stress, physical harm and discomfort when Respondents failed to provide care and treatment to a tiger cub for a wound on its nose in violation of 9 C.F.R. § 2.131(b)(1).

21. On November 4, 2009, at the Family Fun Circus in Enid Oklahoma, Respondents failed to handle animals as carefully as possible to prevent trauma and behavioral stress, physical harm and discomfort when Kamba was allowed to escape and Congo was left alone during Kamba's recapture in willful violation of 9 C.F.R. § 2.131(b)(1).

22. On November 4, 2009, Respondents failed to handle animals as carefully as possible so that there was minimal risk of harm to them and the public, as Kamba escaped and was struck and injured by a vehicle, while Congo was alone in a circus tent filled with spectators in willful violation of 9 C.F.R. § 2.131(c)(1).

23. On November 4, 2009, Respondents failed to exhibit animals under conditions consistent with their good health and well being, in that Mr. Terranova proceeded to exhibit the elephants under hurried conditions, without adequate personnel in violation of 9 C.F.R. § 2.131(d)(1).

24. On November 4, 2009, Respondents failed to enclose outdoor facilities with an adequate perimeter fence, which may have prevented Kamba's escape and accident, in violation of 9 C.F.R. § 3.127(d).

25. No sanction need be imposed for technical violations of the Act to promote the Act's remedial purposes.

26. The Administrator's determination that Respondents' AWA license should be revoked is not warranted, considering that Respondents no longer possess the elephants who were the subject of the most serious violations, so long that their continued license is conditioned upon not

owning, handling, or exhibiting elephants, as those terms are defined under the Act, and further conditioned upon engaging sufficient trained handlers when exhibiting animals.

27. The Administrator's proposed civil money penalty of $25,000.00 is warranted, considering the gravity and numerosity of offenses, the size of Respondents' business, the absence of bad faith, and my determination that license revocation would be overly punitive.

ORDER

1. The Terranova Respondents, their agents, employees, successors and assigns, directly or indirectly through any corporate or other device are ORDERED to cease and desist from further violations of the Act and controlling regulations.

2. Terranova Enterprises, Inc., d/b/a Animal Encounters, Inc. and Douglas Keith Terranova are jointly and severally assessed a civil penalty of $25,000.00 for the violations established herein. Payment of the penalty shall be by certified check or money order payable to the Treasurer of the United States and sent to:

Colleen A. Carroll, Esq.
United States Department of Agriculture
1400 Independence Avenue, S.W.
South Building
Washington, DC 20250-1417

3. Any future renewal of Respondents' license under the AWA shall be conditioned upon an affidavit that they do not and shall not own, handle, or exhibit elephants, as those terms are defined by the Act and prevailing regulations. Further, Respondents shall provide Complainant with an affidavit describing the number of personnel hired for each exhibit, and the training and experience of animal handlers.

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

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

Entered this ___day of_____, 2011 at Washington, DC.

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TERRANOVA ENTERPRISES, INC. d/b/a ANIMAL ENCOUNTERS, INC.; DOUGLAS KEITH TERRANOVA; WILL ANN TERRANOVA; FARIN FLEMING; CRAIG PERRY, d/b/a PERRY'S EXOTIC PETTING ZOO; EUGENE ("TREY") KEY, III, AND KEY EQUIPMENT COMPANY, INC.; d/b/a CULPEPPER & MERRIWEATHER CIRCUS.
AWA-Docket Nos. 09-0155 and 10-0418.
Decision and Order.
Filed December 20, 2011.

AWA

Colleen Carroll, Esq. for APHIS.
Bruce Mornning, Esq. Derek Shaffer. Esq. Vincent Colatriano, Esq. and Michael Weitzner, Esq for Respondents.
Decision and Order by Administrative Law Judge Janice K. Bullard.

DECISION AND ORDER (RESPONDENT WILL ANN TERRANOVA)

I. INTRODUCTION

The above captioned matters involve administrative disciplinary proceedings initiated by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"; "Complainant"), against Terranova Enterprises Inc., Douglas Terranova, Will Ann Terranova, Farin Fleming ("Terranova Respondents")[1]; Craig Perry ("Perry Respondent"); and Eugene "Trey" Key, III, and Key Equipment Company, Inc. (" Key Respondents"). Complainant alleges that Respondents violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131- 2159; "the Act"), and the Regulations and Standards issued under the Act (9 C.F.R. §§ 1.1-3.142; "Regulations and Standards").

Procedural History

[1] I have issued separate Decisions and Orders addressing the charges against Farin Fleming, Doug Terranova and the Terranova business entities, as well as all other named Respondents.

In a Complaint filed on July 23, 2009, amended on June 8, 2010, Complainant alleged that the Terranova, Key and Perry Respondents[2] willfully violated the Act and the Regulations on multiple occasions between 2005 and 2008. Complainant filed another Complaint on September 7, 2010, charging the Terranova Respondents with additional violations of the Act. Generally, the Complaints allege that Respondents failed to properly handle and care for a variety of animals; failed to maintain proper records and facilities; failed to allow access to inspectors; and exhibited animals without proper licenses.

The two Complaints were consolidated, but in deference to the joint request of the Key and Perry Respondents, I found it appropriate to partition the hearing between the allegations raised in the 2009 Complaint and those raised in the 2010 Complaint. The events allegedly underlying the 2009 Complaint were addressed in a hearing that commenced on February 17, 2011 and continued through February 25, 2011, held in person in Washington, D.C., and through audio-visual equipment located in Texas, Iowa and Missouri. Events involving the Terranova Respondents alone were addressed at a hearing that was held on June 1 and 2, 2011 in Dallas, Texas.

Complainant is represented by Colleen A. Carroll, Esq., Office of the General Counsel, Washington D.C. The Terranova Respondents are represented by Bruce Monning, Esq.; the Perry Respondents are represented by Larry Thorson, Esq.; and the Key Respondents are represented by Derek Shaffer, Esq. and Michael Weitzner, Esq. At the hearings, the testimony of witnesses was transcribed, and I received into evidence[3] the parties' exhibits. At the hearing that commenced on February 17, 2011, I admitted to the record Complainant's exhibits identified as CX-1 through CX-67; Terranova Respondents' exhibits TX-1 through TX-41; Key Respondent exhibits KX-1 through KX-30; and Perry Respondents' exhibits PX-1 through PX-8. In addition, the parties entered into stipulations, regarding the admissibility and authenticity of the documentary evidence with the exception of certain photographic and holographic evidence. Tr. at 90-140.

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[2] The complaint also named an individual Sloan Damon as a Respondent, but Complainant and Respondent Damon entered into a Consent Decision dismissing Mr. Damon from the cause of action, which was filed with the Hearing Clerk for OALJ on January 31, 2011. Accordingly, I shall not address charges against Mr. Damon in this Decision and Order.

[3] I excluded from the record CX-23. Tr. at 116.

At the hearing that commenced on June 1, 2011, I admitted to the record exhibits CX-69-93, and TX-42, 42. I granted Respondent's objection to the testimony of Margaret Whittaker. Tr. at 3162 - 3206. The witness was called by Complainant to provide opinions regarding what she believed to be the best training methods for working with elephants, which may have led to her concluding that Respondents did not use the best methods to handle animals. However, Ms. Whittaker had not reviewed the evidence regarding the incidents involved in the instant matter, and could formulate no opinion regarding whether animals had been handled properly. Tr. 3187 -3190. Though I credit Ms. Whittaker's training and expertise, I concluded that the proffered testimony regarding her opinion on the best methods to use to train animals in general is not material to my inquiry, as the Act and controlling regulations do not specify a particular method to train and handle animals. Moreover, Ms. Whittaker was not a fact witness, and was given no evidence relating to the events of this case to allow her to formulate an expert opinion that could be rebutted by Respondent.

Pursuant to my Order of June 28, 2011 the parties submitted corrections to the transcript, which I adopted by Order issued August 8, 2011. The parties submitted written closing argument pursuant to my Order of June 28, 2011. The instant decision[4] is limited to Respondent Will Ann Terranova, and is based upon consideration of the record evidence; the pleadings, arguments and explanations of the parties; and controlling law.

II. ISSUE

Is Will Ann Terranova responsible for any violations of the Act as the result of her association with Terranova Enterprises Inc.?

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Admissions

In its Answer to the Amended Complaint filed July 23, 2010, Respondent admitted that Terranova Enterprises, Inc. is a Texas

[4] In this decision, exhibits shall be denoted as follows: Complainant's shall be "CX-#"; Terranova Respondents' shall be "TX-#"; Perry Respondent shall be "PX-#"; Key Respondents shall be "KX-#". References to the transcript of the hearing shall be denoted as "Tr. at [page] #".

corporation doing business as "Animal Encounters, Inc.", corporate Number 159995901. The corporation's registered agent, President, and director is Douglas Keith Terranova, who resides at 6962 S. FM 148, Kaufman, Texas 75142, which is also the corporation's registered address. The corporate charter was forfeited during the period from February 11, 2005 until on or about November 30, 2005, for failure to file or pay state franchise taxes. The charter was again forfeited for noncompliance with state tax law for the period July 25, 2008 through March 11, 2009. Terranova Enterprises, Inc. and Mr. Terranova continued to operate as an exhibitor and held Animal Welfare Act license number 74-C-0199 during the periods relevant to this adjudication.

Respondent Will Ann Terranova's mailing address and residence is 5066 FM Road 4098, Kaufman, Texas 75142. She was an officer and director of Terranova Enterprises.

B. Summary of Factual History

During the period encompassed by the instant causes of action, all of the Respondents were in the business of exhibiting animals. From 1987 until sometime in 2010, Douglas Keith Terranova trained animals under contract with their owners, and presented instructional programs at fairs and facilities using animals that he owned. Tr. at 2509; 2511; 2517-18. He also provided animals to circuses and production crews for television shows and films and acted with his animals. Tr. at 2517-2518. Mr. Terranova owns many different animals, including a number of tigers, camels, a cougar, and spider monkeys. Tr. at 2518-2523. He owned two elephants, Kamba and Congo, until he donated them to the Dallas zoo in 2009. Tr. at 2801.

Craig Alan Perry has been involved with exotic animals since he was sixteen years of age. Tr. at 1700. He has exhibited animals as an individual and through the auspices of a corporation, which is licensed by USDA. Tr. at 1700-1701. Mr. Perry has a number of different animals, including bobcats, servals, lynx, leopards, mountain lions, tigers, lions; and animals shown in a "petting zoo", such as zebras, kangaroos, goats, cattle, and water buffalo. Tr. at 1701. The petting zoo has been in operation for many years under the name of "Perry's Exotic Petting Zoo". Tr. at 1702;

Eugene Key, III, familiarly known as "Trey", manages the Culpepper and Merriweather Circus ("the Circus"). Tr. at 2217. Mr.

Key is President of Key Equipment Company, which bought the Circus approximately ten years ago. Tr. at 2217. The Key Respondents hold an exhibitor's license, and Mr. Key performs in his circus with two tigers, Delia and Solomon, and a lion named Francis that are owned by Key Equipment. Tr. at 1222.

In December, 2007, Respondent Perry executed a contract with the Iowa State Fair ("the Fair") to provide entertainment in the form of a petting zoo and animal rides during the August, 2008 Fair. PX-3; Tr. at 1709. Seeking to enhance the quality of his services, Mr. Perry arranged for horse and camel rides, and engaged the Terranova Respondents to provide elephant rides. Tr. at 1707-1708; 2654-2657; 2660. Mr. Perry provided the equipment for camel rides and the camels, which the Terranova Respondents had purchased[5]. Tr. at 2654-2656; 2657-8. Mr. Terranova also provided two zebu for Mr. Perry's petting zoo. Tr. at 2666.

It was anticipated that the elephants would be brought to the Fair from the Circus, where they were performing under an agreement between the Terranova and Key Respondents. Tr. at 2553. The Circus travels to different venues from Chicago and the Mississippi to the West Coast, putting on two daily shows under "the Big Top". Tr. at 2218-19. Mr. Key performs in the Circus with two tigers, Solomon and Delia, and a lion, Francis, which the Circus acquired in 2005. Tr. at 2207. The tigers are of the golden tabby variety and were litter mates. Tr. at 2213-2214.

