

# **AGRICULTURE DECISIONS**

**Volume 71**

July – December 2012  
Part One (General)  
Pages 643 - 1064



THIS IS A COMPILATION OF DECISIONS ISSUED BY THE  
SECRETARY OF AGRICULTURE AND THE COURTS  
PERTAINING TO STATUTES ADMINISTERED BY THE  
UNITED STATES DEPARTMENT OF AGRICULTURE

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**AGRICULTURAL MARKETING AGREEMENT ACT**

**COURT DECISIONS**

**HORNE v. USDA.**  
**No. 11-15748.**  
**Court Decision.**  
**Filed October 2, 2012.**

**AMAA—Rulemaking.**

[Cite as: 494 Fed. Appx. 774 (9th Cir. 2012)].

**United States Court of Appeals,  
Ninth Circuit.**

**Before: ALARCÓN, GRABER, and BERZON, Circuit Judges.**

**MEMORANDUM\***

Marvin D. Horne, Laura R. Horne, and Raisin Valley Farms Marketing, LLC (“the Hornes”) petitioned the United States Department of Agriculture (“USDA” or “the agency”) to engage in rulemaking to change the agency’s regulations governing service of final agency orders. USDA denied the petition, and the district court upheld the agency’s decision. We have jurisdiction under 28 U.S.C. § 1291 and remand to the agency for further explanation of its reasons for denying the Hornes’ petition.

The Hornes are California raisin producers. USDA regulates raisin production according to the Raisin Marketing Order (“RMO”), 7 C.F.R. § 989.1 *et seq.*, promulgated under the Agricultural Marketing Agreement Act of 1937 (“AMAA”), 7 U.S.C. § 601 *et seq.* In March 2007, the Hornes petitioned the agency pursuant to AMAA § 608c(15)(A), seeking an exemption from the RMO. A Judicial Officer

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

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(“JO”) dismissed the petition.

Under section 608c(15)(B) of the AMAA, the U.S. District Courts have jurisdiction to review final agency orders, so long as the complaint “is filed within twenty days from the date of the entry of such ruling.” 7 U.S.C. § 608c(15)(B). USDA’s “Rules of Practice Governing Procedures on Petitions to Modify or to Be Exempted from Marketing Orders” (“Rules of Practice”), 7 C.F.R. § 900.50 *et seq.*, provide that a final agency order “shall be filed with the hearing clerk, who shall serve it upon the parties.” *Id.* § 900.66(b). Section 900.69(b) of the Rules of Practice instructs that

Service shall be made either (1) by delivering a copy of the document or paper to the individual to be served ...; or (2) by leaving a copy of the document or paper at the principal office or place of business of such individual ...; or (3) by registering and mailing a copy of the document or paper, addressed to such individual ... at his or its last known principal office, place of business, or residence. Proof of service hereunder shall be made by the affidavit of the person who actually made the service. The affidavit contemplated herein shall be filed with the hearing clerk, and the fact of filing thereof shall be noted on the docket of the proceeding.

The Hornes were the victims of a failed notice attempt by certified mail, which did not reach them until well-after the twenty-day time limit to seek review in the district court. They nonetheless filed a complaint in the district court seeking review of the JO’s decision. The district court, citing the “twenty-day rule” in 7 U.S.C. § 608c(15)(B), dismissed the complaint for lack of subject matter jurisdiction. *Horne v. Dep’t of Agric.*, No. 1:08–CV–00402–OWW–SMS, 2008 WL 4911438, at \*3–4 (E.D.Cal. Nov. 13, 2008) (unpublished).

We affirmed in an unpublished memorandum disposition, but noted the “obvious unfairness of the result.” *Horne v. Dep’t of Agric.*, 395 Fed.Appx. 486, 489 (9th Cir.2010). “[I]n response to our explicit inquiry, the USDA ... t [ook] the position that it lack[ed] discretion to remedy the problem” in the Hornes’ case—a position we found “dubious” under the

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Rules of Practice. *Id.*; *see, e.g.*, 7 C.F.R. § 900.69(c) (providing for discretionary time extensions where “there is good reason”). Nevertheless, we noted that it was “the province of the Department and not this court” to assess the propriety of its own rules. *Horne*, 395 Fed.Appx. at 489.

While their earlier petition was being litigated, the Hornes filed a second petition with the agency requesting that it “engage in rule making to amend the Rules of Practice” to require more prompt notice such as by email or fax. *See* 5 U.S.C. § 553(e) (“Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”). The Hornes cited the failed service by mail in their own earlier case, pointing out that the existing Rules “have no provision for promptly and expeditiously notifying Petitioners [of final agency orders], despite the ... short time frames for Petitioners to appeal ... decisions” to the district court. USDA responded to the Hornes’ rulemaking petition—as it must under the Administrative Procedure Act (APA), 5 U.S.C. § 555(e)<sup>1</sup>—in a one-page letter denying the Hornes’ request. *See also* 7 C.F.R. § 1.28 (“Petitions by interested persons in accordance with 5 U.S.C. § 553(e) ... will be given prompt consideration and petitioners will be notified promptly of the disposition made of their petitions.”).

An agency’s decision not to engage in rulemaking is entitled to a high level of judicial deference. *See Massachusetts v. EPA*, 549 U.S. 497, 527–28, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007). Deference is especially merited where an agency’s procedural regulations are involved. *See Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978) (“Absent constitutional constraints or extremely compelling circumstances the administrative agencies should

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<sup>1</sup> Title 5 U.S.C. § 555(e) provides:

Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

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be free to fashion their own rules of procedure....” (internal quotation marks omitted)).

At the same time, an agency must provide a “reasoned explanation for its refusal [to initiate rulemaking].” *Massachusetts*, 549 U.S. at 534, 127 S.Ct. 1438. Though the Hornes’ rulemaking petition was admittedly brief, USDA’s response did not adequately explain the basis for its decision. Instead, the denial letter primarily cites the district court’s decision in the Hornes’ previous lawsuit challenging the twenty-day time limit as it applied to their complaint for review of the agency’s final order denying them an exemption from the RMO. The district court’s ruling in that earlier case does not explain why the agency declined to consider amending the Rules of Practice.

Nor does USDA’s statement that it “believes that the procedures under the applicable Rules are adequate to effectuate service of department decisions” provide an adequate explanation for its refusal to conduct rulemaking. *Cf. O’Keeffe’s, Inc. v. U.S. Consumer Prod. Safety Comm’n*, 92 F.3d 940, 943-44 (9th Cir. 1996) (holding that the Commission did not act arbitrarily or capriciously in denying a rulemaking petition because it considered several factors to “determin[e] [whether] an amendment to the regulations was ... appropriate or necessary,” such as “the potential benefits of the requested amendment, potential costs, and the relation between the potential benefits and costs”).

We emphasize that in holding that USDA’s statement of grounds was inadequate, we do not purport to review the merits of the agency’s decision not to amend the Rules of Practice. We hold that the agency failed to do what the APA requires: to provide “a brief statement of the grounds for denial [of the rulemaking petition].” 5 U.S.C. § 555(e). Here, the Hornes’ petition, although itself extremely brief, did note the short time-frame for review of final agency orders as established by the AMAA, cite alternative methods for providing notice, and identify at least one case (their own) in which service of a final agency order failed, thereby precluding judicial review. As we noted in our prior memorandum disposition (filed after the denial of the Hornes’ rulemaking petition), the “unfairness” of precluding review by someone who never received notice is “obvious” and could be remedied by

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permitting the exercise of discretion where the agency is aware that notice has failed. *Cf.* Fed. R.App. P. 4(a)(6) (“The district court may reopen the time to file an appeal ... [if] (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment ... sought to be appealed within 21 days after entry.”).

In short, the Hornes’ identification of specific, viable alternative methods for providing notice merited some brief explanation of why the agency did not find it desirable to consider those alternatives at that time. The bare conclusion that its existing procedural rules were “adequate” was not responsive.

REVERSED and REMANDED to the USDA for further explanation of its reasons for denying the rulemaking petition.

Parallel Citations  
2012 WL 4503414 (C.A.9 (Cal.))

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**ADMINISTRATIVE WAGE GARNISHMENT ACT**

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

**DEPARTMENTAL DECISIONS**

**In re: JOSEPH SINIFF, A/K/A JOSEPH E. SINIFF, JR.**

**Docket No. 12-0348.**

**Decision and Order.**

**Filed July 3, 2012.**

**AWG.**

Petitioner, pro se.

Michelle Tanner for RD.

*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

**DECISION AND ORDER**

1. The hearing by telephone was held on June 29, 2012. Joseph E. Siniff, Jr., the Petitioner (“Petitioner Siniff, Jr.”), 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 is represented by Michelle Tanner.

**Summary of the Facts Presented**

3. Petitioner Siniff, Jr.’s Earnings Statements (two) (filed June 13, 2012), plus completed “Consumer Debtor Financial Statement” with attached sheets (filed June 11, 2012), are admitted into evidence, together with the testimony of Petitioner Siniff, Jr., together with his Hearing Request dated March 2, 2012, and all accompanying documents (filed April 9, 2012).
4. USDA Rural Development’s Exhibits RX 1 through RX 12, plus Narrative, Witness & Exhibit List, were filed on May 23, 2012, and are admitted into evidence, together with the testimony of Michelle Tanner. Also admitted into evidence is USDA Rural Development’s document filed on June 29, 2012.

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5. Petitioner Siniff, Jr. bought a home in Michigan in 2005, borrowing \$96,900.00 to pay for it. RX 2. USDA Rural Development's position is that Petitioner Siniff, Jr. owes to USDA Rural Development **\$54,026.94** (as of May 21, 2012), in repayment of the United States Department of Agriculture / Rural Development / Rural Housing Service *Guarantee* (see RX 1, esp. p. 2) for the loan made in 2005 ("the debt"). The loan was made by AmeriFirst Financial Corporation and was sold to JP Morgan Chase Bank, N.A. (Chase Home Finance LLC being the servicing lender); the *Guarantee* remained in force.

6. After careful review of all of the evidence, I agree with USDA Rural Development's position. [The loan balance may have changed from the May 21, 2012 balance of \$54,026.94 (excluding collection costs), because garnishment was ongoing (see RX 12, p. 1); the balance may therefore have been reduced and may continue to change. As will be seen later in this Decision, **the balance will increase when amounts taken from Petitioner Siniff, Jr.'s pay are returned to him.**]

7. The *Guarantee* (RX 1) establishes an **independent** obligation of Petitioner Siniff, Jr., "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 1, p. 2.

8. The Due Date of the last payment made was July 1, 2008. RX 7, p. 3. Petitioner Siniff, Jr. testified that his employer eliminated his job at the plant in Michigan and wanted him to go where he was needed; he took the job in the Richmond, Virginia facility as a result. Petitioner Siniff, Jr. testified that the home in Michigan wouldn't sell because of the high unemployment rates; no one could afford to borrow enough to buy it; numerous houses were empty. Petitioner Siniff, Jr. testified that when he called Chase to request help such as interest only payments, the Chase representative told him that since he was current, he could miss a couple

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of payments and then get back to Chase to request modifying the loan or interest only payments. Petitioner Siniff, Jr. testified that when they called back, Chase treated them like dirt. The foreclosure was initiated on January 26, 2009. RX 7, p. 3. The lender Chase (Chase Home Finance LLC) bid \$52,700.00 and acquired the home, which became REO (Real Estate Owned), at the Sheriff's sale on February 27, 2009. RX 3.