Before the 2008 circus season began, the Key Respondents' big cats were housed in a compound built on Mr. Terranova's facility. Tr. at 2222; 2551-2. The compound was built to ensure separation of Delia from Solomon when necessary, though they were allowed to socialize; Mr. Terranova agreed with Mr. Key that the tigers should not be allowed to breed. Tr. at 2223. Mr. Key believed it would be irresponsible to intentionally breed litter mates, considering the risk of genetic mutation. Tr. at 2225. Mr. Terranova supervised the care of the cats in Mr. Key's absence, and Mr. Key was not at the Terranova property to confirm that the tigers were kept apart when Delia was "in heat". Tr. at 2224; 2551-2552.

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[5] The camels belonged to Perry in April, 2008, when arrangements were made with Terranova to provide camel rides at the Fair, and belonged to Respondents at the time of the Fair. Tr. at 2049.

At the start of the 2008 circus season, Terranova's elephant handler delivered the Key cats and Kamba and Congo to the Circus, but he soon returned to the Terranova facility with the elephants and quit his job. Tr. at 2556. Mr. Terranova could not show the elephants himself because of personal circumstances, and he therefore hired Mr. Sloan Damon upon a friend's recommendation. Tr. at 2557-2559. Mr. Damon trained under Mr. Terranova's supervision at his home before taking the elephants back to the Circus with Richard Childs. Tr. at 233; 2561-2562. Mr. Damon hired Mr. Childs to drive the semi-trailer that was used to transport the animals. Tr. at 231; 238. 230; 239. The semi-trailer was partitioned to transport the elephants in the front and the cats in the rear. Tr. at 239. Mr. Damon and Mr. Childs traveled with the animals in the semi until sometime in June or July, when Mr. Key purchased a truck to carry the cats. Tr. at 239. Mr. Damon also looked after Mr. Key's cats because Mr. Damon had large cat experience. Tr. at 2228.

Shortly after he joined the Circus, Mr. Damon noticed that Mr. Key's female tiger was exhibiting behavior associated with pregnancy, although she did not appear to be expecting cubs. Tr. at 241; 2225-7. While the Circus was in Glasgow, Missouri on May 3, 2008, Delia delivered three cubs, which Mr. Damon found outside the mother's cage. Tr. at 2229-2230. Mr. Damon alerted Mr. Key to the births and Mr. Key observed as Mr. Damon replaced the cubs in the cage with Delia, who pushed them away. Tr. at 2232. Mr. Damon was reluctant to expose the cubs to further rejection from their mother, and Mr. Key gave him approval to hand-raise the cubs. Tr. at 2233. Mr. Key was a risk to the newborns' immune systems because he lived with house cats, and he relied upon Mr. Damon's experience with large cats and his reassurance that he had hand-raised tigers in the past. Tr. at 2233; 226-230. A local veterinarian, Dr. Miller, was called to the site to examine the cubs on the night they were born. Tr. at 180-184; 2236. The doctor helped supply kitten milk replacer (KMR) and vitamins for the cubs, and injected Delia with antibiotics. Tr. at 185-188; CX-7.

Although the cubs appeared to be flourishing with hand feedings, the smallest died on May 6, 2008. Tr. at 246; 2239. It was buried at the Circus site, and the Circus moved to its next engagement in Kansas. Tr. at 2240. When one of the remaining cubs refused to eat on May 12, 2008, Mr. Key authorized Mr. Damon to make an appointment to take the cubs to the Kansas State University Veterinary School for examination. Tr. at 247; 2241. The cub soon showed signs of a seizure

and Mr. Damon drove both cubs to the Veterinary School. Tr. at 247-248; 2242. By the time they arrived for examination by Dr. Gary West, the ailing cub had suffered additional seizures and was confirmed dead. Tr. at 248; 2242; 680; CX-9. Dr. West ordered a necropsy, and placed the surviving cub in intensive care for observation. Tr. at 2243; Tr. at 680-1; CX-9; CX-12. The following day, the doctor discharged the survivor, a male that Mr. Damon named "Tubbs", with a prescription for dietary changes. Tr. at 692-4; 2244 CX-12. Mr. Damon continued to feed and care for Tubbs, who was kept in a transport carrier in the cab of the truck used to transport the elephants and adult tigers. Tr. at 269-272.

On August 3, 2008, Mr. Damon left the Circus to travel to the Fair under the arrangement between the Perry and Terranova Respondents. Tr. at 2259. Mr. Damon set up the elephant ride arena in an area close to the Petting Zoo and camel rides. Tr. at 259-260; CX-35 at p. 4. He kept the semi, with Tubbs in the cab, parked away from the public. Tr. at 270-273; CX-35 at pp 121, 122, 127. Nearby, Mr. Damon erected a large outdoor pen where Tubbs spent some time together with a dog that Mr. Damon had found in his travels. Tr. at 272; CX-35 at p. 128.

On August 13, 2008, APHIS inspectors Dr. Zeigerer and Dr. Sofranko, together with APHIS investigator Mike Booth, arrived at the fairgrounds to inspect the facilities and animals. Tr. at 1715; 2536; 1919; CX-38, 39. The trailers belonging to Perry and Terranova were parked in close proximity, and were inspected, as were the Petting Zoo, and the elephant and camel ride areas. Tr. at 1721; CX-38, 39. The inspectors continued to visit the Respondents over the course of several days at the Fair, and on the second day of their inspection, they observed Tubbs in the cab of Terranova's trailer. Tr. at 2602; 2612-13; CX-35 at pp. 121, 122. Mr. Damon did not have a written plan of veterinary care (Tr. at 233-234) and the inspectors instructed Mr. Damon to have Tubbs examined by a qualified veterinarian. Tr. at 288; 2612-4.

Mr. Terranova asked the Fair veterinarians to examine the cub, and Dr. Clothier, Dr. Lucien and two veterinary school students examined Tubbs. Tr. at 2614-5. Dr. Clothier produced a report of examination, and she also consulted with USDA's veterinarian Dr. Gage and drafted recommendations for the cub's diet. Tr. at 2121. Dr. Clothier's examination report was provided to the inspectors on August 15, 2008. Tr. at 2629; Tr. 2119-2121.

Meanwhile, the inspectors were concerned about the cub's welfare, as they believed the cab of the truck where he was kept during the day was

too hot; that he was underweight; and that his living conditions were unsanitary. CX-38, 29, 48, 49. The inspectors conferred with other USDA personnel, in particular Dr. Gage, USDA's large cat expert. It was decided that Tubbs' interests would be best served if he were confiscated by the inspection team and relocated to another facility. CX-50. The confiscation was effected on Saturday, August 16, 2008, after which the cub was transported to a USDA approved facility, where he was examined by Dr. June Olds. CX-52, CX-54, CX-55. Dr. Olds concluded that the cub had worn an ill-fitting harness that caused skin abrasions, that he was underweight, and had suffered a wound near his right eye. CX- 54, 55. X-rays needed to be highlighted to see the tiger's bone structure. Tr. at 573; CX-53.

The inspectors cited all the Terranova and Key Respondents with violations of the Act regarding the care of the tiger cubs. CX-48, 49. The inspectors cited the Terranova and Perry Respondents with violations pertaining to the care, feeding and housing of the elephants, which were inspected on Saturday morning at the Fair in August 2008. Tr. at 2630-2631. Terranova and Perry Respondents were also charged with failure to handle the elephants in a manner sufficient to avoid harm, and with failure to provide sufficient barrier between the public and elephants during elephant rides. Terranova was also charged with failure to provide adequate veterinary care and maintain a program of adequate care for the elephants.

APHIS investigator Rodney Walker traveled to the Fair from Kansas as part of his investigation into reports that Terranova's elephants had gotten loose on June 4, 2008, while traveling with the Circus in WaKeeney, Kansas. Tr. at 427; 439; CX-21.. Strong winds were present and although Mr. Key denied awareness of tornado advisories for the area, the weather was uncommonly changeable. Tr. at 252-254; 430; 2347. Mr. Key monitored the weather before determining that the Circus could be set up. Tr. at 252; 2344-2346. Mr. Damon had unloaded the elephants, but they were not prepared to conduct rides or show them because the weather was questionable. Tr. at 253-254. He was concerned about leaving the animals in the truck for too long. Tr. at 253. Although Mr. Damon said the decision to conduct the rides was his, he also testified that he would consult Mr. Key, who could override him. Id.

At some point it was decided that that the worst of the weather would bypass the Circus site, and the Circus began to set up attractions. Tr. at

253; 2279. The wind suddenly picked up, and the elephants spooked when a large inflatable amusement slide was blown toward[6] them, and they escaped from their handler. Tr. at 254. They wandered onto nearby private property and were reclaimed only after one was shot with tranquilizers. Tr. at 255-256; CX-18, 21, 22, 26. Apparently, the elephants suffered no permanent injury as the result of this incident in June, because they continued to work at the Circus with Mr. Damon and travel with him to the Fair in August. Tr. at 234. There is conflicting evidence regarding whether Mr. Damon was injured by an elephant during this incident. CX-26.

After the Iowa Fair, Mr. Damon rejoined the circus with the elephants, but he quit his job in September, 2008. Tr. at 234. Mr. Terranova took over the work of handling the animals and was with them on November 4, 2009, at the Family Fun Circus in Enid, Oklahoma, when Kamba escaped and ran onto a highway where she was struck by a vehicle. Tr. at 3483 -3514; CX-70. She sustained various injuries, including lacerations on her right side, a fractured tarsal bone, a broken tusk, bruised trunk, and numerous abrasions. CX-74-76. When Mr. Terranova and his employee Carlos Quinones gave chase to Kamba, they left the other elephant, Congo, unattended for a period of time. Tr. at 3141. Kamba's injuries were treated at the Oklahoma State University School of Veterinary Medicine on the following day. CX-74-76. Kamba recovered from her injuries, and in February 2010, Terranova sold her and Congo to the Dallas Zoo. Tr. at 3517-3520. Mr. Terranova worked at the Zoo until February, 2011, when he resigned following negative publicity involving this case. Tr. at 3520.

Inspections of Terranova's exhibitions at other facilities were conducted and resulted in citations of violations of the Act. It is undisputed that spider monkeys on display at the Circus World Museum in Baraboo, Wisconsin in June, 2005 were provided a variety of foodstuffs and entertainment, but there was no formal enrichment program for primates in place. CX-1. Other inspections revealed that on June 15, 2006, a camel became entangled in a loose rope barrier that separated Terranova's camels and elephants at the Circus World Museum (Tr. at 88; CX-2) and inspections further found that two camels

[6] There is conflicting testimony regarding whether one of the elephants was struck by the inflatable device or whether the device was blown near the elephants. I need not determine which version is accurate because the significance of the event is that it precipitated the elephants' escape.

were left unattended on that day (Tr. at 3444; CX-2). In addition, it was determined that there were insufficient distance and insufficient perimeter fencing at the Circus World Museum in July, 2007. Tr. at 3449; CX-4.

The record reflects that on June 5, 2007, an APHIS Veterinary Medical Officer ("VMO") observed Terranova's mountain lion being inadvertently sprayed with water and exposed to detergent during the cleaning of his cage at the Universoul Circus in Landover, Maryland. CX-3.

Terranova admittedly failed to provide a written program of veterinary care and other records required by the Act while exhibiting at Turner Field in Atlanta, Georgia in February, 2008. CX-6. Further, on June 9 and 10, 2008 no one was available to allow inspection of the Terranova home facility in Kaufman, Texas. CX-6.

At the hearing that commenced on June 1, 2011, Ms. Terranova testified that she was married to Mr. Terranova until their divorce was made final in 2009; however, she has not lived with him since 2006. Tr. at 3208. Ms. Terranova was Secretary and a Director of Terranova Enterprises. Tr. at 3210-3211. Although Ms. Terranova and her daughter Farin Fleming attended some meetings as part of their duties as officers of the corporation, she did not personally own any of the animals used in the business, nor did she perform any work involving the animals. Tr. at 3211. Ms. Terranova testified that she may have taken notes at meetings in the very beginning, but she observed that "it was a long time ago". Tr. at 3228. She recalled that Mr. Terranova inherited some business shares from his father, and she and her husband formed the Terranova Enterprises when they were first married. Tr. at 3226.