9. USDA Rural Development reimbursed the lender \$66,114.66 on July 1, 2010 (RX 7, p. 9). Then a recovery, from sale to a third party, yielded \$1,620.10 to reduce the debt. RX 9. The debt was then \$64,494.56, which is the amount USDA Rural Development seeks to recover from Petitioner Siniff, Jr. under the *Guarantee*. RX 9. RX 9 details the loss claim paid under the *Guarantee*, showing how the debt became \$64,494.56.

\$ 93,489.78	Unpaid Principal Balance
<u>\$ 10,949.93</u>	Unpaid Interest Balance
\$104,439.71	Principal & Interest Due
+ <u>\$ 7,115.82</u>	Lender Expenses to Sell Property
<u>\$111,555.53</u>	Total Debt Charged to Petitioner Siniff, Jr.
- <u>\$ 45,440.87</u>	Credits (includes liquidation value of \$39,600.00, RX 6)
<u>\$ 66,114.66</u>	Amount Due Before \$1,620.10 Recovery
- <u>\$ 1,620.10</u>	Recovery [the portion of the \$1,906.00 that went to USDA Rural Development; the other \$285.90 went to Chase. RX 8]
<u>\$ 64,494.56</u>	

RX 9, USDA Rural Development Narrative, and testimony.

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10. Collections from Treasury (an *offset*, which was an income tax refund from the co-borrower; plus garnishments from Petitioner Siniff, Jr.) applied to the debt (after collection fees are subtracted) leave **\$54,026.94** unpaid as of May 21, 2012 (excluding the potential remaining collection fees). See RX 12. Interest stopped accruing on the date of the liquidation appraisal, which was March 17, 2010 (*see* RX 7, p. 4).

11. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **\$54,026.94**, would increase the balance by \$15,127.55, to \$69,154.49. RX 12. [As indicated, **the balance will increase when amounts taken from Petitioner Siniff, Jr.'s pay are returned to him.**]

12. Petitioner Siniff, Jr. testified that he is currently flat on his back, bedridden, because his heel is fractured in four places. Until the swelling goes down, he cannot undergo the surgery he needs. The plan is to insert a metal plate.

13. Petitioner Siniff, Jr. testified that he has three children to support and is recently divorced. [References to his spouse on his Consumer Debtor Financial Statement are to his now former spouse.] Petitioner Siniff, Jr.'s child support obligation is more than \$1,000.00 per month. The child support for his oldest child, who is 17, is deducted as a payroll deduction or garnishment from Petitioner Siniff, Jr.'s paycheck. Petitioner Siniff, Jr. testified that the garnishments to pay the USDA Rural Development debt put him behind in paying child support for his two younger children. [The Earnings Statements mistakenly refer to the garnishments as "Garnish: Stud. Loan". Petitioner Siniff, Jr. testified that there is no student loan; these are the garnishments to pay the USDA Rural Development debt.]

14. Petitioner Siniff, Jr. asks that the garnishments cease, and also that the amounts already garnished be refunded to him so that he can pay the child support for his two younger children that he was unable to pay because of the garnishments. Petitioner Siniff, Jr.'s Consumer Debtor Financial Statement (with attached sheets) filed June 11, 2012 shows that his current living expenses are reasonable (frugal, actually). Petitioner

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

Siniff, Jr. is heavily burdened with debt, including roughly \$35,000.00 still owed for his attorneys' fees for the divorce (to various attorneys and to his parents to repay their payments to his attorneys). His current medical crisis will of course be costly. And he owes various amounts to his former wife; \$1,400.00 on back federal income taxes; back rent; payments on his pick-up truck; payments on loans against his 401 K accounts; and payments on medical bills and a credit card.

15. I have carefully considered Petitioner Siniff, Jr.'s request that the amounts already garnished be refunded to him. The garnishments began because Petitioner Siniff, Jr.'s Hearing Request was regarded as LATE. Pioneer Credit Recovery, Inc., in November 2011, was using an old address for him. Petitioner Siniff, Jr. testified that he had been at his current address (the one on his Hearing Request; the one on his Consumer Debtor Financial Statement) since about June or July 2011. Pioneer Credit Recovery, Inc., on January 23, 2012, used that correct address, indicating that a copy of the information that he had previously requested was enclosed. Petitioner Siniff, Jr. responded promptly, with documentation, as can be seen from his letter dated February 26, 2012, included in the accompanying documents to his Hearing Request dated March 2, 2012. The deadline for Petitioner Siniff, Jr. to submit his Hearing Request timely (December 9, 2011) had come and gone long before he got notice of the documents dated November 17, 2011. Petitioner Siniff, Jr. was responsible in his correspondence with Pioneer Credit Recovery, Inc. promptly upon his receiving a copy of the documents dated November 17, 2011 (he received the documents sometime from late January to early February 2012). Further, Petitioner Siniff, Jr. is in dire straits because of his current injury. Consequently, I order that the amounts taken from Petitioner Siniff, Jr.'s pay, through garnishment, be returned to him, even though his Hearing Request was regarded as LATE.

16. Garnishment at 15% of Petitioner Siniff, Jr.'s disposable pay would currently cause Petitioner Siniff, Jr. financial hardship. To prevent hardship, potential garnishment to repay the USDA Rural Development debt must be limited to **0%** of Petitioner Siniff, Jr.'s disposable pay through August 2013; then **up to 5%** of Petitioner Siniff, Jr.'s disposable pay beginning September 2013 through August 2015; then **up to 10%** of Petitioner Siniff, Jr.'s disposable pay beginning September 2015 through

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August 2017; then **up to 15%** of Petitioner Siniff, Jr.'s disposable pay thereafter. 31 C.F.R. § 285.11.

17. Petitioner Siniff, Jr., you may want to negotiate the disposition of the debt with Treasury's collection agency.

### Discussion

18. I encourage **Petitioner Siniff, Jr. and the collection agency** to **negotiate** the repayment of the debt. Petitioner Siniff, Jr., 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 Siniff, Jr., you may want to request apportionment of debt between you and the co-borrower. Petitioner Siniff, Jr., 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. Petitioner Siniff, Jr., 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 wish to include someone else with you in the telephone call when you call to negotiate.

### Findings, Analysis and Conclusions

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

20. Petitioner Siniff, Jr. owes the debt described in paragraphs 5 through 11.

21. Garnishment is authorized, but to prevent financial hardship shall be limited as follows: through August 2013, garnishment limited to **0%** of Petitioner Siniff, Jr.'s disposable pay; beginning September 2013 through August 2015 garnishment **up to 5%** of Petitioner Siniff, Jr.'s disposable pay; beginning September 2015 through August 2017 garnishment **up to 10%** of Petitioner Siniff, Jr.'s disposable pay; and thereafter, garnishment **up to 15%** of Petitioner Siniff, Jr.'s disposable pay. 31 C.F.R. § 285.11.

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22. Any amounts collected through garnishment of Petitioner Siniff, Jr.'s pay prior to implementation of this Decision **shall be returned to Petitioner Siniff, Jr.**, and Petitioner Siniff, Jr. **shall first bring his child support obligations current** before spending the balance as he chooses.

23. Repayment of the debt may occur through *offset* of Petitioner Siniff, Jr.'s **income tax refunds** or other **Federal monies** payable to the order of Mr. Siniff, Jr.

**ORDER**

24. Until the debt is repaid, Petitioner Siniff, Jr. 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).

25. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment limited to **0%** of Petitioner Siniff, Jr.'s disposable pay through August 2013; then **up to 5%** of Petitioner Siniff, Jr.'s disposable pay beginning September 2013 through August 2015; then **up to 10%** of Petitioner Siniff, Jr.'s disposable pay beginning September 2015 through August 2017; then **up to 15%** of Petitioner Siniff, Jr.'s disposable pay thereafter. 31 C.F.R. § 285.11.

26. USDA Rural Development, and those collecting on its behalf, will be required to **return to Petitioner Siniff, Jr.** any amounts already collected through garnishment of Petitioner Siniff, Jr.'s pay, prior to implementation of this Decision. Petitioner Siniff, Jr. **shall first bring his child support obligations current** before spending the balance as he chooses.

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

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Cindy A. Battisoni  
71 Agric. Dec. 655

**In re: CINDY A. BATTISONI, F/K/A CINDY A. VANBUREN  
Docket No. 12-0349.  
Decision and Order.  
Filed July 10, 2012.**

AWG.

Petitioner, pro se.  
Michelle Tanner for RD.

*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

### **DECISION AND ORDER**

1. The hearing by telephone was held on June 29, 2012. The Petitioner, Cindy A. Battisoni, formerly known as Cindy A. VanBuren (“Petitioner Battisoni”), participated, representing herself (appears *pro se*).
2. The Respondent, Rural Development, an agency of the United States Department of Agriculture (“USDA Rural Development”), participated, represented by Michelle Tanner.

### **Summary of the Facts Presented**

3. Admitted into evidence are Petitioner Battisoni’s testimony and her Hearing Request dated March 9, 2012.
4. Admitted into evidence are Michelle Tanner’s testimony and USDA Rural Development’s Exhibits RX 1 through RX 7, plus Narrative, Witness & Exhibit List, which were filed on June 1, 2012.
5. Petitioner Battisoni owes to USDA Rural Development **\$23,318.22** (as of May 31, 2012, *see esp.* RX 7, pp. 1, 2), in repayment of a United States Department of Agriculture / Farmers Home Administration loan made in 1994, for a home in New York. The balance 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

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

**\$23,318.22**, would increase the balance by \$6,529.10 to \$29,847.32. *See* esp. RX 7, p. 2.

7. The amount Petitioner Battistoni borrowed in 1994 was \$68,000.00. RX 1. Foreclosure was begun in 2009. Petitioner Battistoni's co-borrower, her former husband, Chad D. VanBuren, Sr., filed for Chapter 13 Bankruptcy in 2010. The Bankruptcy stay was modified to allow foreclosure. The foreclosure sale took place in March 2011, when the home was sold to a third party for \$55,100.00 (RX 4). By the time the sale proceeds (\$54,980.56) were applied to reduce the balance, the USDA Rural Development debt had grown to \$80,751.78:

\$ 56,387.20	Principal
\$ 11,488.86	Interest
\$ 12,802.75	Recoverable Costs
\$ <u>72.97</u>	Interest on Recoverable Costs
\$ 80,751.78	Amount Due when sale funds were applied on the loan

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RX 6, and USDA Rural Development Narrative.

The sale proceeds of \$54,980.56 were applied to the Amount Due. Interest stopped accruing when the sale funds were applied on the loan. Collections from Treasury (through *offset* of Petitioner Battistoni's income tax refund that was intercepted and applied to the debt, *see* RX 7, p. 1) reduced the debt from \$25,771.22 to **\$23,318.22** unpaid as of May 31, 2012 (excluding the potential remaining collection fees). *See* RX 7 and USDA Rural Development Narrative.

8. Petitioner Battistoni testified that the home and the debt are the responsibility of her co-borrower, her former husband, Chad D. VanBuren, Sr. Petitioner Battistoni may have recourse against her co-borrower, her former husband, for sums she is required to pay that were his responsibility. Nevertheless, the debt remains her and her co-borrower's joint-and-several obligation. Petitioner Battistoni still owes the balance of **\$23,318.22** (as of May 31, 2012, excluding the potential remaining collection fees), and USDA Rural Development may collect

Cindy A. Battisoni  
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that amount from her. When Petitioner Battisoni entered into the borrowing transaction with her co-borrower in 1994, certain responsibilities were fixed, as to each of them. Petitioner Battisoni testified that she did inquire about a release of liability, but her co-borrower was already delinquent when she asked.

**9. Petitioner Battisoni has held her current job for less than 12 months, and she was involuntarily separated (let go) from her last job.** She may not be garnished until she has held a job for 12 months or longer.

### Discussion

10. I recommend that Petitioner Battisoni and Treasury's collection agency negotiate a compromise of the debt. Petitioner Battisoni, 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 Battisoni, you may want to request apportionment of debt between you and the co-borrower. Petitioner Battisoni, 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. Petitioner Battisoni, 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. Petitioner Battisoni, you may wish to include someone else with you in the telephone call when you call to negotiate.

### Findings, Analysis and Conclusions

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

12. Petitioner Battisoni owes the debt described in paragraphs 5 through 7.

**13. Garnishment is not authorized through July 2013.** To prevent hardship, beginning **August 2013 through July 2014**, potential garnishment to repay the debt **up to 10%** of Petitioner Battisoni's

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disposable pay is authorized; and **up to 15%** thereafter. 31 C.F.R. § 285.11.

14.I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through *offset* or garnishment of Petitioner Battistoni's pay, to be returned to Petitioner Battistoni.

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

**ORDER**

16.Until the debt is repaid, Petitioner Battistoni 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 in any amount **through July 2013**. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment **up to 10%** of Petitioner Battistoni's disposable pay beginning **August 2013 through July 2014**; and **up to 15%** thereafter. 31 C.F.R. § 285.11.

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

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Frank Black  
71 Agric. Dec. 659

**In re: FRANK BLACK.  
Docket No. 12-0413.  
Decision and Order.  
Filed July 11, 2012.**

AWG.

Petitioner, pro se.  
Giovanna Leopardi for RD.  
*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

### **DECISION AND ORDER**

1. The hearing by telephone was held on July 11, 2012. Frank Black, also known as Frank Black, Jr., the Petitioner (“Petitioner Black”), 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 is represented by Giovanna Leopardi.

### **Summary of the Facts Presented**

3. Petitioner Black’s completed “Consumer Debtor Financial Statement” (filed June 28, 2012) is admitted into evidence, together with the testimony of Petitioner Black, together with his Hearing Request dated March 14, 2012.
4. USDA Rural Development’s Exhibits RX 1 through RX 11, plus Narrative, Witness & Exhibit List (filed June 13, 2012) are admitted into evidence, together with the testimony of Giovanna Leopardi.
5. Petitioner Black bought a home in Michigan in 2003, borrowing \$73,000.00 to pay for it (\$68,000.00 for the home; \$5,000.00 for closing costs, etc.). RX 1, 2. The loan was made by Chase Manhattan Mortgage Corporation, succeeded by JP Morgan Chase Bank, N.A., with the servicing lender being Chase Home Finance, LLC. A loan modification in 2008 added arrearages to principal: the modified unpaid principal became \$71,798.36 in 2008. RX 2, esp. p. 8.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

6. USDA Rural Development's position is that Petitioner Black owed to USDA Rural Development \$54,719.49 as the loss claim amount that USDA Rural Development paid to the lender on April 1, 2011. RX 6, p. 13. USDA Rural Development paid the loss claim pursuant to the United States Department of Agriculture / Rural Development / Rural Housing Service *Guarantee* (see RX 1, esp. p. 2) for the loan made in 2003 ("the debt"). After careful review of all of the evidence, I agree with USDA Rural Development's position.

7. The *Guarantee* (RX 1) establishes an **independent** obligation of Petitioner Black, "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 1, p. 2.

8. The Due Date of the last payment made was December 1, 2008. RX 6, p. 7. Petitioner Black testified that he was on disability for about 5 months in 2008 and/or 2009. Further, his wife lost her job. Foreclosure was initiated on May 5, 2009. RX 6, p. 8. The lender Chase (Chase Home Finance LLC) bid \$52,700.00 and acquired the home, which became REO (Real Estate Owned), at the Sheriff's sale on June 12, 2009. RX 3. See also RX 6, p. 8. The lender Chase marketed the home but did not accomplish a sale within the prescribed period. A liquidation appraisal was done on July 2, 2010 (see RX 6, p. 9).<sup>1</sup>

9. USDA Rural Development reimbursed the lender \$54,719.49 on April 1, 2011. RX 6, p. 13. The \$54,719.49 is the amount USDA Rural Development seeks to recover from Petitioner Black under the *Guarantee*. RX 7. RX 7 details the loss claim paid under the *Guarantee*, showing how the debt became \$54,719.49.

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<sup>1</sup> The liquidation value, used because the home did not sell within the prescribed period, was only \$22,000.00. RX 5, pp. 7, 8; RX 6, p. 9. The sale price was apparently only \$9,500.00. RX 6, p. 3.

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\$ 68,056.05	Unpaid Principal Balance
\$ 6,479.31	Unpaid Interest Balance
\$ 3,553.80	Protective Advance to Pay Taxes and Insurance
<u>\$ 66.71</u>	Interest on Protective Advance
\$ 78,155.87	Due from Borrower BEFORE Lender Expenses Added
+ <u>\$ 4,712.94</u>	Lender Expenses to Sell Property
<u>\$ 82,868.81</u>	Total Debt Charged to Petitioner Black
- <u>\$ 28,149.32</u>	Credits (includes liquidation value of \$22,000.00, RX 6, exp. p. 9)
<u>\$ 54,719.49</u>	Loss Claim

RX 7, USDA Rural Development Narrative, and testimony.

10. Collections from Treasury (an *offset*, which was an income tax refund; plus garnishments from Petitioner Black) applied to the debt (after collection fees are subtracted) leave **\$46,570.00** unpaid as of May 18, 2012 (excluding the potential remaining collection fees). *See* RX 10. Interest stopped accruing on the date of the liquidation appraisal, which was July 2, 2010 (*see* RX 6, p. 9). The debt amount of **\$46,570.00** as of May 18, 2012 (excluding collection costs), may have changed, because garnishment was ongoing (*see* RX 10, p. 1); the balance may therefore have been reduced and may continue to change.

11. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **\$46,570.00**, would increase the balance by \$13,039.60, to \$59,609.60. RX 10, esp. p. 2.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

12. Petitioner Black's Consumer Debtor Financial Statement and testimony show that his current living expenses for himself, his wife, and 3 children, are reasonable. Garnishment at 15% of Petitioner Black's disposable pay is currently causing Petitioner Black and his wife and children financial hardship. To prevent hardship, potential garnishment to repay the USDA Rural Development debt must be limited to **0%** of Petitioner Black's disposable pay through August 2014; then **up to 5%** of Petitioner Black's disposable pay beginning September 2014 through August 2015; then **up to 10%** of Petitioner Black's disposable pay beginning September 2015 through August 2016; then **up to 15%** of Petitioner Black's disposable pay thereafter. 31 C.F.R. § 285.11.

13. Petitioner Black, you may want to negotiate the disposition of the debt with Treasury's collection agency.

**Discussion**

14. I encourage **Petitioner Black and the collection agency** to **negotiate** the repayment of the debt. Petitioner Black, 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 Black, 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. Petitioner Black, 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 wish to include someone else with you in the telephone call when you call to negotiate.

**Findings, Analysis and Conclusions**

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

16. Petitioner Black owes the debt described in paragraphs 5 through 11.

17. To prevent financial hardship, garnishment shall be limited as follows: through August 2014 garnishment is limited to **0%** of

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Petitioner Black's disposable pay; beginning September 2014 through August 2015 garnishment is limited to **up to 5%** of Petitioner Black's disposable pay; beginning September 2015 through August 2016 garnishment is limited to **up to 10%** of Petitioner Black's disposable pay; and thereafter, garnishment **up to 15%** of Petitioner Black's disposable pay is authorized. 31 C.F.R. § 285.11.

18.I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through *offset* or garnishment of Petitioner Black's pay, to be returned to Petitioner Black.

19.Repayment of the debt may occur through *offset* of Petitioner Black's **income tax refunds** or other **Federal monies** payable to the order of Mr. Black.<sup>2</sup>

### ORDER

20.Until the debt is repaid, Petitioner Black 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).

21.USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment limited to **0%** of Petitioner Black's disposable pay through August 2014; then **up to 5%** of Petitioner Black's disposable pay beginning September 2014 through August 2015; then **up to 10%** of Petitioner Black's disposable pay beginning September 2015 through August 2016; then **up to 15%** of Petitioner Black'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.

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<sup>2</sup> Petitioner Black, your spouse is not obligated under the *Guarantee*. Consequently, if you file a joint income tax return and any of the refund taken is your spouse's, you will want to call Treasury at **1-888-826-3127** to ask how your "injured spouse" may obtain her refund back. You will want to pursue the "injured spouse" claim also if the refund taken in February 2012 had any of your spouse's refund in it.

**ADMINISTRATIVE WAGE GARNISHMENT ACT****In re: NOREEN CROPPER-LEWIS.****Docket No. 12-0412.****Decision and Order.****Filed July 7, 2012.****AWG.**

Petitioner, pro se.

Giovanna Leopardi for RD.

*Decision and Order entered by Janice K. Bullard, Administrative Law Judge.***DECISION AND ORDER**

This matter is before the Office of Administrative Law Judges (“OALJ”) upon the request of Noreen Cropper-Lewis (“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. A telephonic hearing was set to commence on July 10, 2012 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, identified as RX-1 through RX-11. Petitioner filed a Consumer Debtor Financial Statement, identified as PX-1.

Hearing commenced as scheduled. Petitioner represented herself, and Respondent was represented by Ms. Leopardi of Rural Development, USDA, Saint Louis, Missouri. Both representatives testified.

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 May 21, 2007 Petitioner received a home mortgage loan in the amount of \$164,209.00 from DHI Mortgage Company, Ltd. for the purchase of real property located in Providence Village, Texas, evidenced by Promissory Note and Deed of Trust. RX -2.