Ms. Terranova denied being involved in making decisions regarding the operation of the business, but she recalled discussing the cost of purchases and budget items with her husband. Tr. at 3224-3225. She was not involved in decisions regarding buying and selling animals. Tr. at 3225. Ms. Terranova did not participate in any meetings or perform duties for the corporation since her separation from Mr. Terranova in 2006. Tr. at 3225.

Ms. Terranova did not know how many tigers the company owned, even when she lived with Mr. Terranova. Tr. at 3222. Ms. Terranova saw Mr. Terranova's circus act, but she refused to watch the tiger act. She believed that she remained a corporate officer during the pendency

of her divorce proceedings, but thought that she had been removed as officer when the divorce was final. Tr. at 3209.

Ms. Terranova knew about Kamba's escape in Oklahoma, but she knew nothing about the incidents underlying the instant action until the complaint was filed against her. Tr. at 3212-3213. Ms. Terranova testified that she was not familiar with other incidents where animals were hurt, but she knew that Mr. Terranova had been injured by one of his cats. Tr. at 3215-3216. Despite that incident, Ms. Terranova believed that Mr. Terranova was in control of the animals when he worked with them. Tr. at 3217. She had no opinion regarding the incidents involving Kamba, as they occurred after her marriage. Tr. at 3218. She was not involved in the decision to sell the elephants to the Dallas Zoo, and could not say whether her divorce was final at the time of that decision. Tr. at 3218. She did not recall signing any documents regarding that sale, either as an individual or corporate officer. Id.

C. Prevailing Law and Regulations

The purpose of the Animal Welfare Act, as it relates to exhibited animals, is to insure that they are provided humane care and treatment (7 U.S.C. § 2131). The Secretary of Agriculture is specifically authorized to promulgate regulations to govern the humane handling and transportation of animals by (7 U.S.C. §§ 2143(a), 2151). The Act requires exhibitors to be licensed and requires the maintenance of records regarding the purchase, sale, transfer and transportation of regulated animals. 7 U.S.C. §§2133, 2134, 2140. Exhibitors must also allow inspection by APHIS inspectors to assure that the provisions of the Act and the Regulations and Standards are being followed. 7 U.S.C. §§ 2142, 2143, 2143 (a)(1) and (2), 2146 (a).

Violations of the Act by licensees may result in the assessment of civil penalties, and the suspension or revocation of licensees. 7 U.S.C. § 2149. The maximum civil penalty that may be assessed for each violation was modified under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note) and various implementing regulations issued by the Secretary. Though the Act originally specified a $2,500 maximum, between April 14, 2004 and June 17, 2008 the maximum for each violation was $3,750. In addition, 7 U.S.C. § 2149(b), was itself amended and, effective June 18, 2008, the maximum civil penalty for each violation has been increased to $10,000.

The Act extends liability for violations to agents, pursuant to 7 U.S.C. §2139, which states, in pertinent part: "the act, omission, or failure of any person acting for or employed by . . . an exhibitor or a person licensed as . . . an exhibitor . . . within the scope of his employment or office, shall be deemed the act, omission or failure of such . . . exhibitor as well as of such person." 7 U.S.C. §2139.

Regulations promulgated to implement the Act provide requirements for licensing, recordkeeping and attending veterinary care, as well as specifications for the humane handling, care, treatment and transportation of covered animals. 9 C.F.R. Chapter 1, Subchapter A, Parts 1 through 4. The regulations set forth specific instructions regarding the size and environmental specifications of facilities where animals are housed or kept; the need for adequate barriers; the feeding and watering of animals; sanitation requirements; and the size of enclosures and manner used to transport animals. 9 C.F.R. Chapter 1, Subchapter A, Part 3, Subpart F. The regulations make it clear that exhibited animals must be handled in a manner that assures not only their safety but also the safety of the public, with sufficient distance or barriers between animals and people. Id..

D. Discussion

Complainant argues that because Respondent Will Ann Terranova was listed as an officer and director of Terranova Enterprises, Inc., she should be held personally responsible for any violations of the Act devolving from acts of other officers. In support of this theory, Complainant cites to the holding in *In re Lion Raisins, Inc.*, 69 Agric. Dec. __ 2010, whereby the failure of a corporation to observe corporate formalities sufficed to render the individual officers indistinguishable from the corporate entity.

It is clear from the record that beyond holding a few meetings early after its formation, Terranova Enterprises, Inc. did not engage in formal corporate decision-making processes. I fully credit Ms. Terranova's testimony that the business decisions were left to her ex-husband, who had the experience and expertise with exhibiting animals. Tr. at 3226. She was not involved with the animals (Tr. at 3012), did not know how many tigers the company owned and abhorred even watching her ex-husband interact with the business' tigers (Tr. at 3222). Her involvement was limited to taking minutes at a few meetings and discussing budgets

and costs with her ex-husband. Tr. at 3224-3226. Therefore, factually, the instant matter is distinguishable from the circumstances involved in *In re Lion Raisins, Inc.*, supra., where the individuals were involved in the business. That case is further distinguishable because it involves an entirely separate statute with specific provisions regarding the personal liability of individuals.

Although it is likely that Will Ann Terranova's limited involvement as a corporate officer and director ended before her separation from her husband, the unrebutted record demonstrates by substantial evidence that she was not involved in any corporate decisions following her separation from her husband in 2006. I find insufficient evidence of record to impute to Respondent Will Ann Terranova knowledge of the business dealings of Terranova Enterprises during the period relevant to this adjudication. I find that she had little role in making decisions regarding business operations. There is no evidence that she acted on behalf of the corporation in any of the incidents underlying the Complaints under adjudication. There is no evidence that was employed by the corporate entity during the entire period at issue. There is no evidence that she was familiar with the work involved in caring for or exhibiting animals. I further find that since 2006, her retention as a corporate officer was due solely to complications of ongoing divorce proceedings, and does not constitute more than a prima facie indication that she was involved in decisions involving the company. I further note that contrary to assertions by Complainant, Ms. Terranova's mailing address is not the same as that of the corporate entity.

I find that there is insufficient evidence of record to substantially conclude that Ms. Terranova was individually responsible for any of the alleged violations represented by actions taken by Terranova Enterprises, Inc. or Mr. Doug Terranova at any time after they separated. The only alleged violation cited before 2006 is the failure to document a plan for environmental enhancement adequate to promote the psychological well-being of two spider monkeys on exhibition at the Circus World Museum in Baraboo, Wisconsin in June, 2005. There is no evidence that she was aware of this particular exhibition, or that she was involved in keeping records required under the Act. I credit Mr. Terranova's testimony in which he admitted to poor record keeping habits, and find that this violation has been established. Further, I credit his testimony that despite the lack of a formal plan, the monkeys were provided with a variety of foodstuffs and activities so as to promote their well being,

which was corroborated by the inspector who cited Terranova with the violation. I find that the remedial nature of the Act does not support imposing pecuniary or other sanctions for such technical violations.

E. Findings of Fact

1. Respondent Will Ann Terranova is an individual residing in Kaufman, Texas.
2. Respondent Will Ann Terranova was the secretary and a director of Respondent Terranova Enterprises, Inc. until her divorce from Douglas Keith Terranova was finalized in 2009.
3. Terranova Enterprises, Inc., is a moderate sized business that exhibits wild and exotic animals, including tigers, a cougar, and spider monkeys, which operated as an exhibitor under the Act at all times relevant to this adjudication, under AWA license number 74-C-0199.
4. Respondent Will Ann Terranova was not involved in any manner with the acts of Douglas Keith Terranova or Terranova Enterprises Inc. after she separated from Mr. Terranova in 2006.
5. In June, 2005 Respondents exhibited two spider monkeys at the Circus World Museum in Baraboo, Wisconsin.
6. Inspection of the exhibition disclosed that Respondents had not prepared a written plan for environmental enhancement.
7. Despite the lack of a written plan, the monkeys were provided with a variety of foodstuffs and activities to promote their physical and psychological well-being.

F. Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. In her capacity as corporate officer and director, Respondent Will Ann Terranova operated as an exhibitor as that term is defined by the Act and regulations until 2006.
3. Pursuant to 7 U.S.C. § 2139, Will Ann Terranova's acts, omissions or failures in her capacity as corporate officer and director until 2006 are deemed to be her own as well as those of the corporate entity.
4. In June, 2005, Respondents exhibited spider monkeys without having in place a documented environmental enhancement plan to

promote the psychological well being of non-human primates pursuant to 9 C.F.R. § 3.81.

5. Because the monkeys were provided psychological stimulation and an enhanced environment, the lack of a documented plan constitutes a technical violation of the Act.

6. Beginning in 2006, Respondent Will Ann Terranova was a corporate officer and director in name only, and was not involved in any manner with the operation of Terranova Enterprises, Inc.

7. Any violations of the Act after 2005 are not imputed to Respondent Will Ann Terranova.

G. Sanctions

With respect to assessing civil penalties against Respondent for the violation of the Act and the Regulations and Standards, 7 U.S.C. § 2149(b) directs that "…[t]he Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations". 7 U.S.C. § 2149(b).

Respondent admitted in Answer to the Complaints that during the period material to this adjudication that Respondents' business is of moderate size. The sole violation substantiated and imputed to Respondent Will Ann Terranova constitutes the first, chronologically, that was brought against the Respondents in this matter, and therefore, the history of violations and lack of Respondent's good faith are not factors meriting the assessment of a penalty. The violation itself is a record-keeping violation that is not per se offensive to the purposes of the Act, and did not merit the assessment of a monetary penalty when it was cited by APHIS inspector Cynthia Neis. The evidence does not establish willfulness, as I find that the violation was not intentional or in reckless disregard of the law.

In consideration of the foregoing, I find that the evidence does not support an assessment of a civil money penalties against Respondent Will Ann Terranova with respect to this violation. As I have found that Respondent Will Ann Terranova was not involved in the activities or operation of the business conducted by Terranova Enterprises, Inc., or by Douglas Keith Terranova, there is no reason to consider any further sanction against her.

ORDER

All charges brought against Will Ann Terranova with the exception of the failure to have a plan for environmental enrichment are DISMISSED.

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

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

So Ordered this ____ day of _____, 2011 at Washington, DC.

HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

JACK L. RADER AND BARBARA L. RADER d/b/a RADER STABLES.
HPA-Docket Nos. 11-0256 and 11-0257.
Decision and Order.
Filed November 17, 2011.

HPA

Petitioners, Pro se
Sharlene Deskins, Esq. for APHIS.
Initial Decision by Administrative Law Judge Janice K. Bullard.
Decision and Order by William Jenson, Judicial Officer.

Decision and Order

PROCEDURAL HISTORY

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on May 26, 2011. The Administrator instituted the 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 (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges that, on July 2, 2009: (1) Jack L. Rader, in violation of 15 U.S.C. § 1824(1), transported, shipped, moved, delivered, or received a horse known as "Thumbs Up" while the horse was sore, so that the horse could be shown or exhibited at the Owingsville Lions Club Horse Show in Owingsville, Kentucky, as entry 381 in class number 20; and (2) Jack L. Rader and Barbara L. Rader, in violation of 15 U.S.C. § 1824(2)(B) and (2)(D), entered and allowed the entry for the purpose of showing or exhibiting a horse known as "Thumbs Up," as entry 381 in

class number 20, at the Owingsville Lions Club Horse Show in Owingsville, Kentucky, while the horse was sore.[1]

On June 9, 2011, the Hearing Clerk served Mr. Rader and Mrs. Rader with a copy of the Complaint, a copy of the Rules of Practice, and the Hearing Clerk's May 27, 2011, service letter.[2] Mr. Rader and Mrs. Rader failed to file an answer to the Complaint within 20 days after the Hearing Clerk served the Complaint, as required by 7 C.F.R. § 1.136(a). The Hearing Clerk sent a letter, dated June 30, 2011, to Mr. Rader and Mrs. Rader informing them that their answer to the Complaint had not been filed within the time prescribed in the Rules of Practice. On July 5, 2011, Mr. Rader and Mrs. Rader each filed an answer to the Complaint. On August 3, 2011, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] filed an Order To Show Cause Why Default Judgment Should Not Be Entered Against Respondents And Consolidating Cases [hereinafter Order to Show Cause] in which the ALJ provided Mr. Rader, Mrs. Rader, and the Administrator 20 days after the date of the Order to Show Cause within which to respond to the Order to Show Cause.[3]

On August 22, 2011, the Administrator filed a timely response to the ALJ's Order to Show Cause. On September 6, 2011, 14 days after the time for filing a response to the ALJ's Order to Show Cause had expired, Mr. Rader and Mrs. Rader filed a response to the ALJ's Order to Show Cause.

On September 21, 2011, in accordance with 7 C.F.R. § 1.139, the ALJ filed a Decision And Order Entering Default Judgment [hereinafter Default Decision]: (1) concluding that Mr. Rader and Mrs. Rader violated the Horse Protection Act, as alleged in the Complaint; (2) assessing Mr. Rader and Mrs. Rader each a $2,200 civil penalty; and (3) disqualifying Mr. Rader and Mrs. Rader for 1 year from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale,

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[1]Compl. at 1-2 ¶¶ 5-6.

[2]Domestic Return Receipt for article number 7009 1680 0001 9851 7509 and Domestic Return Receipt for article number 7009 1680 0001 9851 7493.

[3]Order to Show Cause at 3.

or horse auction.[4] Later that same day, September 21, 2011, Mr. Rader and Mrs. Rader filed a reply, dated September 13, 2011, to the Administrator's response to the ALJ's Order to Show Cause.

On October 19, 2011, Mr. Rader and Mrs. Rader appealed the ALJ's Default Decision to the Judicial Officer. On November 7, 2011, the Administrator filed Complainant's Opposition to the Respondents' Appeal of The Decision and Order Upon Admission of Facts by Reason of Default. On November 10, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I adopt, with minor changes, the ALJ's Default Decision as the final agency decision.

DECISION

Statement of the Case

Mr. Rader and Mrs. Rader failed to file an answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). The Rules of Practice (7 C.F.R. § 1.136(c)) provide 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, pursuant to 7 C.F.R. § 1.139, the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint are adopted as findings of fact. I issue this Decision and Order pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Jack L. Rader is an individual whose mailing address is in the State of West Virginia. At all times material to the instant proceeding, Jack L. Rader: (a) used the business name "Rader's Stables" and (b) was the owner of the horse known as "Thumbs Up."

2. Barbara L. Rader is an individual whose mailing address is in the State of West Virginia. At all times material to the instant proceeding, Barbara L. Rader: (a) used the business name "Rader's Stables" and (b) was the owner of the horse known as "Thumbs Up."

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[4] ALJ's Default Decision at 5-6.

3. At all times material to the instant proceeding, Jack L. Rader was the trainer of "Thumbs Up."

4. On or about July 2, 2009, Jack L. Rader transported "Thumbs Up" to the Owingsville Lions Club Horse Show in Owingsville, Kentucky, for the purpose of entering, showing, and exhibiting the horse.

5. On or about July 2, 2009, Jack L. Rader transported, shipped, moved, delivered, or received the horse known as "Thumbs Up," in violation of 15 U.S.C. § 1824(1), while the horse was "sore," as that term is defined in the Horse Protection Act, so that the horse could be shown or exhibited at the Owingsville Lions Club Horse Show in Owingsville, Kentucky, as entry 381 in class number 20.

6. On July 2, 2009, Jack L. Rader and Barbara L. Rader, in violation of 15 U.S.C. § 1824(2)(B) and (2)(D), entered and allowed the entry for the purpose of showing or exhibiting the horse known as "Thumbs Up," as entry 381 in class number 20, at the Owingsville Lions Club Horse Show in Owingsville, Kentucky, while the horse was "sore," as that term is defined in the Horse Protection Act.

Conclusions of Law

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

2. By reason of the findings of fact, Jack L. Rader has violated the Horse Protection Act (15 U.S.C. § 1824(1), (2)(B), (2)(D)).

3. By reason of the findings of fact, Barbara L. Rader has violated the Horse Protection Act (15 U.S.C. § 1824(2)(B), (2)(D)).

4. The Order in this Decision and Order is authorized by the Horse Protection Act and justified under the circumstances described in this Decision and Order.

Mr. Rader and Mrs. Rader's Appeal Petition

Mr. Rader and Mrs. Rader raise five issues in their letter to the Hearing Clerk, which they filed with the Hearing Clerk on October 19, 2011 [hereinafter Appeal Petition]. First, Mr. Rader and Mrs. Rader contend the Rules of Practice do not state that weekends and holidays are included in computing the time allowed for filing a response to a complaint with the Hearing Clerk. Mr. Rader and Mrs. Rader assert, if weekends and holidays are not included in the computation of the time

allowed for filing a response to a complaint, their responses to the Complaint were timely filed with the Hearing Clerk. (Appeal Pet. at 1.)

The Rules of Practice provide that an answer to a complaint must be filed with the Hearing Clerk within 20 days after the Hearing Clerk serves the complaint.[5] The Rules of Practice specifically provide that Saturdays, Sundays, and Federal holidays are included in the computation of the time allowed for filing any document or paper, 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, I reject Mr. Rader and Mrs. Rader's contention that Saturdays, Sundays, and holidays are not included in the computation of the time allowed for filing their responses to the Complaint. The Hearing Clerk served Mr. Rader and Mrs. Rader with the Complaint on June 9, 2011;[6] therefore, Mr. Rader's and Mrs. Rader's responses to the Complaint were required to be filed with the Hearing Clerk no later than June 29, 2011. Mr. Rader and Mrs. Rader filed their responses to the Complaint on July 5, 2011, 6 days after their responses were required to be filed. Therefore, Mr. Rader and Mrs. Rader are deemed, or the purposes of the instant proceeding, to have admitted the allegations in the Complaint and waived the right to hearing.[7]

Second, Mr. Rader and Mrs. Rader assert Mrs. Rader called the Hearing Clerk's office and inquired about an extension of time within which to file responses to the Complaint. Mr. Rader and Mrs. Rader state Mrs. Rader was informed that the person she needed to talk to was

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[5] 7 C.F.R. § 1.136(a).

[6] See note 2.

[7] 7 C.F.R. §§ 1.136(c), .139.

out for 1 week and, during the following week, Mrs. Rader was away from her home and had no means by which to contact the Hearing Clerk. Mr. Rader and Mrs. Rader state these events "made for a late response." (Appeal Pet. at 1.)

The Rules of Practice provide that the time for filing any document or paper required or authorized to be filed under the Rules of Practice may be extended, as follows:

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

. . . .

(f) *Extensions of time*. The time for the filing of any document or paper required or authorized under the rules in this part to be filed may be extended by the Judge or the Judicial Officer as provided in § 1.143, if, in the judgment of the Judge or the Judicial Officer, as the case may be, there is good reason for the extension. In all instances in which time permits, notice of the request for extension of time shall be given to the other party with opportunity to submit views concerning the request.

7 C.F.R. § 1.147(f). Moreover, the Rules of Practice set forth the manner by which to request an extension of time to file a document or paper, as follows:**§ 1.143 Motions and requests.**

(a) *General*. All motions and requests shall be filed with the Hearing Clerk. . . . The Judge shall rule upon all motions and requests filed or made prior to the filing of an appeal of the Judge's decision pursuant to § 1.145, except motions directly relating to the appeal. Thereafter, the Judicial Officer will rule on any motions and requests, as well as the motions directly relating to the appeal.

(b) *Motions entertained*. (1) Any motion will be entertained other than a motion to dismiss on the pleading.

(2) All motions and request[s] concerning the complaint must be made within the time allowed for filing an answer.

(c) *Contents*. All written motions and requests shall state the particular order, ruling, or action desired and the grounds therefor.

7 C.F.R. § 1.143(a)-(c). The Hearing Clerk served Mr. Rader and Mrs. Rader with the Rules of Practice on June 9, 2011.[8] Therefore, I find Mr. Rader and Mrs. Rader knew, or should have known, that they could request an extension of time within which to file their responses to the Complaint and how to request that extension of time. Mr. Rader and Mrs. Rader's inability to discuss an extension of time with a United States Department of Agriculture employee did not impede Mr. Rader's or Mrs. Rader's filing a request for an extension of time.Third, Mr. Rader and Mrs. Rader assert Mrs. Rader called to obtain an extension of time within which to file an appeal petition and was told her request for an extension would have to be "in writing and approved." (Appeal Pet. at 1.)

Mr. Rader and Mrs. Rader's Appeal Petition was timely-filed with the Hearing Clerk; therefore, I find the details of any discussion Mrs. Rader had with a United States Department of Agriculture employee regarding an extension of time to file Mr. Rader and Mrs. Rader's Appeal Petition, irrelevant.

Fourth, Mr. Rader and Mrs. Rader assert much of the correspondence which they have received from the United States Department of Agriculture in the instant proceeding references times and dates that are incorrect. Mr. Rader and Mrs. Rader posit the question: "Why are we held to a higher standard [than] the USDA?" (Appeal Pet. at 1.)

The issue before me is the timeliness of Mr. Rader's and Mrs. Rader's responses to the Complaint. The record establishes that the Hearing Clerk served Mr. Rader and Mrs. Rader with the Complaint on June 9, 2011,[9] and that Mr. Rader and Mrs. Rader filed their responses to the Complaint 26 days later, on July 5, 2011. Mr. Rader's and Mrs. Rader's responses to the Complaint are late-filed; therefore, Mr. Rader and Mrs. Rader are deemed, for the purposes of this proceeding, to have admitted the allegations of the Complaint and waived the right to hearing.[10]

Fifth, Mr. Rader and Mrs. Rader assert the incident which gave rise to the Complaint occurred in 2009, but the Administrator failed to file the

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[8] See note 2.

[9] See note 2.

[10] 7 C.F.R. §§ 1.136(c), .139.

Complaint for 2 years. Mr. Rader and Mrs. Rader assert the Administrator failed to file the Complaint timely. (Appeal Pet. at 1.)

The "incident" that gave rise to the Administrator's filing the Complaint occurred on July 2, 2009. The Administrator filed the Complaint on May 26, 2011, 1 year 10 months 24 days after the "incident." An action on behalf of the United States in its governmental capacity is subject to no time limitation absent enactment of a limitation. Mr. Rader and Mrs. Rader do not direct me to any enactment which establishes a time limitation on the institution of an administrative disciplinary proceeding under the Horse Protection Act. Even assuming, for the sake of argument, that the statute of limitations in 28 U.S.C. § 2462 applies to the instant proceeding, this proceeding is not barred by 28 U.S.C. § 2462, as the Administrator brought the action within the 5-year period set forth in 28 U.S.C. § 2462. Also, laches is not applicable to actions of the government.[11] Therefore, I reject Mr. Rader nd Mrs. Rader's unsupported contention that the Administrator failed to file the Complaint timely.

Mr. Rader and Mrs. Rader's November 14, 2011, Filing

On November 14, 2011, Mr. Rader and Mrs. Rader filed an undated letter with the Hearing Clerk, which is addressed to "To Whom This May Concern." The letter appears to be Mr. Rader and Mrs. Rader's second response to the Complaint. The Hearing Clerk served Mr. Rader and Mrs. Rader with the Complaint on June 9, 2011.[12] The Rules Practice require that any response to a complaint must be filed with the Hearing Clerk within 20 days after the complaint is served by the Hearing Clerk;[13] therefore, Mr. Rader and Mrs. Rader's response to the Complaint was required to be filed with the Hearing Clerk no later than June 29, 2011. Mr. Rader and Mrs. Rader's November 14, 2011, response to the Complaint comes far too late to be considered.

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[11] *United States v. Mack*, 295 U.S. 480, 489 (1935); *United States v. Verdier*, 164 U.S. 213, 219 (1896); *German Bank v. United States*, 148 U.S. 573, 579-80 (1893); *Gaussen v. United States*, 97 U.S. 584, 590 (1878); *Cooke v. United States*, 91 U.S. 389, 398 (1875); *United States v. Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735-36 (1824).

[12] See note 2.

[13] 7 C.F.R. § 1.136(a).

For the foregoing reasons, the following Order is issued.