Noreen Cropper-Lewis  
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2. Before closing on the real property purchase, Petitioner signed a Request for USDA-RD to guarantee the loan, thereby certifying that she would reimburse Respondent for any loss claim paid to the lender. RX-1.
3. The loan note was sold to Chase MMC on September 20, 2007. RX-3.
4. The Petitioner subsequently defaulted on the loan, and on April 6, 2010, the property was sold to Chase MMC at a foreclosure sale for the amount of \$139,000.00. RX-4; RX-5.
5. The property was sold to a third party on August 6, 2010 for \$125,000.00. RX-5.
6. Petitioner's loan balance at the time of foreclosure was \$195,502.65. RX-6.
7. USDA-RD paid a loss claim to Chase MMC in the amount of \$68,551.69. RX-7.
8. The balance on Petitioner's loan after sale proceeds, credits and fees were applied was \$68,551.69. RX-\*
9. The loan was forwarded to the U.S. Department of Treasury ("Treasury") for collection, as mandated by law.
10. After application of additional credits and Treasury refund offset, Petitioner's debt as of the date of the hearing is \$67,823. 97, with potential additional fees of \$18,990.68. RX-10.
11. Petitioner was advised of intent to garnish her wages to satisfy the indebtedness.
12. Petitioner's request for a hearing was not timely and garnishment of her wages has been ongoing.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

13. Petitioner works a flexible schedule for an hourly rate; she usually works thirty hours a week, but sometimes works a full-time schedule.

14. Petitioner contended that wage garnishment against her salary would represent a substantial financial hardship.

15. Petitioner's wages are the sole source of income for her and one dependent.

16. Petitioner's income is almost exhausted by her monthly expenses.

17. Petitioner's income can withstand garnishment only by reducing the amount of garnishment to 10% of her disposable income.

**Conclusions of Law**

1. The Secretary has jurisdiction in this matter.
2. Petitioner is indebted to USDA Rural Development in the amount of \$67,823.97 exclusive of potential Treasury fees for the mortgage loan extended to her.
3. All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met.
4. The Respondent is entitled to administratively garnish the wages of the Petitioner but may not 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 be subjected to administrative wage garnishment up to 10% of Petitioner's disposable pay. 31 C.F.R. § 285.11.

Petitioner is encouraged to negotiate repayment of the debt with the representatives of Treasury. The toll free number for Treasury's agent is **1-888-826-3127**.

Joy Kent  
71 Agric. Dec. 667

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.

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**In re: JOY KENT, N/K/A JOY OWENS.**  
**Docket No. 12-0409.**  
**Decision and Order.**  
**Filed July 18, 2012.**

AWG.

Petitioner, pro se.  
Giovanna Leopardi for RD.  
*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

### **DECISION AND ORDER**

1. The hearing by telephone was held as scheduled on July 10, 2012. Joy Kent, now known as Joy Owens (Petitioner Kent) did not participate. (Petitioner Kent did not participate by telephone: there was no telephone number for Ms. Kent provided in her Hearing Request; and in response to my instructions in the Hearing Notice [signed April 25, 2012 and filed May 9, 2012], Petitioner Kent provided no telephone number where she could be reached for the hearing by telephone.)

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (“USDA Rural Development”) and is represented by Giovanna Leopardi.

**Summary of the Facts Presented**

3. Petitioner Kent owes to USDA Rural Development a balance of **\$62,015.88** (as of May 11, 2012, *see* RX 8), in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service *Guarantee* (*see* RX 1, esp. p. 2) for a loan made in 2006, the balance of which is now unsecured (“the debt”). Petitioner Kent borrowed, with the co-borrower, her then-husband, to buy a home in Virginia. *See* USDA Rural Development Exhibits RX 1 through RX 8, together with the Narrative, Witness & Exhibit List (filed May 22, 2012); and the testimony of Giovanna Leopardi, all of which I admit into evidence.

4. The *Guarantee* (RX 1) establishes an independent obligation of Petitioner Kent, “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 1, 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 **\$62,015.88** would increase the current balance by \$17,364.45, to \$79,380.33 (as of May 11, 2012). RX 8, p. 4.

6. Petitioner Kent and her co-borrower, her former husband, are jointly and severally liable to pay the debt. Benjamin Kent is held responsible to pay the debt just as Petitioner Kent is, as shown by RX 8. Petitioner Kent stated on her Hearing Request “my exhusband is equally responsible.” Yes, but USDA Rural Development may legally collect

Joy Kent  
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more than half, even all, from either one of them. Once Petitioner Kent entered into the borrowing transaction with her co-borrower, certain responsibilities were fixed. Petitioner Kent still owes the balance of **\$62,015.88** (excluding potential collection fees), as of May 11, 2012, and so does her co-borrower, her former husband. Even though Petitioner Kent may have legal recourse against her co-borrower for monies collected from her on the debt, that does not prevent USDA Rural Development from collecting from her, pursuant to the *Guarantee*. RX 1.

7. Petitioner Kent failed to file a Consumer Debtor Financial Statement, or anything, in response to my instructions in the Hearing Notice [signed April 25, 2012 and filed May 9, 2012]. Thus I cannot calculate Petitioner Kent's current disposable pay. (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. There is no evidence before me to use to consider the factors to be considered under 31 C.F.R. § 285.11. In other words, I cannot tell whether garnishment to repay "the debt" (*see* paragraph 3) in the amount of 15% of Petitioner Kent's disposable pay creates a financial hardship.

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

### Discussion

10. I encourage **Petitioner Kent and the collection agency to negotiate** promptly the repayment of the debt. Petitioner Kent, 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. Petitioner Kent, you may want to have someone else with you on the line if you call.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

**Findings, Analysis and Conclusions**

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

12. Petitioner Kent owes the debt described in paragraphs 3 through 6.

13. **Garnishment up to 15% of Petitioner Kent's disposable pay** is authorized. There is no evidence that financial hardship will be created by garnishment. 31 C.F.R. § 285.11.

14. **No refund** to Petitioner Kent of monies already collected or collected prior to implementation of this Decision is appropriate, and no refund is authorized.

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

**ORDER**

16. Until the debt is repaid, Petitioner Kent 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 authorized to proceed with **garnishment up to 15% of Petitioner Kent'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.

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Kimberly Ann Stewart  
71 Agric. Dec. 671

**In re: KIMBERLY ANN STEWART.  
Docket No. 12-0345.  
Decision and Order.  
Filed July 19, 2012.**

AWG.

Petitioner, pro se.  
Michelle Tanner for RD.

*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

### **DECISION AND ORDER**

1. The hearing by telephone was held on June 26 and July 16, 2012. Kimberly Ann Stewart, the Petitioner, also known as Kimberly A. Stewart (“Petitioner Stewart”), participated, representing 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 Michelle Tanner.

### **Summary of the Facts Presented**

3. USDA Rural Development’s Exhibits RX 1 through RX 11, plus Narrative, Witness & Exhibit List (filed on May 11, 2012), are admitted into evidence, together with the testimony of Michelle Tanner.
4. Petitioner Stewart’s completed “Consumer Debtor Financial Statement” (filed on July 10, 2012), is admitted into evidence, together with the testimony of Petitioner Stewart, together with her Hearing Request (dated March 1, 2012).
5. Petitioner Stewart owes to USDA Rural Development **\$26,834.77** (as of May 9, 2012), in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service **Guarantee** (see RX 1, esp. p. 2) for a loan made in 2008, the balance of which is now unsecured (“the debt”). Petitioner Stewart borrowed to buy a home in Illinois.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

6. The *Guarantee* (RX 1) establishes an **independent** obligation of Petitioner Stewart, “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 1, p. 2.

7. The Due Date of Last Payment Made was October 1, 2008. RX 6, p. 5. Foreclosure was initiated on July 20, 2009. RX 6, p. 5. The lender Chase (Chase Home Finance LLC) bid \$29,325.00 and acquired the home, which became REO (Real Estate Owned), at the Sheriff’s sale on March 2, 2010. RX 3, esp. p. 6. *See also* RX 6, p. 5. The lender Chase marketed the home but did not accomplish a sale within the prescribed period. A liquidation appraisal was done on September 21, 2010 (*see* RX 5, p. 2).<sup>1</sup>

8. USDA Rural Development reimbursed the lender \$28,772.77 on April 28, 2011. RX 6, p. 10. The \$1,938.00 recovery from the sale after the liquidation appraisal, reduced the amount of USDA Rural Development’s payment to **\$26,834.77**, which is the amount USDA Rural Development seeks to recover from Petitioner Stewart under the *Guarantee*. RX 7. RX 7 details the loss claim paid under the *Guarantee*, showing how the debt became **\$26,834.77**.

\$ 41,187.03	Unpaid Principal Balance
\$ 5,635.68	Unpaid Interest Balance (10-01-08 to 09-21-10)
\$ 988.74	Protective Advance to Pay Taxes and Insurance
<u>\$ 24.71</u>	Interest on Protective Advance

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<sup>1</sup> The liquidation value, used because the home did not sell within the prescribed period, was only \$23,000.00. RX 5, p. 2; RX 6, p. 1. Chase then sold the REO for \$25,900.00 after the liquidation appraisal, which resulted in \$1,938.00 credited to USDA Rural Development. RX 6, pp. 18-19.

Kimberly Ann Stewart  
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\$ 47,836.16	Due from Borrower BEFORE Lender Expenses Added
+ \$ <u>7,117.10</u>	Lender Expenses to Sell Property
\$ <u>54,953.26</u>	Total Debt Charged to Petitioner Stewart
- \$ <u>26,180.49</u>	Credits (includes liquidation value of \$23,000.00)
\$ <u>28,772.77</u>	Loss Claim
- \$ <u>1,938.00</u>	Recovery/REO Sale
<u>\$ <b>26,834.77</b></u>	

RX 7, USDA Rural Development Narrative, and testimony.

9. Interest stopped accruing on the date of the liquidation appraisal, which was September 21, 2010 (*see* RX 5, p. 2).

10. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **\$26,834.77**, would increase the balance by \$7,513.74, to \$34,348.51. *See* USDA Rural Development Exhibits, esp. RX 10, p. 2.

11. Petitioner Stewart works as a dispatcher in a new job that she began just last month. Petitioner Stewart is still recovering from setbacks in about 2008 when she lost the job she had had for 10 years, and her health problems began. Her blood pressure is high, and for health reasons she left the job she had immediately prior to the dispatcher job (a factory job manufacturing headlights). Now, her disposable pay (within the meaning of 31 C.F.R. § 285.11) is roughly \$850.00 every 2 weeks, roughly \$1,850.00 per month. [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance withholding;

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

and in certain situations minus other employee benefits contributions that are required to be withheld.]

12. Garnishment at 15% of Petitioner Stewart's disposable pay could yield nearly \$280.00 per month to repay the USDA Rural Development debt; but garnishment in any amount now would clearly cause Petitioner Stewart financial hardship (within the meaning of 31 C.F.R. § 285.11). Petitioner Stewart's Consumer Debtor Financial Statement (filed July 10, 2012) shows that her living expenses are understated (she allowed no money for food or clothing or emergencies or recreation, for example). In addition to living expenses, Petitioner Stewart is completing the last payments on medical expenses; paying delinquent federal income taxes (about \$300.00); and making payments on several other liabilities, all of which may be paid in full by the first quarter of 2013.

13. To prevent hardship, potential garnishment to repay "the debt" (*see* paragraph 5) must be limited to **0%** of Petitioner Stewart's disposable pay through July 2013; then **up to 7%** of Petitioner Stewart's disposable pay beginning August 2013 through July 2014; then **up to 15%** of Petitioner Stewart's disposable pay thereafter. 31 C.F.R. § 285.11.