ORDER

1. Jack L. Rader and Barbara L. Rader are each assessed a $2,200 civil penalty. The civil penalties shall be paid by certified checks or money orders, made payable to the "Treasurer of the United States" and sent to:

Sharlene Deskins
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Mr. Rader's civil penalty payment shall be forwarded to, and received by, Ms. Deskins within 60 days after service of this Order on Mr. Rader. Mrs. Rader's civil penalty payment shall be forwarded to, and received by, Ms. Deskins within 60 days after service of this Order on Mrs. Rader. Mr. Rader and Mrs. Rader shall indicate on the certified checks or money orders that the payments are in reference to Docket Nos. 11-0256 and 11-0257.

2. Jack L. Rader and Barbara L. Rader are disqualified for 1 uninterrupted year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, corporation, partnership, 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: (1) transporting, or arranging for the transportation of, horses to or from equine events; (2) personally giving instructions to exhibitors; (3) being present in the warm-up or inspection areas or in any area where spectators are not allowed; and (4) financing the participation of others in equine events. Mr. Rader's disqualification shall continue until the $2,200 civil penalty assessed against him in paragraph 1 of this Order is paid in full. Mrs. Rader's disqualification shall continue until the $2,200 civil penalty assessed against her in paragraph 1 of this Order is paid in full. The disqualification of Mr. Rader shall become effective on the 60th day after

service of this Order on Mr. Rader. The disqualification of Mrs. Rader shall become effective on the 60th day after service of this Order on Mrs. Rader.

RIGHT TO JUDICIAL REVIEW

Jack L. Rader and Barbara L. Rader have the right to obtain review of this Order in the court of appeals of the United States for the circuit in which they reside or have their place of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. Rader and Mrs. Rader must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of any notice of appeal by certified mail to the Secretary of Agriculture.[14] The date of this Order is November 17, 2011.

Done at Washington, DC

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[14] 15 U.S.C. § 1825(b)(2), (c).

EQUAL OPPORTUNITY CREDIT ACT

DEPARTMENTAL DECISION

COREY LEA; COREY LEA, INC., START YOUR DREAM, INC.; AND COWTOWN FOUNDATION, INC.
Docket No. 11-0180.
Decision and Order.
Filed August 16, 2011.

EOCA

Petitioner Pro se.
Jeffrey Knishkowy, Esq for OCR.
Initial Decision by Administrative Law Judge Janice Bullard.
Ruling by William Jenson, Judicial Officer

Decision and Order

PROCEDURAL HISTORY

On March 31, 2011, Corey Lea and Corey Lea, Inc., instituted the instant proceeding by filing a petition seeking a hearing before the Office of Administrative Law Judges, United States Department of Agriculture [hereinafter the OALJ], regarding the denial of discrimination complaints filed with the Office of the Assistant Secretary for Civil Rights, United States Department of Agriculture [hereinafter the OASCR]. In subsequent pleadings, Corey Lea, Corey Lea, Inc., Start Your Dream, Inc., and Cowtown Foundation, Inc. [hereinafter Petitioners], also requested that the OALJ provide Petitioners relief under the Federal Tort Claims Act and that the OALJ review the United States Department of Agriculture's denial of Petitioners' Freedom of Information Act requests.

On May 26, 2011, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] issued a Decision and Order Dismissing Petition in which the ALJ concluded the OALJ is without jurisdiction to: (1) grant Petitioners' request for a hearing regarding the OASCR's denial of Petitioners' discrimination complaints; (2) consider Petitioners' claims under the Federal Tort Claims Act; or (3) review the United States Department of Agriculture's denial of Petitioners' Freedom of Information Act requests.

On June 16, 2011, Petitioners appealed the ALJ's Decision and Order Dismissing Petition to the Judicial Officer.[1] On July 12, 2011, the OASCR filed Agency Opposition to Appeal Petition, and on July 14, 2011, Petitioners filed a response to the Agency Opposition to Appeal Petition. On July 18, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

DECISION

The OASCR asserts Petitioners filed a petition for review with the United States Court of Appeals for the Sixth Circuit on June 20, 2011 (Agency Opposition to Appeal Petition at 1 n.1). I could not locate any filing by Petitioners in the United States Court of Appeals for the Sixth Circuit; however, in *Lea v. U.S. Dep't of Agric.*, Case No. 1:11-CV-0094-JHM (W.D. Ky. June 20, 2011), Petitioners seek, *inter alia*, review of the ALJ's May 26, 2011, Decision and Order Dismissing Petition.[2]

As Petitioners' request for judicial review of the ALJ's May 26, 2011, Decision and Order Dismissing Petition is pending before the United States District Court for the Western District of Kentucky, I have no jurisdiction to review the ALJ's decision. Accordingly, Petitioners' Appeal Petition must be dismissed.

ORDER

Petitioners' Appeal Petition is dismissed. This Order shall be effective upon service on Petitioners.

Done at Washington, DC

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[1]Petitioners style the appeal petition "Motion to Review, Motion to Reconsider and Motion to Enter Default Judgment" [hereinafter Appeal Petition].

[2]Petitioners filed the petition for review in the United States District Court for the Western District of Kentucky, but, with no explanation, request review by the United States Court of Appeals for the Sixth Circuit in their pleading.

MISCELLANEOUS ORDERS

[Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Miscellaneous Orders issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported - Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at:
www.dm.usda.gov/oaljdecisions

HEIN HETTINGA AND ELLEN HETTINGA d/b/a SARAH FARMS v. USDA.
AMA-M-Docket No. 08-0070.
Miscellaneous Order.
Filed November 10, 2011.

FEDERAL MILK MARKETING ORDER IN THE MIDEAST
AO-Docket No. 11-0333.
Transcript Certification.
Filed November 8, 2011.

MITCHELL STANLEY d/b/a STANLEY BROTHERS LIVESTOCK.
AQ-Docket No. 11-0235.
Miscellaneous Order.
Filed October 4, 2011.

AWA

Thomas Bolick, Esq. for APHIS.
Respondent Pro se.
Initial Decision by Chief Administrative Law Judge Peter M. Davenport.
Ruling by William Jenson, Judicial Officer.

Decision and Order

PROCEDURAL HISTORY

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on May 17, 2011. The Administrator instituted the proceeding under sections 901-905 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. § 1901 note) [hereinafter the Commercial Transportation of Equine for Slaughter Act]; the regulations issued under the Commercial Transportation of Equine for Slaughter Act (9 C.F.R. pt. 88) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges, on or about May 10, 2007, Mitchell Stanley, d/b/a Stanley Brothers Livestock, commercially transported 27 horses from Bastrop, Louisiana, to Cavel International, in DeKalb, Illinois [hereinafter Cavel], for slaughter, in violation of the Commercial Transportation of Equine for Slaughter Act and the Regulations, and, on or about August 13, 2009, Mr. Stanley commercially transported 36 horses from Hamburg, Arkansas, to Carnicos de Jeres S.A. de C.V., in Jerez, Zacatecas, Mexico [hereinafter Carnicos], for slaughter, in violation of the Commercial Transportation of Equine for Slaughter Act and the Regulations.[1]

The Hearing Clerk served Mr. Stanley with the Complaint and a service letter on June 15, 2011.[2] Mr. Stanley failed to file an answer to the Complaint within 20 days after service, as required by the Rules of Practice (7 C.F.R. § 1.136(a)). The Hearing Clerk sent Mr. Stanley a letter dated July 8, 2011, informing Mr. Stanley that he had not filed a timely response to the Complaint. Mr. Stanley failed to file a response to the Hearing Clerk's July 8, 2011, letter.

On July 13, 2011, in accordance with the Rules of Practice (7 C.F.R. § 1.139), the Administrator filed a Motion for Adoption of Proposed Default Decision and Order [hereinafter Motion for Default Decision] and a Proposed Default Decision and Order. The Hearing Clerk served Mr. Stanley with the Administrator's Motion for Default Decision

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[1]Compl. ¶¶ II-III.

[2]Memorandum to the File, dated June 15, 2011, and signed by Carla M. Andrews, Assistant Hearing Clerk.

and the Administrator's Proposed Default Decision and Order on July 19, 2011.[3] Mr. Stanley failed to file objections to the Administrator's Motion for Default Decision and the Administrator's Proposed Default Decision and Order within 20 days after service, as required by the Rules of Practice (7 C.F.R. § 1.139).

On August 12, 2011, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ], in accordance with the Rules of Practice (7 C.F.R. § 1.139), issued a Default Decision and Order concluding Mr. Stanley violated the Commercial Transportation of Equine for Slaughter Act and the Regulations, as alleged in the Complaint, and assessing Mr. Stanley an $11,525 civil penalty.

On September 8, 2011, Mr. Stanley appealed the Chief ALJ's Default Decision and Order to the Judicial Officer. On September 23, 2011, the Administrator filed Complainant's Response to Respondent's Appeal. On September 28, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful review of the record, I affirm the Chief ALJ's Default Decision and Order.

DECISION

Statement of the Case

Mr. Stanley failed to file an answer to the Complaint within the time prescribed in the Rules of Practice (7 C.F.R. § 1.136(a)). The Rules of Practice (7 C.F.R. § 1.136(c)) provide the failure to file an answer within the time provided in 7 C.F.R. § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file an answer or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact. I issue this Decision and Order pursuant to 7 C.F.R. § 1.139.

Findings of Fact

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[3]United States Postal Service Domestic Return Receipt for article number 7009 1680 0001 9852 7836.

1. Mitchell Stanley, d/b/a Stanley Brothers Livestock, owns and operates Stanley Brothers Livestock and has a mailing address in Hamburg, Arkansas.

2. On or about May 10, 2007, Mr. Stanley commercially transported 27 horses from Bastrop, Louisiana, to Cavel, for slaughter but failed to properly fill out the required owner/shipper certificate, VS 10-13. The form had the following deficiencies: (1) the prefix and tag number for one horse's USDA back tag were not recorded, in violation of 9 C.F.R. § 88.4(a)(3)(vi); (2) the form did not indicate the breed or type of any of the horses, in violation of 9 C.F.R. § 88.4(a)(3)(v); and (3) Mr. Stanley did not sign the form on the owner/shipper signature line, in violation of 9 C.F.R. § 88.4(a)(3).

3. On or about August 13, 2009, Mr. Stanley commercially transported 36 horses from Hamburg, Arkansas, to Carnicos, a commercial horse slaughter plant, for slaughter. None of the horses in the shipment were tagged with a USDA back tag, in violation of 9 C.F.R. § 88.4(a)(2).

4. On or about August 13, 2009, Mr. Stanley commercially transported 36 horses from Hamburg, Arkansas, to Carnicos for slaughter but did not properly fill out the required owner/shipper certificate, VS 10-13. The form had the following deficiencies: (1) the form did not list the date and time that the horses were loaded onto the conveyance, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

5. On or about August 13, 2009, Mr. Stanley commercially transported 36 horses from Hamburg, Arkansas, to Carnicos for slaughter. Mr. Stanley's driver developed engine trouble while en route to the land border port in Eagle Pass, Texas, so he offloaded the horses at Atascosa Livestock Auction in Pleasanton, Texas, and took his truck in for repairs. Mr. Stanley sent a relief driver to Pleasanton, Texas, to load the horses onto a conveyance and take them to the border, but the relief driver did not prepare a second owner/shipper certificate, VS 10-13, noting the date, time, and place when and where the offloading occurred, in violation of 9 C.F.R. § 88.4(b)(4).

6. On or about August 13, 2009, Mr. Stanley commercially transported 36 horses from Hamburg, Arkansas, to Carnicos for slaughter. One of the horses in the shipment, bearing Louisiana back tag # 72DL3 285, had a severe laceration on the inside of its left rear leg that was causing the horse obvious physical distress. A USDA representative informed Mr. Stanley about the injured horse and directed him to seek

veterinary assistance to alleviate the suffering of the horse. Despite being informed about the horse's injury and directed to obtain veterinary assistance for the injured horse from an equine veterinarian, Mr. Stanley did not obtain veterinary assistance for the horse and the horse had to be euthanized. Mr. Stanley thus failed to obtain veterinary assistance as soon as possible from an equine veterinarian for a horse that was in obvious physical distress, in violation of 9 C.F.R. § 88.4(b)(2). Mr. Stanley also failed to comply with the directions of a USDA representative to take appropriate actions to alleviate the suffering of the injured horse, in violation of 9 C.F.R. § 88.4(e).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. By reason of the Findings of Fact set forth in this Decision and Order, Mr. Stanley violated the Commercial Transportation of Equine for Slaughter Act (7 U.S.C. § 1901 note) and the Regulations (9 C.F.R. pt. 88).

Mr. Stanley's Appeal Petition

Mr. Stanley raises three issues in his letter filed September 8, 2011 [hereinafter Appeal Petition]. First, Mr. Stanley denies some of the allegations of the Complaint (Appeal Pet. at 1).

The Hearing Clerk served Mr. Stanley with the Complaint on June 15, 2011.[4] Mr. Stanley was required by the Rules of Practice to file a response to the Complaint within 20 days after the Hearing Clerk served him with the Complaint;[5] namely, no later than July 5, 2011. The Rules of Practice provide that failure to file a timely answer shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint.[6] Mr. Stanley's denial of the allegations of the Complaint in his Appeal Petition, filed September 8, 2011, 2 months 3 days after Mr. Stanley was required to file an answer, comes far too late to be

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[4]See note 2.

[5]See 7 C.F.R. § 1.136(a).

[6]See 7 C.F.R. § 1.136(c).

considered. As Mr. Stanley has failed to file a timely answer, Mr. Stanley is deemed to have admitted the material allegations of the Complaint, and I reject his late-filed denial of the allegations of the Complaint.

Second, Mr. Stanley asserts he is not able to pay the $11,525 civil penalty assessed by the Chief ALJ. Mr. Stanley requests that I reduce the $11,525 civil penalty assessed by the Chief ALJ to an amount that he is able to pay. Mr. Stanley asserts he can pay a $1,000 civil penalty in installments. (Appeal Pet. at 1.

Neither the Commercial Transportation of Equine for Slaughter Act nor the Regulations provide that a respondent's ability to pay a civil penalty is a factor that must be considered when determining the amount of the civil penalty to be assessed for violations of the Commercial Transportation of Equine for Slaughter Act and the Regulations. I have consistently rejected requests that I consider a respondent's ability to pay a civil penalty when determining the amount of the civil penalty to be assessed in cases involving violations of the Commercial Transportation of Equine for Slaughter Act and the Regulations.[7] Therefore, I reject Mr. Stanley's request that I reduce the $11,525 civil penalty assessed by the Chief ALJ based upon Mr. Stanley's inability to pay that civil penalty.

Third, Mr. Stanley states the Chief ALJ's findings have made him physically ill and emotionally upset (Appeal Pet. at 1-2).

I have no reason to doubt Mr. Stanley's assertions regarding the impact of the Chief ALJ's findings on his physical health and emotional state. While I empathize with Mr. Stanley, the impact of an administrative law judge's decision on a respondent's physical and emotional health is not a basis for setting aside that decision.

For the foregoing reasons, the following Order is issued.

ORDER

Mitchell Stanley, d/b/a Stanley Brothers Livestock, is assessed a civil penalty of $11,525. This civil penalty shall be paid by certified check or money order payable to the "Treasurer of the United States" and sent to:

U.S. Bank

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[7] *See In re William Richardson* (Order Denying Pet. to Reconsider), __ Agric. Dec. ___, slip op. at 11-12 (Oct. 28, 2010); *In re Leroy H. Baker, Jr.* (Order Denying Pet. to Reconsider), 67 Agric. Dec. 1259, 1261-62 (2008).

P.O. Box 979043
St. Louis, MO 63197

Payment of the civil penalty shall be sent to, and received by, the U.S. Bank within 30 days after service of this Order on Mr. Stanley. Mr. Stanley shall state on the certified check or money order that payment is in reference to Docket No. 11-0235.

Done at Washington, DC.

AGNES BETHEA.
AWG-Docket No. 11-0226.
Miscellaneous Order.
Filed July 7, 2011.

PHILLIP UNRUH.
AWG-Docket No. 11-0232.
Miscellaneous Order.
Filed July 11, 2011.

SARAH WALLACE.
AWG-Docket No. 11-0217.
Miscellaneous Order.
Filed July 19, 2011.

LISA SLOAN.
AWG-Docket No. 11-0198.
Miscellaneous Order.
Filed July 21, 2011.

TIMOTHY WEBB.
AWG-Docket No. 11-0218.
Miscellaneous Order.
Filed July 21, 2011.

LORI MITCHELL.
AWG-Docket No. 11-0229.
Miscellaneous Order.
Filed July 21, 2011.

SONYA K. BARTON.
AWG-Docket No. 11-0283.
Miscellaneous Order.
Filed July 28, 2011.

PATTY WILLIAMSEN.
AWG-Docket No. 11-0250.
Miscellaneous Order.
Filed July 29, 2011.

DONAM C. JOHNSON.
AWG-Docket No. 11-0285.
Miscellaneous Order.
Filed July 29, 2011.

LISA HEIBER.
AWG-Docket No. 11-0247.
Miscellaneous Order.
Filed August 3, 2011.

AARON ISENBERG.
AWG-Docket No. 11-0281.
Miscellaneous Order.
Filed August 3, 2011.

ROBERT HAYDEN.
AWG-Docket No. 11-0236.
Miscellaneous Order.
Filed August 5, 2011.

RYAN HUTH.
AWG-Docket No. 11-0338.
Miscellaneous Order.
Filed August 11, 2011.

TERESA BURKS.
AWG-Docket No. 11-0340.
Miscellaneous Order.
Filed August 31, 2011.

JUSTIN WRIGHT.
AWG-Docket No. 11-0154.
Miscellaneous Order.
Filed September 8, 2011.

DIANE R. DELLACA.
AWG-Docket No. 11-0152.
Miscellaneous Order.
Filed September 8, 2011.

SUSAN T. ZIMMERMAN.
AWG-Docket No. 11-0173.
Miscellaneous Order.
Filed September 8, 2011.

JASON SAPP.
AWG-Docket No. 11-0336.
Miscellaneous Order.
Filed September 14, 2011.

JOHNNY WHITFIELD.
AWG-Docket No. 11-0339.
Miscellaneous Order.
Filed September 27, 2011.

WANDA GRIFFITH.
AWG-Docket No. 11-0252.
Miscellaneous Order.
Filed October 3, 2011.

KAREN GLOVER.
AWG-Docket No. 11-0309.
Miscellaneous Order.
Filed October 11, 2011.

KRISTE L. LOWER.
AWG-Docket No. 11-0287.
Miscellaneous Order.
Filed October 19, 2011.

KENNETH A. SANCHEZ.
AWG-Docket No. 11-0372.
Miscellaneous Order.
Filed October 19, 2011.

GAIL N. SHERFIELD.
AWG-Docket No. 11-0373.
Miscellaneous Order.
Filed October 25, 2011.

BRENDA J. MARTIN.
AWG-Docket No. 11-0372.
Miscellaneous Order.
Filed October 26, 2011.

STEPHANIE L. AVERY.
AWG-Docket No. 11-0312.
Miscellaneous Order.
Filed October 26, 2011.

ANTONIO PONCE-C/O KAYLA DREYER.
AWG-Docket No. 11-0356.
Miscellaneous Order.
Filed October 27, 2011.

JESSICA D. WIBLE.
AWG-Docket No. 11-0298.
Miscellaneous Order.
Filed November 9, 2011.

ROBIN EURE.
AWG-Docket No. 11-0223.
Miscellaneous Order.
Filed November 15, 2011.

ANGELES J. BALDERAS.
AWG-Docket No. 11-0280.
Miscellaneous Order.
Filed November 15, 2011.

WILLIAM L. KELSEY.
AWG-Docket No. 11-0248.
Miscellaneous Order.
Filed December 8, 2011.

JOSEPH K. MEDEIROS.
AWG-Docket No. 11-0297.
Miscellaneous Order.
Filed December 8, 2011.

LANCELOT KOLLMAN RAMOS, a/k/a LANCELOT RAMOS AND LANCELOT KOLLMAN.
AWA-Docket No. 10-0417.
Miscellaneous Order.
Filed July 15, 2011.

ARBUCKLE MOUNTAIN DEVELOPMENT, LLC.
AWA-Docket No. 10-0207.
Miscellaneous Order.
Filed August 11, 2011

ERIC JOHN DROGOSCH.
AWA-Docket No. 11-0024
Miscellaneous Order.
Filed August 19, 2011.

AWA

Petitioner, Pro se.
Colleen Carroll, Esq. for APHIS
Initial Decision by Administrative Law Judge Jill S. Clifton
Ruling by William Jenson, Judicial Officer.

Ruling Regarding Petition to Reopen

On April 25, 2011, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a Decision and Order as to Only Eric John Drogosch by Reason of Default [hereinafter Default Decision]. On July 27, 2011, Mr. Drogosch filed a "Motion of Appeal." On August 12, 2011, the ALJ issued an Order Vacating Default Decision Against Eric John Drogosch in which the ALJ: (1) found Mr. Drogosch's July 27, 2011, filing is a petition to reopen hearing; (2) vacated the April 25, 2011, Default Decision; and (3) reopened the hearing as to Mr. Drogosch. On August 12, 2011, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed "Complainant's Response to Petition for Appeal" in which the Administrator responded to Mr. Drogosch's July 27, 2011, petition to reopen hearing. On August 18, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of Mr. Drogosch's petition to reopen hearing.

As Mr. Drogosch filed the petition to reopen hearing prior to the filing of an appeal of the ALJ's April 25, 2011, Default Decision, the petition is a matter within the ALJ's jurisdiction. I have no jurisdiction to entertain Mr. Drogosch's petition to reopen hearing.[1]

Done at Washington, DC

JUDIE A. HARRISON, d/b/a PARTY SAFARI ZOO AND MONKEE BUSINESS.
AWA-Docket No. 11-0214.
Miscellaneous Order.
Filed October 14, 2011.

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[1] *See* 7 C.F.R. § 1.146(a)(1) (providing any petition to reopen hearing filed prior to the filing of an appeal of the administrative law judge's decision shall be ruled upon by the administrative law judge and any petition to reopen hearing filed after the filing of an appeal of the administrative law judge's decision shall be ruled upon by the Judicial Officer).

MELANIE H. BOYNES.
AWA-Docket No. 11-0012.
Miscellaneous Order.
Filed September 9, 2011.

Petitioner, Pro se.
Colleen Carroll, Esq. for APHIS
Initial Decision by Chief Administrative Law Judge Peter M. Davenport.
Ruling by William Jenson, Judicial Officer.

Order Denying Petition to Reconsider

PROCEDURAL HISTORY

On October 27, 2011, Melanie H. Boynes filed a petition for reconsideration of *In re Melanie H. Boynes*, __ Agric. Dec. __ (Oct. 18, 2011) [hereinafter Petition to Reconsider]. On November 7, 2011, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed a response to Ms. Boynes' Petition to Reconsider. On November 8, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, Ms. Boynes' Petition to Reconsider.

The purpose of a petition to reconsider is to seek correction of manifest errors of law or fact. Petitions to reconsider are not to be used as vehicles merely for registering disagreement with the Judicial Officer's decision. A petition to reconsider is only granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in controlling law.[1] Based upon my review of the record, in light of the issues raised in Ms. Boynes' Petition to Reconsider, I find no error of law or fact necessitating modification of *In re Melanie H. Boynes*, __ Agric. Dec. ___ (Oct. 18, 2011). Moreover, Ms. Boynes does not assert an intervening change in controlling law, and I find no highly unusual circumstances necessitating modification of *In re Melanie H. Boynes*, __ Agric. Dec. ___ (Oct. 18, 2011). Therefore, I

[1] *In re Sam Mazzola* (Order Denying Pet. for Recons. and Ruling Denying Mot. for Oral Argument), __ Agric. Dec. ___, slip op. at 2 (Mar. 29, 2010).

deny Ms. Boynes' Petition to Reconsider *In re Melanie H. Boynes*, __ Agric. Dec. ___ (Oct. 18, 2011).

DISCUSSION ON RECONSIDERATION

Ms. Boynes makes six factual assertions in her Petition to Reconsider. I infer Ms. Boynes contends *In re Melanie H. Boynes*, __ Agric. Dec. ___ (Oct. 18, 2011), must be modified to include the six factual assertions in her Petition to Reconsider.[2]

First, Ms. Boynes asserts she originally applied for a license under the Animal Welfare Act, as amended (7 U.S.C. § 2131-2159) [hereinafter the Animal Welfare Act], as an individual; however, Dr. Gregory Gaj, a supervisor employed by Animal Care, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter APHIS], and Megan E. Adams, an inspector employed by APHIS, advised that Ms. Boynes include Mr. Sipek on the Animal Welfare Act license application as a partner/co-owner (Pet. to Reconsider at 1).