14. Petitioner Stewart is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

**Discussion**

15. Through July 2013, no garnishment is authorized. Beginning August 2013 through July 2014, garnishment up to 7% of Petitioner Stewart's disposable pay is authorized; and thereafter, garnishment up to 15% of Petitioner Stewart's disposable pay is authorized. *See* paragraphs 11, 12 and 13. I encourage **Petitioner Stewart and the collection agency to negotiate** the repayment of the debt. Petitioner Stewart, 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 Stewart, 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. Petitioner Stewart, you may want to have someone else with you on the line if you call.

Kimberly Ann Stewart  
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### Findings, Analysis and Conclusions

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

17. Petitioner Stewart owes the debt described in paragraphs 5 through 10.

18. **Garnishment is authorized**, as follows: through July 2013, **no** garnishment. Beginning August 2013 through July 2014, garnishment **up to 7%** of Petitioner Stewart's disposable pay; and thereafter, garnishment **up to 15%** of Petitioner Stewart's disposable pay. 31 C.F.R. § 285.11.

19. I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through *offset* or garnishment of Petitioner Stewart's pay, to be returned to Petitioner Stewart.

20. Repayment of the debt may occur through *offset* of Petitioner Stewart's **income tax refunds** or other **Federal monies** payable to the order of Ms. Stewart (whether or not garnishment is authorized).

### ORDER

21. Until the debt is repaid, Petitioner Stewart 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).

22. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through July 2013. Beginning August 2013 through July 2014, garnishment **up to 7%** of Petitioner Stewart's disposable pay is authorized; and garnishment **up to 15%** of Petitioner Stewart's disposable pay thereafter. 31 C.F.R. § 285.11.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

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

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**In re: KAREN M. RATNER.**

**Docket No. 12-0331.**

**Decision and Order.**

**Filed July 20, 2012.**

**AWG.**

Petitioner, pro se.

Michelle Tanner for RD.

*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

**DECISION AND ORDER**

1. The hearing by telephone was begun on June 13, 2012, resumed on June 20 with little progress, and was completed on July 18, 2012. Karen I. Nordling, also known as Karen R. Nordling, formerly known as Karen M. Ratner (“Petitioner Nordling”), participated, representing herself (appeared *pro se*).
2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent (“USDA Rural Development”), also participated, represented by Michelle Tanner.

**Summary of the Facts Presented**

3. USDA Rural Development’s Exhibits RX 1 through RX 7, plus Narrative, Witness & Exhibit List (filed on May 4, 2012), are admitted into evidence, together with the testimony of Michelle Tanner.
4. Petitioner Nordling’s completed “Consumer Debtor Financial Statement” plus two pay stubs (filed on July 6, 2012), are admitted into evidence, together with the testimony of Petitioner Nordling, together with her Hearing Request (dated February 29, 2012).

Karen M. Ratner  
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5. Petitioner Nordling owes to USDA Rural Development **\$33,977.46** (as of May 3, 2012) in repayment of a USDA Farmers Home Administration loan borrowed in 1996 for a home in Texas, 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 **\$33,977.46**, would increase the current balance by \$9,513.69, to \$43,491.15. *See* USDA Rural Development Exhibits, esp. RX 7 (adjusted by \$789.00; *see* footnote 2).

7. The amount Petitioner Nordling borrowed from USDA Farmers Home Administration in 1996 was \$72,570.00. RX 1. Payments were made until about October 18, 2003. Attempted reamortization in 2004 had to be reversed, because of no response from Petitioner Nordling and USDA Rural Development’s realization that she was no longer living in the property. RX 2. The loan was accelerated for foreclosure on June 23, 2005 due to “monetary default and abandoned property.” RX 3. The foreclosure sale was held on September 2, 2008. RX 4, esp. p. 2.

8. At the time of the foreclosure sale in 2008, the debt balance was \$127,179.12.

\$ 68,175.29	unpaid principal
\$ 23,693.64	unpaid interest
\$ 35,098.76	fees/costs (taxes, insurance, the debt to the leverage lender <sup>1</sup> , costs)
<u>\$ 211.43</u>	interest on fees/costs

\$127,179.12  
=====

RX 6 and Michelle Tanner’s testimony.

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<sup>1</sup> The leverage lender was paid in full, more than \$15,000.00.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

The highest bid at the foreclosure sale was \$92,794.00, bid by USDA. The \$92,794.00 was applied to reduce the debt (leaving a balance owed of \$34,385.12). Then an insurance refund of \$407.68 was applied to reduce the debt (leaving a balance owed of **\$33,977.46**). RX 6 and Michelle Tanner's testimony.<sup>2</sup> Since the foreclosure sale, no additional interest has accrued.

9. Petitioner Nordling still owes the balance of **\$33,977.46** (excluding potential collection fees), as of May 3, 2012, and USDA Rural Development may collect that amount from her.

10. Petitioner Nordling testified that she is married, and that her husband receives military retirement pay. Her husband is **not** responsible to repay the USDA Rural Development debt. The two of them are obligated to pay the Internal Revenue Service (IRS) about \$20,000.00 for back income taxes, and interest continues to accrue. They are making monthly payments. Their household includes her daughter and son-in-law and two children, who were displaced by a huge wildfire. Her daughter works part-time only, and her son-in-law has been unemployed for about a year.

11. Petitioner Nordling's disposable pay (within the meaning of 31 C.F.R. § 285.11) is roughly \$1,400.00 every 2 weeks, roughly \$3,000.00 per month. [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance and, here, disability insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.]

12. Garnishment at 15% of Petitioner Nordling's disposable pay could yield nearly \$450.00 per month to repay the USDA Rural Development debt, but garnishment in that amount now would cause Petitioner Nordling and the family who live with her financial hardship (within the meaning of 31 C.F.R. § 285.11). Petitioner Nordling's Consumer Debtor Financial Statement (filed July 6, 2012) shows that her living expenses, including what she spends for others in her household are reasonable, and when her payments on debt are added, amount to about \$2,900.00

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<sup>2</sup> Ms. Tanner subtracted the \$789.00 shown on RX 6 as an additional foreclosure fee billed after the foreclosure.

Karen M. Ratner  
71 Agric. Dec. 676

per month. If Petitioner Nordling did not have her husband's support, she would now be able to afford only about \$100.00 per month to repay the USDA Rural Development debt.

13. To prevent financial hardship, potential garnishment to repay "the debt" (*see* paragraph 5) must be limited to **5%** of Petitioner Nordling's disposable pay through July 2013; then **up to 10%** of Petitioner Nordling's disposable pay beginning August 2013 through July 2015; then **up to 15%** of Petitioner Nordling's disposable pay thereafter. 31 C.F.R. § 285.11.

14. Petitioner Nordling is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

#### **Discussion**

15. Garnishment is authorized. *See* paragraphs 10 through 13. I encourage **Petitioner Nordling and Treasury's collection agency** to **negotiate** the repayment of the debt. Petitioner Nordling, 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 Nordling, 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. Petitioner Nordling, you may want to have someone else with you on the line if you call.

#### **Findings, Analysis and Conclusions**

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

17. Petitioner Nordling owes the debt described in paragraphs 5 through 9.

18. **Garnishment is authorized**, as follows: through July 2013, garnishment **up to 5%** of Petitioner Nordling's disposable pay; beginning August 2013 through July 2015, garnishment **up to 10%** of

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

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

19.I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through *offset* or garnishment of Petitioner Nordling's pay, to be returned to Petitioner Nordling.

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

**ORDER**

21.Until the debt is repaid, Petitioner Nordling 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).

22.USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment **up to 5%** of Petitioner Nordling's disposable pay through July 2013. Beginning August 2013 through July 2015, garnishment **up to 10%** of Petitioner Nordling's disposable pay is authorized; and garnishment **up to 15%** of Petitioner Nordling'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.

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Donna Cassella  
71 Agric. Dec. 681

**In re: DONNA CASSELLA.**  
**Docket No. 12-0480.**  
**Decision and Order.**  
**Filed August 22, 2012.**

AWG.

Frank W. Jones, Esq., for Petitioner.  
Giovanna Leopardi for RD.  
*Decision and Order entered by James P. Hurt, Hearing Official.*

### **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 25, 2012, 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 18, 2012. Petitioner submitted exhibits on June 23, 2012, July 31, 2012, and August 15, 2012. On August 9, 2012, at the time set for the hearing, both parties were available. Ms. Giovanna Leopardi represented RD. Ms. Cassella was represented by Frank W. Jones, Esq. The parties were sworn.

Petitioner has been employed for more than one year. Petitioner contends that RD's Counter-Offer to settle the debt was accepted by Petitioner or/about December 21, 2004. RD failed to process the documentation to complete the transaction and provide instructions for forwarding of the agreed settlement funds. Treasury thereafter continued to collect tax refunds via the TOPS (Tax Offset) program.

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

**ADMINISTRATIVE WAGE GARNISHMENT ACT****Findings of Fact**

1. On/about August 20, 1985, Petitioner and her former husband, Joseph Casella, obtained a loan from USDA (formerly FmHA) in the amount of \$41,700 United States Department of Agriculture (USDA), now Rural Development (RD). RX-1.
2. The debt went into default.
3. The home was sold in a “short sale” on/about November 2, 1998. RX-3.
4. Petitioner became divorced from her former husband, Joseph Casella, but had a property settlement agreement between the marital parties.
5. Both Petitioner and her former husband remained jointly and severally liable on the remaining debt to RD.
6. Joseph Casella is now deceased.
7. Petitioner and RD exchanged written offers and counter-offers regarding the terms of settlement of the remaining debt.
8. RD’s May 6, 2003 counter-offer of a full and final settlement of \$6,000 (RX-4 @ p.29 of 32, & 32 of 32) was communicated to Petitioner’s attorney via a phone conversation with RD’s collection agent (DSC, Inc.) on/about March 23, 2004.
9. Despite the Petitioner’s acceptance of RD’s counter-offer, (PX-11) dated December 21, 2004, RD and/or Treasury, and/or its collection agent (DSC, Inc.) continued to utilize tax off-set collection from Petitioner.
10. RD has collected \$1,409 (net) from Petitioner. RX-6 @ p. 1 of 3.
11. Despite RD’s close relationship with Treasury and familiarity with the debt collection process, RD still embraces “transfer to Treasury for

Donna Cassella  
71 Agric. Dec. 681

cross-servicing” as a legalistic excuse for its failure to settle the debt at terms it was willing to accept. RX-3 @ p. 14 of 20.

12.I find that the parties, being variously, the Treasury of United States of America and/or Rural Development agency of USDA, and/or its collection agent (DSC, Inc.) and the Petitioner reached a settlement on the outstanding debt in the amount of \$6,000.00.

13.I further find that despite the inchoate settlement, Treasury has collected \$1409.00 towards the debt.

14.Petitioner stated during the hearing that she was and has been ready, willing, and able to complete the debt settlement transaction in a lump sum amount.

15.Notwithstanding the counter-offer and acceptance thereof, I have prepared a Financial Hardship Calculation<sup>1</sup> using the Financial Statements signed under oath by Petitioner.

16.The routine Financial Hardship Calculation reveals that even if this debt were not already settled, then RD would not be permitted to garnish her wages under her current financial position.

### **Conclusions of Law**

1. Petitioner is jointly and severally indebted to USDA Rural Development in the amount of \$4,591 (\$6,000.00 - \$1409.00) for the mortgage loan extended to her.
2. The settlement amount of \$4,591.00 is valid only if the funds are forwarded to RD or its designee in a lump sum within 14 days of this order.
3. All procedural requirements for administrative wage offset set forth in 31 C.F.R. § 285.11 have been met.

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<sup>1</sup> The Financial Hardship calculation is not posted on the OAJ website.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

4. The Respondent is not entitled to administratively garnish the wages of the Petitioner.

**ORDER**

For the foregoing reasons, I find that Petitioner's debt to RD in the amount of \$4,591.00 may be fully satisfied by a lump sum payment in the same amount within 14 days of this order.

The parties may mutually agree in writing to extend the time for concluding the settlement.

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

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**In re: PAULA WARE.  
Docket No. 12-0437.  
Decision and Order.  
Filed July 23, 2012.**

**AWG.**

Petitioner, pro se.  
Giovanna Leopardi for RD.  
*Decision and Order entered by James P. Hurt, Hearing Official.*

**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 12, 2012, 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.

Paula Ware  
71 Agric. Dec. 684

The Rural Development Agency (RD), Respondent, complied with the Discovery Order and a Narrative was filed, together with supporting documentation RX-1 through RX-10 on June 8, 2012. Petitioner filed a letter with her Request for Hearing dated April 25, 2012 and later she filed her Financial Statement and payroll documents on July 17, 2012, which I now label as PX-1, PX-2, and PX-3, respectively. On July 20, 2012, at the time re-set for the hearing by agreement of the parties, both parties were available. Ms. Giovanna Leopardi represented RD. Ms. Ware was self represented. The parties were sworn.

Petitioner has been employed for more than one year by a local government, but her employment is only part-time in a community where the average wage is low. She stated she had no health insurance and owes the local hospital for a prior medical incident which is paying off for the next thirty months.

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 March 25, 2005, Petitioner obtained a loan for a mortgage on a primary home in the amount of \$134,640.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) to purchase her home on a property located in Columbia, Alabama. RX-2 @ p. 3 of 5.
2. Prior to signing the loan, the borrower signed RD form 1980-21 (Loan Guarantee) RX-1 @ p. 2 of 4.
3. The borrower became delinquent. The loan was accelerated for foreclosure and a judicial sale was duly advertised in the Shelby County, Alabama legal notices. RX-3 @ 2 of 6.
4. The home was sold at a judicial sale on January 26, 2010 for \$118,640.72. Narrative, RX-3 @ p. 4 of 6.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

5. Prior to the sale the borrower owed \$125,980.64 for principal, plus \$8,172.57 for interest, plus \$833.01 for fees for a total of \$134,986.22 to pay off the RD loan. RX-7.
6. After application of the judicial sale proceeds, the borrower owed \$47,198.41. RX-7.
7. Treasury has collected an additional \$371.76 (net amount) towards the debt. RX-10 @ 1 of 2.
8. The remaining amount due of \$46,826.65 was transferred to Treasury for collection on June 6, 2012. RX-10 @ p.2 of 2.
9. The potential Treasury collection fees are \$13,111.46. RX-10 @ p. 2 of 2.
10. Ms. Ware is now living in Oregon and working part time as a local government employee and has no health insurance.
11. Ms. Ware raised an issue of financial hardship. Testimony.
12. Ms. Ware has an outstanding debt for hospital treatment and she is paying it off in installments of \$25.00 per month.
13. I performed a Financial Hardship Calculation for Ms. Ware gross income<sup>1</sup>. Considering her expenses on PX-2, there was no need to further refine the calculation to arrive at net income.

**Conclusions of Law**

1. Petitioner is indebted to USDA Rural Development in the amount of \$46,826.65 exclusive of potential Treasury fees for the mortgage loan extended to her.
2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of \$13,111.46.

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<sup>1</sup> The Financial Hardship calculation is not posted on the OALJ website.

Deborah Bradford  
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3. All procedural requirements for administrative wage offset set forth in 31 C.F.R. § 285.11 have been met.
4. 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.

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**In re: DEBORAH BRADFORD, FORMERLY DEBORAH CAMPBELL.**  
**Docket No. 12-0366.**  
**Decision and Order.**  
**Filed July 24, 2012.**

AWG.

Petitioner, pro se.  
Michelle Tanner for RD.

*Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.*

### **DECISION AND ORDER**

This matter is before the Administrative Law Judge 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 10, 2012, 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 on July 24, 2012.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on May 23, 2012. The Petitioner filed her documentation with the Hearing Clerk on July 12, 2012. At the hearing held on July 24, 2012, both the Petitioner and Michelle Tanner, Appeals Coordinator, Rural Development, United States Department of Agriculture, St. Louis, Missouri testified.

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 6, 1989, the Petitioner and her then husband, James Campbell, Jr. received a home mortgage loan in the amount of \$43,500.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) for property located in Lebanon, Virginia. RX-1.
2. In May of 2002, the marriage of the Petitioner and her husband was dissolved by decree entered on May 13, 2002 in the Circuit Court of Russell County, Virginia. As part of those proceedings, the ex-husband assumed financial responsibility for the related debt. PX-1.
3. Although apparently not disclosed to the divorce court, the property secured by the indebtedness to FmHA had previously been sold at foreclosure sale on November 27, 2001 with proceeds realized from that sale in the amount of \$24,815.50, leaving a balance due of \$22,360.88 after adding foreclosure expenses of \$725.00 to the amount due. RX-5.
4. After receipt of Treasury offsets, the remaining unpaid debt is in the amount of \$13,783.80 exclusive of potential Treasury fees. RX-6.

**Conclusions of Law**

1. Petitioner is indebted to USDA Rural Development in the amount of \$13,783.80 for the mortgage loan extended to him/her.

Christina J. Canovas  
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2. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.
3. The Respondent is entitled to administratively garnish the wages of the Petitioner.

### **ORDER**

For the foregoing reasons, the wages of Petitioner 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. § 285.11(i).

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

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**In re: CHRISTINA J. CANOVAS.**  
**Docket No. 12-03671.**  
**Decision and Order.**  
**Filed July 24, 2012.**

AWG.

Kayla Dreyer, Esq., for Petitioner.  
Michelle Tanner for RD.

*Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.*

### **DECISION AND ORDER**

This matter is before the Administrative Law Judge 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 10, 2012, 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 on July 24, 2012.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on May 25, 2012. The Petitioner who is represented by Counsel, Kayla Dreyer, filed a Narrative, Memorandum of Law and Request for Interpreter with the Hearing Clerk on July 16, 2012. At the hearing held on July 24, 2012, both the Petitioner and Michelle Tanner, Appeals Coordinator, Rural Development, United States Department of Agriculture, St. Louis, Missouri testified.

In the Memorandum of Law, Petitioner raises affirmative defenses alleging that USDA failed to timely liquidate the property and in so doing failed to mitigate the loss. Examination of the sequence of events reflects however that the delay was the result of the Petitioner filing for Chapter 13 relief under the Bankruptcy Act and the accumulation of additional debt during that period was the result of the Petitioner's failure to make regular payments reducing the amount owed. Laches, a defense based upon undue delay in asserting a legal right or privilege, has long been held to be inapplicable to actions of the Government. *United States v. Kirkpatrick*, 22 U.S. (9 Wheat) 720 (1824); *See also, Gaussen v. United States*, 97 U.S. 584,590 (1878); *German Bank v. United States*, 148 U.S. 573, 579 (1893); *United States v. Verdier*, 164 U.S. 213, 219 (1896); *United States v. Mack*, 295 U.S. 480, 489 (1935).

Moreover, contrary to Petitioner's assertion that she was not afforded loss mitigation or moratorium relief, the file reflects that payment assistance packages were sent to her. RX-5. No provision currently exists under regulations to provide the services of an interpreter (See generally, 7 C.F.R. §3.62); however, given that the Petitioner is represented and she had the services of an interpreter, it is difficult to see how the Petitioner will be prejudiced by the government's failure to provide such services.

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

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### **Findings of Fact**

1. On January 21, 2004, the Petitioner received a home mortgage loan in the amount of \$80,000.00 from Rural Development (RD) for property located in Los Fresnos, Texas. RX-1.
2. The loan was accelerated for foreclosure in June of 2006 for monetary default; however, the foreclosure action was held in abeyance when the Petitioner filed for relief under Chapter 13 of the Bankruptcy Act. RX-2, 3.
3. The Bankruptcy proceeding were subsequently dismissed on May 13, 2010 and the foreclosure proceeding were then resumed. RX-3.
4. The property was sold at foreclosure sale on July 6, 2010 and the property was acquired by RD for a bid of \$45,025.00. RX-4.
5. Prior to the sale, Petitioner owed \$106,340.64 for principal, interest and recoverable costs. After application of the funds, the remaining amount due was \$60,900.62. RX-6.
6. After receipt of Treasury offsets, the remaining unpaid debt is in the amount of \$53,625.62 exclusive of potential Treasury fees. RX-7.
7. The Petitioner's income is currently exceeded by her expenses. PX-7.

### **Conclusions of Law**

1. Petitioner is indebted to USDA Rural Development in the amount of \$53,625.62 for the mortgage loan extended to her.
2. The Petitioner is under a financial hardship at this time.
3. The Respondent is **NOT** entitled to administratively garnish the wages of the Petitioner.

**ADMINISTRATIVE WAGE GARNISHMENT ACT****ORDER**

For the foregoing reasons, the wages of Petitioner **MAY NOT** be subjected to administrative wage garnishment at this time. Should Petitioner's financial position improve, RD may seek to recommence proceedings; however, any subsequent determinations of hardship will be made by Treasury.

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

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**In re: DEBBIE D. HARVEY.**  
**Docket No. 12-0368.**  
**Decision and Order.**  
**Filed July 25, 2012.**

**AWG.**

Petitioner, pro se.

Michelle Tanner for RD.

*Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.*

**DECISION AND ORDER**

This matter is before the Administrative Law Judge upon the request of the 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 10, 2012, 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 case for a telephonic hearing on July 25, 2012.

The Respondent complied with the Prehearing Order and a Narrative was filed, together with supporting documentation on May 25, 2012. The Petitioner has neither filed any material subsequent to the Request

Debbie D. Harvey  
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for Hearing nor otherwise complied with the Prehearing Order. At the hearing held on July 25, 2012, both the Petitioner and Michelle Tanner, Appeals Coordinator, Rural Development, United States Department of Agriculture, St. Louis, Missouri testified.