In *In re Melanie H. Boynes*, __ Agric. Dec. ___, slip op. at 8-9 (Oct. 18, 2011), I found that Ms. Boynes originally applied for an Animal Welfare Act license as an individual and that Ms. Boynes was asked to correct or update the application to reflect those involved in the business. The record does not support a finding that both Dr. Gaj and Ms. Adams advised that Ms. Boynes modify her Animal Welfare Act license application to include Mr. Sipek as a partner/co-owner. Instead, the record indicates that only Dr. Gaj advised Ms. Boynes regarding modifications to her Animal Welfare Act license application (Tr. 50-51, 80). Moreover, even if I were to find that both Dr. Gaj and Ms. Adams advised Ms. Boynes to include Mr. Sipek as a partner/co-owner, that finding would not change the disposition of the proceeding.

Second, Ms. Boynes asserts Mr. Sipek has never held an Animal Welfare Act license (Pet. to Reconsider at 1).

The record appears to support Ms. Boynes' assertion; however, even if I were to find that Mr. Sipek has never held an Animal Welfare Act license, that finding would not change the disposition of the proceeding.

Third, Ms. Boynes asserts that she and Mr. Sipek hold a Florida Class I Wildlife license and that she and Mr. Sipek are only required to

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[2]Ms. Boynes provides no citations to the record to support her six factual assertions.

obtain an Animal Welfare Act license because the State of Florida requires them to exhibit animals in order to retain their Florida Class I Wildlife license (Pet. to Reconsider at 1).

Ms. Boynes and Mr. Sipek are required to obtain an Animal Welfare Act license in order to exhibit regulated animals. The State of Florida requirement that Ms. Boynes and Mr. Sipek exhibit animals in order to retain their Florida Class I Wildlife license does not exempt Ms. Boynes or Mr. Sipek from compliance with the Animal Welfare Act.

Fourth, Ms. Boynes asserts all six deficiencies identified by APHIS inspector Megan E. Adams during her August 24, 2010, inspection of Ms. Boynes and Mr. Sipek's Loxahatchee, Florida, facility have now been corrected (Pet. to Reconsider at 1).

If true, Ms. Boynes and Mr. Sipek's correction of deficiencies is commendable; however, the partnership's failure to comply with all the regulations and standards issued under the Animal Welfare Act is not the sole basis for denial of the partnership's Animal Welfare Act license application. Therefore, even if I were to find that the Loxahatchee, Florida, facility complies with all the regulations and standards issued under the Animal Welfare Act (which I do not so find), I would not set aside *In re Melanie H. Boynes*, __ Agric. Dec. ___ (Oct, 18, 2011).

Fifth, Ms. Boynes states she believes the APHIS regional office in North Carolina based the decision to deny the partnership's August 24, 2010, application for an Animal Welfare Act license solely on Mr. Sipek's past history with the United States Department of Agriculture (Pet. to Reconsider at 1).

The grounds for denial of the partnership's August 24, 2010, application for an Animal Welfare Act license are set forth in a letter from Dr. Elizabeth Goldentyer, Eastern Regional Director, Animal Care, APHIS, to Ms. Boynes and Mr. Sipek (RX 21). The letter belies Ms. Boynes' belief that the decision to deny the partnership's August 24, 2010, application for an Animal Welfare Act license was based solely on Mr. Sipek's past history with the United States Department of Agriculture. Moreover, Ms. Boynes cites no evidence in support of her belief. Therefore, I decline to find that the denial of the partnership's August 24, 2010, application for an Animal Welfare Act license was based solely on Mr. Sipek's past history with the United States Department of Agriculture.

Sixth, Ms. Boynes asserts, during the May 24, 2011, hearing, APHIS inspector Megan E. Adams testified that Ms. Boynes is "doing

everything in order to be in compliance with USDA regulations" (Pet. to Reconsider at 1).

Ms. Adams testified that, during her August 24, 2010, inspection of the Loxahatchee, Florida, facility she "saw a tremendous amount of progress with housekeeping" and noticed that Ms. Boynes was attempting to make the changes that APHIS had requested (Tr. 79-80). However, I cannot locate testimony that supports Ms. Boynes assertion that Ms. Adams testified that Ms. Boynes is doing everything in order to be in compliance with USDA regulations.

The Rules of Practice provide that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider (7 C.F.R. § 1.146(b)). Ms. Boynes' Petition to Reconsider was timely-filed and automatically stayed *In re Melanie H. Boynes*, __ Agric. Dec. ___ (Oct. 18, 2011). Therefore, since Ms. Boynes' Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Melanie H. Boynes*, __ Agric. Dec. ___ (Oct. 18, 2011), is reinstated.

For the foregoing reasons, the following Order is issued.

ORDER

Ms. Boynes' Petition to Reconsider, filed October 27, 2011, is denied. This Order shall become effective upon service on Ms. Boynes.

Done at Washington, DC

ZOOCATS, INC; MARCUS COOK, A/K/A MARCUS CLINE-HINES COOK, AND MELISSA COODY, A/K/A MISTY COODY, D/B/A ZOO DYNAMICS AND ZOOCATS ZOOLOGICAL SYSTEMS; SIX FLAGS OVER TEXAS, INC.
AWA-Docket No. 03-0035.
Miscellaneous Order.
Filed December 13, 2011.

AWA

Petitioner, Pro se.
Colleen Carroll, Esq. for APHIS
Initial Decision by Administrative Law Judge Victor W. Palmer.
Ruling by William Jenson, Judicial Officer.

Order Denying ZooCats, Inc., Marcus corporation; and Marian Buehler,Cook, and Melissa Coody's Motion toan individual, Reopen and Order Lifting Stay Order as to ZooCats, Inc., Marcus Cook, and Melissa Coody

PROCEDURAL HISTORY

I issued *In re ZooCats, Inc.* (Decision as to ZooCats, Inc., Marcus Cook, and Melissa Coody), 68 Agric. Dec. 737 (2009). Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], and ZooCats, Inc., Marcus Cook, and Melissa Coody [hereinafter Respondents] filed petitions to reconsider that decision, and I, subsequently, issued *In re ZooCats, Inc.* (Order Denying Respondents' Petition to Reconsider and Administrator's Petition to Reconsider), 68 Agric. Dec. 1072 (2009).

On December 23, 2009, Respondents filed a motion for a stay of the Orders in *In re ZooCats, Inc.* (Decision as to ZooCats, Inc., Marcus Cook, and Melissa Coody), 68 Agric. Dec. 737 (2009), and *In re ZooCats, Inc.* (Order Denying Respondents' Petition to Reconsider and Administrator's Petition to Reconsider), 68 Agric. Dec. 1072 (2009), pending the outcome of proceedings for judicial review. On January 8, 2010, I granted Respondents' motion for a stay. *In re ZooCats, Inc.* (Stay Order as to ZooCats, Inc., Marcus Cook, and Melissa Coody), __ Agric. Dec. ___ (Jan. 8, 2010).

On October 5, 2011, the Administrator filed a Motion to Lift Stay Order stating proceedings for judicial review are concluded. On November 28, 2011, Respondents filed Respondents' Motion to Reopen the Case to Take Newly Discovered Evidence and Response to Complaints' [sic] Motion to Lift Stay Order [hereinafter Motion to Reopen]. On December 12, 2011, the Administrator filed Complainant's Reply to Motion to Reopen. On December 13, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for rulings on the Respondents' Motion to Reopen and the Administrator's Motion to Lift Stay Order.

RULING

Respondents' Motion to Reopen

Respondents assert, during the last several months, they have discovered new evidence which supports many of Respondents' claims (Mot. to Reopen at 5 ¶ 11). Respondents also assert the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter APHIS], has inspected Respondents to determine their compliance with the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter Animal Welfare Act], and the regulations and standards issued under the Animal Welfare Act (7 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]. Respondents assert, after each of those APHIS inspections, Respondents have received "a perfect report[.]" (Mot. to Reopen at 6 ¶ 13.) Respondents request that I reopen the hearing to allow the newly discovered evidence to be submitted (Mot. to Reopen at 6 ¶ 14). Respondents cite, but do not discuss the applicability of, *State v. Powell*, 4 So. 447 (La. 1888), and *State v. Kezer*, 918 S.W.2d 874 (Mo. Ct. App. 1996).

Under the rules of practice applicable to this proceeding,[1] a petition to reopen a hearing to take further evidence must be filed prior to the issuance of the Judicial Officer's decision.[2] I issued *In re ZooCats, Inc.* (Decision as to ZooCats, Inc., Marcus Cook, and Melissa Coody), 68 Agric. Dec. 737 (2009), on July 27, 2009; therefore, Respondents' Motion to Reopen, filed November 28, 2011, must be denied. Neither *State v. Powell*, 4 So. 447 (La. 1888), nor *State v. Kezer*, 918 S.W.2d 874

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[1]The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

[2]7 C.F.R. § 1.146(a)(2). *See In re Lion Raisins, Inc.* (Rulings Denying Respondents' Mot. for Consolidation and Pet. to Reopen Evidence or for Rehearing), 68 Agric. Dec. 1098, 1099-1101 (2009) (denying as late-filed the respondents' petition to reopen the hearing filed 3 months 10 days after the Judicial Officer issued the decision); *In re PMD Brokerage Corp*. (Order Denying Pet. for Recons. and Pet. for New Hearing on Remand), 61 Agric. Dec. 389, 396-99 (2002) (denying the respondent's petition to reopen the hearing filed 1 month 15 days after the Judicial Officer issued the decision on remand); *In re Potato Sales Co*. (Order Denying Pet. to Reopen Hearing to Take Further Evidence as to Potato Sales Co., Inc.), 55 Agric. Dec. 708 (1996) (denying the respondent's petition to reopen the hearing as untimely because the respondent filed the petition to reopen the hearing 2 months after the Judicial Officer issued the decision).

(Mo. Ct. App. 1996), addresses reopening a hearing under the Rules of Practice, and I find these two cases, cited by Respondents, inapposite.

Administrator's Motion to Lift Stay Order

Respondents do not dispute the Administrator's assertion that proceedings for judicial review are concluded. I issued the January 8, 2010, Stay Order as to ZooCats, Inc., Marcus Cook, and Melissa Coody pending the outcome of proceedings for judicial review. As proceedings for judicial review are concluded, the Administrator's Motion to Lift Stay Order is granted, and the Orders in *In re ZooCats, Inc.* (Decision as to ZooCats, Inc., Marcus Cook, and Melissa Coody), 68 Agric. Dec. 737 (2009), and *In re ZooCats, Inc.* (Order Denying Respondents' Petition to Reconsider and Administrator's Petition to Reconsider), 68 Agric. Dec. 1072 (2009), shall be effective as provided in the following Order.

ORDER

1. Respondents' Motion to Reopen, filed November 28, 2011, is denied.

Paragraph 1 of this Order shall become effective upon service of this Order on Respondents.

2. ZooCats, Inc., Marcus Cook, and Melissa Coody, 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, in particular, shall cease and desist from:

(a) failing to handle animals as expeditiously and carefully as possible in a manner that does not cause the animals trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort;

(b) using physical abuse to train, work, or otherwise handle animals;

(c) failing, during public exhibition, to handle animals so there is minimal risk of harm to the animals and the public, with sufficient distance and/or barriers between the animals and the general viewing public, so as to assure the safety of the animals and the public;

(d) failing to remove excreta from primary enclosures as often as necessary to prevent the contamination of animals contained in the enclosures;

(e) utilizing an insufficient number of adequately trained employees to maintain a professionally acceptable level of husbandry practices;

(f) failing to provide a suitable method to rapidly eliminate excess water from enclosures housing animals;

(g) failing to provide food that is wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain the good health of animals;

(h) failing to feed animals at least once a day, except as dictated by hibernation, veterinary treatment, normal fasts, or other professionally accepted practices;

(i) failing to have an attending veterinarian evaluate the diet plan for each animal, the amount of food necessary for each animal, and the food supplements necessary for each animal;

(j) failing to follow the prescribed dietary recommendations of Respondents' attending veterinarian;

(k) failing to establish and maintain a program of adequate veterinary care that includes the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries; and

(l) failing to have formal arrangements for regularly scheduled veterinary visits to Respondents' premises.