This case is problematic for a number of reasons. Initially, while possibly waived in order to preserve the sale it appears that Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) failed to secure a first lien on the property prior to all others as the Deed which conveyed the property to the Petitioner and her husband retained a Vendor's Lien for \$15,000.00 which was secured by a Deed of Trust to Meier Mortgage, Inc.<sup>1</sup> RX-2. On July 5, 2005, RD undertook to pay off that indebtedness (RX-5; 3 of 29) and in September of 2005 received an Assignment of Note and Deed of Trust from Chase Home Finance. LLC which represented itself to then be the holder of the Note and Deed of Trust. RX-2, (7 and 8 of 9.) The Display History/Notes reflect that the borrowers were contacted to sign a Reamortization Agreement; however, it was never executed or return to RD. RX-5 (5 of 29) That same exhibit then reflects that although the borrowers had notified the field office on or about April 6, 2006 that they were no longer living in the property, on April 17, 2006, the Agency nonetheless sent the Notice of Acceleration to the borrowers at the property address. The record then reflects that the foreclosure sale did not occur until June 3, 2008.

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**

1. On January 31, 1997, Debbie D. Harvey and her husband James Harvey, III received a home mortgage loan in the amount of \$95,500.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) for property located in Leander, Texas. RX-1.

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<sup>1</sup> The record does not contain any information that FmHA was aware of the prior lien or that approval of the prior indebtedness was given.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

2. On the same date, Petitioner and her husband executed a Deed of Trust in favor of Meier Mortgage, Inc. securing indebtedness of \$15,000.00 arising out of a Vendor's Lien retained in the Deed of Conveyance of the above property to them and having priority over the home mortgage loan to FmHA. RX-2.
3. On July 5, 2005, RD undertook to pay off the prior Deed of Trust indebtedness then amounting to \$20,778.36 (RX-5; 3 of 29) and in September of 2005 received an Assignment of Note and Deed of Trust from Chase Home Finance. LLC which represented itself to then be the holder of the Note and Deed of Trust. RX-2, (7 and 8 of 9.)
4. Although the Deed of Trust to Meier Mortgage, Inc. reflects that the recorded document was to be sent to Chase Manhattan Mortgage Corporation, the record does not contain evidence of the assignment from Meier Mortgage, Inc. to any subsequent holder. RX-2.
5. Although there are no intermediate assignments contained in the record, the assignment to United States Department of Agriculture Rural Housing Service reflects that it was received from Chase Home Finance LLC, an entity other than either Meier Mortgage, Inc. or Chase Manhattan Mortgage Corporation. RX-2.
6. Although RD sent a Notice of Acceleration to the property address in April of 2006, the foreclosure sale was not conducted until June of 2008.
7. USDA claims an alleged debt of \$32,768.91 and referred that amount to Treasury. RX-7.
8. There is no indication that any amounts have been received via the Treasury Offset Program.
9. For the deficiencies noted in the Conclusions of Law, the amount established to be due will be reduced to \$11,990.55, exclusive of potential Treasury fees.

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### **Conclusions of Law**

1. The Secretary has jurisdiction in this matter.
2. The Agency failed in its obligation to act diligently in the following instances.
  - a. A first and prior lien on the property was not obtained.
  - b. The Agency undertook to pay off the prior Deed of Trust indebtedness then amounting to \$20,778.36 (RX-5; 3 of 29) and in September of 2005 received an Assignment of Note and Deed of Trust from an entity which the file does not establish to be the then holder of the Note and Deed of Trust. RX-2, (7 and 8 of 9.)
  - c. Despite Acceleration of the Indebtedness in April of 2006, the foreclosure sale did not take place until June of 2008, over two years later.
3. Petitioner is indebted to USDA Rural Development in the amount of \$11,990.55 for the mortgage loan extended to her.
4. All procedural requirements for administrative wage offset set forth in 31 C.F.R. § 285.11 have been met.
5. The Respondent is entitled to administratively garnish the wages of the Petitioner.

### **ORDER**

For the foregoing reasons, the wages of Petitioner 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. § 285.11(i).

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

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**ADMINISTRATIVE WAGE GARNISHMENT ACT****In re: VANESSA JOHNSON.****Docket No. 12-0371.****Decision and Order.****Filed July 25, 2012.**

AWG.

Petitioner, pro se.

Michelle Tanner for RD.

*Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.***DECISION AND ORDER**

This matter is before the Administrative Law Judge upon the request of the 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 10, 2012, 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 case for a telephonic hearing on July 25, 2012.

The Respondent complied with the Prehearing Order and a Narrative was filed, together with supporting documentation on June 4, 2012. The Petitioner has neither filed any material subsequent to the Request for Hearing nor otherwise complied with the Prehearing Order. Nothing further having been received from the Petitioner, and there being no compliance with the Prehearing Order, the Petitioner will be deemed to have waived the right to a hearing and the matter will be decided upon the record before me.

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.

Vanessa Johnson  
71 Agric. Dec. 696

### **Findings of Fact**

1. On October 20, 2004, Vanessa Johnson and co-borrower John Vix received a home mortgage loan from Bell American Mortgage, LLC in the amount of \$122,100.00 for the purchase of property located in Webster, Wisconsin. RX-2.
2. On August 16, 2004, prior to obtaining the loan, the Petitioner and the co-borrower had executed a Loan Guarantee Agreement with Rural Development (RD), USDA in which she agreed to repay to RD any loss incurred in connection with the above loan. RX-1.
3. In 2008, the Petitioner and the co-borrower defaulted on the mortgage loan and the residence was ultimately sold for \$36,550.00. RX-3.
4. The record does not contain any foreclosure action pleadings or indicate whether a deficiency judgment obtained.
5. Thereafter, although the Narrative and RX-2 indicate that the Bell America Mortgage was sold to Chase Manhattan Mortgage Corporation, the records reflect that RD paid JP Morgan Chase Bank, N.A., an entity not established to be the then holder of the note, the sum of \$45,551.00 on the Loan Guarantee. RX-6, 7.
6. After application of amounts have been received via the Treasury Offset Program, the amount of \$27,222.00 remains allegedly due, exclusive of potential Treasury fees. RX-10.

### **Conclusions of Law**

1. The Secretary has jurisdiction in this matter.
2. The Agency has failed in its burden of proof of establishing a debt in this matter.
3. USDA paid an entity under the guarantee agreement that was not established by the record to be the then holder of the note entitled to make such a loss claim.

**ADMINISTRATIVE WAGE GARNISHMENT ACT****ORDER**

1. For the foregoing reasons, no debt being established, the wages of the Petitioner may **NOT** be subjected to administrative wage garnishment.
2. All amounts collected from the Petitioner through the Treasury Offset Program subsequent to the foreclosure sale shall be refunded to her.
3. No debt having been established, issuance of a 1099 to the Petitioner reflecting forgiveness of a debt is **NOT** authorized.

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

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**In re: MICHELLE MARTINEZ.**  
**Docket No. 12-0372.**  
**Corrected Decision and Order.**  
**Filed July 26, 2012.**

**AWG.**

Petitioner, pro se.  
Michelle Tanner for RD.

*Corrected Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.*

**CORRECTED DECISION AND ORDER**

This matter is before the Administrative Law Judge upon the request of Michelle Martinez 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 15, 2012, 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 case for a telephonic hearing on July 26, 2012.

Michelle Martinez  
71 Agric. Dec. 698

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on June 12, 2012. The Petitioner failed to provide any material to the Hearing Clerk, did not comply with the instructions contained in the Prehearing Order, and refused delivery of the Narrative and related exhibits sent to her by Rural Development. Accordingly, it will be deemed that the Petitioner has waived her right to a hearing and the issues before me will be decided on the basis of the record.

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**

1. On June 4, 2007, Michelle Martinez applied for and received a home mortgage loan guarantee from Rural Development (RD), United States Department of Agriculture (USDA). RX-1.
2. On July 10, 2007, Petitioner obtained a home mortgage loan for the purchase of property located in Coalinga, California from J.P. Morgan Chase Bank, N.A. (Chase) for \$180,540.00. RX-2.
3. In 2010, the Petitioner defaulted on the mortgage loan and foreclosure proceedings were initiated. A foreclosure sale was conducted on August 6, 2010 and Chase acquired the property with a bid of \$59,500.00. RX-3.
4. Chase submitted a loss claim and USDA paid Chase the sum of \$151,864.89 for principal, accrued interest, protective advances, liquidation costs and property sale costs. RX-6, 7.
5. After receipt of Treasury offsets, the remaining unpaid debt is in the amount of \$148,667.01, exclusive of potential Treasury fees.

#### **Conclusions of Law**

1. Michelle Martinez is indebted to USDA Rural Development in the amount of \$148,667.01 for the mortgage loan guarantee extended to her.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

2. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.
3. The Respondent is entitled to administratively garnish the wages of the Petitioner.

**ORDER**

For the foregoing reasons, the wages of Michelle Martinez 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. § 285.11(i).

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

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**In re: JORDY WEAVER.**  
**Docket No. 12-0378.**  
**Decision and Order.**  
**Filed July 26, 2012.**

**AWG.**

Petitioner, pro se.  
Michelle Tanner for RD.

*Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.*

**DECISION AND ORDER**

This matter is before the Administrative Law Judge upon the request of Jordy Weaver asking 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 15, 2012, 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

Jordy Weaver  
71 Agric. Dec. 701

concerning the existence of the debt and setting the case for a telephonic hearing on July 26, 2012.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on June 7, 2012. The Petitioner filed her materials, a letter and a Consumer Debtor Financial Statement with the Hearing Clerk on July 11, 2012. At the hearing held on July 26, 2012, both the Petitioner and Michelle Tanner, Appeals Coordinator, Rural Development, United States Department of Agriculture, St. Louis, Missouri participated.

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**

1. On July 16, 2008, Jordy Weaver applied for and received a home mortgage loan guarantee from Rural Development (RD), United States Department of Agriculture (USDA). RX-1.
2. On August 26, 2008, she obtained a home mortgage loan for the purchase of property located in Casa Grande, Arizona from Wells Fargo Bank, N.A. (Wells Fargo) for \$105,458.00. RX-2.
3. In 2010, the Petitioner defaulted on her mortgage loan and foreclosure proceedings were initiated. RX-6. The foreclosure sale was held on September 7, 2010 and Wells Fargo acquired the property with a bid of \$56,950.00. RX-4.
4. Wells Fargo submitted a loss claim and USDA paid Wells Fargo the sum of \$75,846.75 for principal, accrued interest, protective advances, liquidation costs and property sale costs. RX-7, 8.
5. The remaining unpaid debt after application of Treasury offsets is in the amount of \$75,846.75, exclusive of potential Treasury fees.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

6. The Consumer Debtor Financial Statement submitted by the Petitioner reflects that she has been employed for only seven months which is short of the twelve continuous month period required for garnishment.

**Conclusions of Law**

1. Jordy Weaver is indebted to USDA Rural Development in the amount of \$75,846.75 for the mortgage loan guarantee extended to her.
2. Because the Petitioner has been employed for only seven months, she is not eligible to be garnished at this time.
3. The Respondent is **NOT** entitled to administratively garnish the wages of the Petitioner at this time.

**ORDER**

For the foregoing reasons, the wages of the Petitioner may **NOT** be subjected to administrative wage garnishment. Once a continuous twelve month period of employment has been established, garnishment action may be resumed; however, any hardship determination in such case will be made by Treasury.