Paragraph 2 of this Order shall become effective 1 day after service of this Order on Respondents.

3. Animal Welfare Act license number 74-C-0426, issued to ZooCats, Inc., is permanently revoked.

Paragraph 3 of this Order shall become effective 60 days after service of this Order on ZooCats, Inc.

Done at Washington, DC

JACQUELINE WADE ROSENBAUM, d/b/a NW SILVER STARR RODENTRY.
AWA Docket No. 10-0041.
Miscellaneous Order.
Filed December 27, 2011.

COREY LEA; COREY LEA, INC.; START YOUR DREAM, INC.; AND COWTOWN FOUNDATION, INC.
EOCA-Docket No. 11-0180.
Miscellaneous Order.
Filed July 13, 2011.

EOCA

Petitioner Pro se.
Jeffrey Knishkowy, Esq for OCR.
Initial Decision by Administrative Law Judge Janice Bullard.
Ruling by William Jenson, Judicial Officer

Ruling Granting Request to File Reply

On July 12, 2011, the Assistant Secretary for Civil Rights filed Agency Opposition to Appeal Petition. On July 13, 2011, Corey Lea, by telephone, requested an opportunity to file a reply to the Agency Opposition to Appeal Petition. Counsel for the Assistant Secretary for Civil Rights informed me, by telephone, that she had no objection to Mr. Lea's request. Therefore, Mr. Lea's request to file a reply to the Agency Opposition to Appeal Petition is granted. Mr. Lea's reply to the Agency Opposition to Appeal Petition must be filed with the Hearing Clerk no later than July 20, 2011.[1]

Done at Washington, DC

COREY LEA; COREY LEA, INC.; START YOUR DREAM, INC.; AND COWTOWN FOUNDATION, INC.
EOCA-Docket No. 11-0180.
Miscellaneous Order.
Filed August 30, 2011.

[1]The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, Mr. Lea must ensure his reply to the Agency Opposition to Appeal Petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, July 20, 2011.

EOCA

Petitioner Pro se.
Jeffrey Knishkowy, Esq for OCR.
Initial Decision by Administrative Law Judge Janice Bullard.
Ruling by William Jenson, Judicial Officer

Order Denying Petitioners' Motion to Reconsider and Clarify

PROCEDURAL HISTORY

On March 31, 2011, Corey Lea and Corey Lea, Inc., filed a petition seeking a hearing before the Office of Administrative Law Judges, United States Department of Agriculture [hereinafter the OALJ], regarding the denial of discrimination complaints filed with the Office of the Assistant Secretary for Civil Rights, United States Department of Agriculture [hereinafter the OASCR]. In subsequent pleadings, Corey Lea, Corey Lea, Inc., Start Your Dream, Inc., and Cowtown Foundation, Inc. [hereinafter Petitioners], also requested that the OALJ provide Petitioners relief under the Federal Tort Claims Act and that the OALJ review the United States Department of Agriculture's denial of Petitioners' Freedom of Information Act requests.

On May 26, 2011, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] issued a Decision and Order Dismissing Petition in which the ALJ concluded the OALJ is without jurisdiction to entertain Petitioners' requests for relief. Petitioners appealed the ALJ's Decision and Order Dismissing Petition to the Judicial Officer,[2] and on August 16, 2011, I dismissed Petitioners' Appeal Petition on the ground that I had no jurisdiction to review the ALJ's decision as Petitioners' request for judicial review of the ALJ's May 26, 2011, Decision and Order Dismissing Petition was pending before the United States District Court for the Western District of Kentucky.

On August 17, 2011, Petitioners filed a "Motion to Reconsider Final Order of Judicial Officer Motion to Clarify" [hereinafter Motion to Reconsider and Clarify]. On August 25, 2011, OASCR filed "Agency Opposition to Motion to Reconsider and Clarify," and on August 29,

[2]Petitioners styled the appeal petition "Motion to Review, Motion to Reconsider and Motion to Enter Default Judgment" [hereinafter Appeal Petition].

2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer to consider and rule on Petitioners' Motion to Reconsider and Clarify.

DECISION

In the August 16, 2011, Decision and Order, I concluded I had no jurisdiction to entertain Petitioners' Appeal Petition because review of the ALJ's May 26, 2011, Decision and Order Dismissing Petition was pending before the United States District Court for the Western District of Kentucky. Petitioners have not established or even asserted that my conclusion is error. *Lea v. U.S. Dep't of Agric.*, Case No. 1:11-CV-0094-JHM (W.D. Ky. June 20, 2011), is still pending in the United States District Court for the Western District of Kentucky. Therefore, I must deny Petitioners' Motion to Reconsider and Clarify.

Petitioners also assert new bases for the Judicial Officer's jurisdiction to entertain their Appeal Petition. First, Petitioners assert the Judicial Officer has jurisdiction 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 (16 U.S.C. 620 *et seq.*)" (7 C.F.R. §§ 1.410-.429) [hereinafter the Rules of Practice] (Mot. to Reconsider and Clarify at 1-2). However, I find nothing in the record to indicate that the instant proceeding concerns an application for a sourcing area or formal review of a sourcing area under the Forest Resources Conservation and Shortage Relief Act of 1990, as amended (16 U.S.C. §§ 620-620j). Therefore, I conclude the Rules of Practice are not applicable to the instant proceeding, and I reject Petitioners' contention that the Judicial Officer has jurisdiction to entertain their Appeal Petition pursuant to 7 C.F.R. § 1.426.

Petitioners also assert 28 U.S.C. § 2342 provides the Judicial Officer with jurisdiction to entertain their Appeal Petition (Mot. to Reconsider and Clarify at 2-3). However, 28 U.S.C. § 2342 explicitly contains a grant of jurisdiction to the court of appeals (other than the United States Court of Appeals for the Federal Circuit); it does not contain a grant of jurisdiction to the Judicial Officer. Therefore, I reject Petitioners' contention that the Judicial Officer has jurisdiction to entertain their Appeal Petition pursuant to 28 U.S.C. § 2342.

ORDER

Petitioners' Motion to Reconsider and Clarify is denied. This Order shall be effective upon service on Petitioners.

Done at Washington, DC

PROMISELAND LIVESTOCK, LLC, AND ANTHONY J. ZEMAN.
OFPA-Docket No. 08-0134.
Miscellaneous Order.
Filed July 18, 2011.

OFPA

Babak Rastgoufard, Esq. for AMS.
Mark Mansour, Esq. and Paricia Hayden, Esq for Respondent.
Initial Decision by Chief Administrative Law Judge Peter M. Davenport.
Ruling by William Jenson, Judicial Officer.

Order Lifting Stay

On October 19, 2010, I issued a Decision and Order in which I found Promiseland Livestock, LLC, and Anthony J. Zeman [hereinafter Respondents] violated the Organic Foods Production Act of 1990, as amended (7 U.S.C. §§ 6501-6523) [hereinafter the Organic Foods Production Act], and the National Organic Program regulations (7 C.F.R. pt. 205).[1]

On December 2, 2010, Respondents filed a motion requesting a stay of the Decision and Order pending judicial review, which I granted.[2] On June 30, 2011, Respondents dismissed with prejudice the complaint they had filed in the United States District Court for the District of Nebraska, thereby, concluding proceedings for judicial review. On June 30, 2011, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed

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[1] *In re Promiseland Livestock, LLC*, __ Agric. Dec. ___ (Oct. 19, 2010), *dismissed*, No. 8:11-cv-62 (D. Neb. June 30, 2011).

[2] *See In re Promiseland Livestock, LLC* (Stay Order), __ Agric. Dec. ___ (Dec. 2, 2010).

Complainant's Unopposed Motion to Lift Stay requesting that I lift the December 2, 2010, Stay Order and make the Order in *In re Promiseland, LLC,* __ Agric. Dec. ___ (Oct. 19, 2010), effective 7 days after service on Respondents of any order lifting stay.

As Respondents do not oppose the Administrator's request that I lift the December 2, 2010, Stay Order and proceedings for judicial review are concluded, the December 2, 2010, Stay Order is lifted and the Order issued in *In re Promiseland Livestock, LLC*, __ Agric. Dec. ___ (Oct. 19, 2010), is effective, as follows:

ORDER

1. The organic certifications of Promiseland Livestock, LLC, and Anthony J. Zeman are suspended for a period of 5 years.

2. Promiseland Livestock, LLC; Anthony J. Zeman; and any person responsibly connected with Promiseland's certified organic operation are disqualified from receiving certification under the Organic Foods Production Act for a period of 5 years.

3. This Order shall become effective 7 days after service of this Order Lifting Stay on Promiseland Livestock, LLC, and Anthony J. Zeman.

Done at Washington, DC

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COLORADO CERTIFIED POTATO GROWERS' ASSOCIATION, INC.
PVPO-Docket No. 11-0201.
Miscellaneous Order.
Filed December 12, 2011.

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DEFAULT DECISIONS

[Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported - Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions]

ANIMAL QUARANTINE

ROGER L. MCCORD
AQ- Docket 11-0148.
Default Decision.
Filed August 8, 2011.

MITCHELL STANLEY D/B/A STANLEY BROTHERS LIVESTOCK
AQ- Docket 11-0148.
Default Decision.
Filed August 8, 2011.

KENNETH BURDETTE
AQ- Docket 11-0148.
Default Decision.
Filed August 8, 2011.

ANIMAL WELFARE ACT

VANA M. NAYO, a/k/a VANA M. STARK
AWA-Docket 11-0408.
Default Decision.
Filed December 19, 2011

HORSE PROTECTION ACT

GERONDRICK S. COLE, A/K/A ROCKY COLE, d/b/a KOLBRITE FARMS
HPA- Docket 11-0241.
Default Decision.
Filed September 30, 2011

HARVEY RODRIGUEZ et al
HPA-Docket 11-0242.
Default Decision.
Filed November 18, 2011

MICHELLE HASTING
HPA-Docket 11-0256.
Default Decision.
Filed November 18, 2011

CONSENT DECISIONS

ANIMAL QUARANTINE ACT

Roy Joseph Simon, AQ-11-0053, 07/15/11.
BovaGen, P.C., AQ-11-0302, 07/27/11.
Russell Cable, AQ-11-0302, 07/27/11.
Lewis C. Hull, AQ-11-0158, 07/28/11.

ANIMAL WELFARE ACT

Mark Guttman, Jeri Poling, AWA-10-0375, 08/25/11.
Marsha Cox, AWA-11-0074, 08/30/11.
United Airlines Inc., AWA-11-0315, 11/03/11.
Barbara Gullett, d/b/a Gullett Kennel, AWA-11-0421, 11/28/11.
Martine Colette, AWA-07-0175, 12/01/11.

FEDERAL CROP INSURANCE ACT

Herbert Putz d/b/a Putz Farms Joint Venture, FCIA-11-0134, 09/16/11.

FOOD NUTRITION SERVICE

Arizona Department of Economic Security v. USDA, FNS-11-0300 12/14/11.

HORSE PROTECTION ACT

John Lamont Tudor and John Tudor Stables, HPA-09-0064, 09/09/11.
Melanie C. Collier, HPA-11-0450, 11/04/11.
Jerry W. Collier, HPA-11-0450, 11/04/11.
Larry T. Brady, HPA-11-0411, 11/04/11.
Tina B. Young, HPA-11-0448, 11/16/11.
Johnny Bunton, HPA-11-0448, 11/16/11.

Robert Franklin Hurley and Scott Allen Wilhite, HPA-11-0423, 11/16/11.

Keith Rabon and Rex Halstead, HPA-11-0429, 11/22/11.

Keith Rabon, Hoyt Rabon d/b/a Hoyt Rabon Stables, and Howard Bellamy, HPA-11-0432, 11/22/11.

Billy Joe Hayes, HPA-12-0008, 12/14/11.

PLANT QUARANTINE ACT

United Parcel Service Inc., PQ/AQ-11-0398, 09/14/11.