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

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Linda Faulkner  
71 Agric. Dec. 703

**In re: LINDA FAULKNER.  
Docket No. 12-0373.  
Decision and Order.  
Filed July 26, 2012.**

AWG.

Petitioner, pro se.  
Michelle Tanner for RD.

*Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.*

### **DECISION AND ORDER**

This matter is before the Administrative Law Judge upon the request of Linda Faulkner asking 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 15, 2012, 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 case for a telephonic hearing on July 26, 2012.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on June 7, 2012. The Petitioner filed her material, a Consumer Debtor Financial Statement with the Hearing Clerk on July 17, 2012. At the hearing held on July 26, 2012, both the Petitioner and Michelle Tanner, Appeals Coordinator, Rural Development, United States Department of Agriculture, St. Louis, Missouri participated.

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.

**ADMINISTRATIVE WAGE GARNISHMENT ACT****Findings of Fact**

1. On August 19, 2008, Linda Faulkner applied for and received a home mortgage loan guarantee from Rural Development (RD), United States Department of Agriculture (USDA). RX-1.
2. On September 16, 2008, she obtained a home mortgage loan for the purchase of property located in Fountain Inn, South Carolina from Carolina Bank for \$100,918.00. RX-2.
3. The note and mortgage to Carolina Bank was subsequently sold to JP Morgan Chase Bank, N.A. (Chase). RX-2.
4. In 2009, the Petitioner defaulted on her mortgage loan and foreclosure proceedings were initiated. RX-6. The foreclosure sale was held on March 1, 2010 and Chase acquired the property with a bid of \$92,465.73. RX-3.
5. Chase submitted a loss claim and USDA paid Chase the sum of \$43,658.59 for principal, accrued interest, protective advances, liquidation costs and property sale costs. RX-6, 7.
6. The remaining unpaid debt after application of Treasury offsets is in the amount of \$41,046.61, exclusive of potential Treasury fees.
7. The Consumer Debtor Financial Statement submitted by the Petitioner reflects roughly equal income and expenses, with expenses exceeding income taking into account car insurance and taxes.
8. The petitioner is at further risk of being laid off or having her hours cut by her employer by reason of the current economic situation.

**Conclusions of Law**

1. Linda Faulkner is indebted to USDA Rural Development in the amount of \$41,046.61 for the mortgage loan guarantee extended to her.
2. The Petitioner is under a financial hardship at the present time.

Danielle Bodle  
71 Agric. Dec. 705

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

### **ORDER**

For the foregoing reasons, the wages of the Petitioner may **NOT** be subjected to administrative wage garnishment. Should RD determine that Petitioner's financial condition has improved, garnishment action may be taken; however, any hardship determination in such case will be made by Treasury.

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

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**In re: DANIELLE BODLE.**  
**Docket No. 12-0380.**  
**Decision and Order.**  
**Filed July 27, 2012.**

AWG.

Petitioner, pro se.  
Michelle Tanner for RD.

*Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.*

### **DECISION AND ORDER**

This matter is before the Administrative Law Judge upon the request of Danielle Bodle 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 15, 2012, 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 case for a telephonic hearing on July 27, 2012.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on June 8, 2012. The Petitioner failed to provide any material to the Hearing Clerk and did not comply with the instructions contained in the Prehearing Order. Accordingly, it will be deemed that the Petitioner has waived her right to a hearing and the issues before me will be decided on the basis of the record.

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**

1. On May 1, 2007, Danielle Bodle and her then husband Shaun R. Bodle applied for and received a home mortgage loan guarantee from Rural Development (RD), United States Department of Agriculture (USDA). RX-1.
2. On May 31, 2007, Petitioner and her then husband obtained a home mortgage loan for the purchase of property located in Skidmore, Missouri from J.P. Morgan Chase Bank, N.A. (Chase) for \$40,816.00. RX-2.
3. In 2010, the Petitioner defaulted on the mortgage loan and foreclosure proceedings were initiated. RX-6 A foreclosure sale was conducted on February 10, 2010 and Chase acquired the property with a bid of \$32,300.00. RX-3.
4. Chase submitted a loss claim and USDA paid Chase the sum of \$30,612.83 for principal, accrued interest, protective advances, liquidation costs and property sale costs. RX-6, 7.
5. After receipt of Treasury offsets, the remaining unpaid debt is in the amount of \$25,125.51, exclusive of potential Treasury fees.

**Conclusions of Law**

1. Danielle Bodle, is indebted to USDA Rural Development in the amount of \$25,125.51 for the mortgage loan guarantee extended to her.

Jason McCanless  
71 Agric. Dec. 707

2. All procedural requirements for administrative wage offset set forth in 31 C.F.R. § 285.11 have been met.
3. The Respondent is entitled to administratively garnish the wages of the Petitioner.

### **ORDER**

For the foregoing reasons, the wages of the Danielle Bodle 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. § 285.11(i).

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

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**In re: JASON MCCANLESS.**  
**Docket No. 12-0383.**  
**Decision and Order.**  
**Filed July 31, 2012.**

**AWG.**

William A. Kozub, Esq., for Petitioner.  
Michelle Tanner for RD.

*Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.*

### **DECISION AND ORDER**

This matter is before the Administrative Law Judge upon the request of Jason McCanless 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 15, 2012, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

direct the exchange of information and documentation concerning the existence of the debt and setting the case for a telephonic hearing on July 31, 2012.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on June 7, 2012. The Petitioner filed his material with the Hearing Clerk on July 31, 2012, consisting of a Narrative and a letter from Attorney William Kozub to the Department of the Treasury and a Consumer Debtor Financial Statement setting forth the Petitioner's financial condition. At the hearing held on July 31, 2012, both the Petitioner and Michelle Tanner, Appeals Coordinator, Rural Development, United States Department of Agriculture, St. Louis, Missouri testified. Petitioner's wife, Samantha McCanless participated as well, but was not sworn.

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**

1. On September 17, 2008, Petitioner and his wife applied for and received a home mortgage loan guarantee from Rural Development (RD), United States Department of Agriculture (USDA). RX-1.
2. On February 12, 2009, the couple obtained a home mortgage loan for the purchase of property located in Queen Creek, Arizona from CNN Mortgage for \$159,702.00. RX-2.
3. On April 2, 2009, the note and mortgage were sold to JP Morgan Chase Bank. RX-2 and Petitioner's Narrative.
4. Following an unforeseen job loss in mid 2009, Petitioner and his wife defaulted on the mortgage loan and despite Petitioner's efforts to secure modification of the loan foreclosure proceedings were initiated. Petitioner's Narrative and RX-3.
5. A foreclosure sale was held on April 21, 2011 and the property was sold to a third party for a bid of \$64,500.00. RX-3.

Jason McCanless  
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6. Chase submitted a loss claim and USDA paid Chase the sum of \$96,569.82 for unpaid principal, accrued interest, protective advances, liquidation costs and property sale costs. RX-4, 5.
7. After application of Treasury offsets, the remaining unpaid debt is in the amount of \$96,187.00, exclusive of potential Treasury fees.
8. The income and expenses of the Petitioner's household of five are approximately equal.

#### **Conclusions of Law**

1. Jason McCanless is indebted to USDA Rural Development in the amount of \$96,187.00 for the mortgage loan guarantee extended to him.
2. The Petitioner is under a financial hardship at the current time.
3. The Respondent is NOT entitled to administratively garnish the wages of the Petitioner.

#### **ORDER**

For the foregoing reasons, the wages of the Jason McCanless may NOT be subjected to administrative wage garnishment. The debt will remain at Treasury for cross servicing. Should the Petitioner's financial condition improve, proceedings may be reinstated; however, any hardship determination at that time will be made by Treasury.

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

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**ADMINISTRATIVE WAGE GARNISHMENT ACT**

**In re: JOYCE A. SMITH.  
Docket No. 12-0384.  
Decision and Order.  
Filed July 31, 2012.**

**AWG.**

Petitioner, pro se.

Michelle Tanner for RD.

*Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.*

**DECISION AND ORDER**

This matter is before the Administrative Law Judge upon the request of Joyce A. Smith 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 15, 2012, 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 case for a telephonic hearing on July 31, 2012.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on June 8, 2012. The Petitioner failed to provide any material to the Hearing Clerk and did not comply with the instructions contained in the Prehearing Order. Accordingly, it will be deemed that the Petitioner has waived her right to a hearing and the issues before me will be decided on the basis of the record.

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**

1. On June 12, 1987, the Petitioner received the first of two home mortgage loan in the amount of \$37,500.00 from Farmers Home Administration (FmHA), United States Department of Agriculture

Joyce A. Smith  
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(USDA), now Rural Development (RD) for property located in West Point, Mississippi. RX-1.

2. On November 30, 1987, the second loan in the amount of \$1,000.00 was made. RX-1.
3. The loans were accelerated for foreclosure on June 12, 2003 for monetary default and the property was sold at a foreclosure sale on January 12, 2004 for a bid of \$14,600.00 from a third party. RX-3.
4. After application of sale proceeds and an insurance refund, the amount due was \$25,107.25. RX-3, 4.
5. After application of Treasury offsets, the remaining unpaid debt is in the amount of \$21,835.25, exclusive of potential Treasury fees. RX-6.

#### **Conclusions of Law**

1. Petitioner is indebted to USDA Rural Development in the amount of \$21,835.25 for the mortgage loan extended to her.
2. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.
3. The Respondent is entitled to administratively garnish the wages of the Petitioner.

#### **ORDER**

For the foregoing reasons, the wages of Petitioner 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. § 285.11(i).

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

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**ADMINISTRATIVE WAGE GARNISHMENT ACT**

**In re: NEIL BUNTYN.  
Docket No. 12-0267.  
Decision and Order.  
Filed August 2, 2012.**

**AWG—Dismissal—Prejudice, with.**

Robert C. Burnett, Esq., for Petitioner.  
Michelle Tanner for RD.

*Decision and Order entered by Janice K. Bullard, Administrative Law Judge.*

**DECISION AND ORDER DISMISSING  
WAGE GARNISHMENT ACTION**

This matter is before the Office of Administrative Law Judges (“OALJ”) upon the petition of Neil Buntyn (“Petitioner”) challenging the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development Agency (“Respondent”; “USDA-RD”); and if established, the propriety of imposing administrative wage garnishment.

On March 5, 2012, Petitioner timely requested a hearing before the Office of Administrative Law Judges (“OALJ”) upon notice of intent to garnish his wages. By Order issued March 29, 2012, a hearing was scheduled to commence on April 26, 2012. At the hearing, I continued the matter pending the filing of additional information by both Petitioner and USDA-RD. Both parties filed additional documents with the Hearing Clerk and the hearing was rescheduled to commence on August 1, 2012.

I held the hearing as scheduled. Michelle Tanner appeared and testified on behalf of USDA-RD, and also represented the agency. Petitioner testified, and was assisted by Robert C. Barnett, Esq. I entered into the record all of the documents filed by both parties.

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

Neil Buntyn  
71 Agric. Dec. 712

### **Findings of Fact**

1. On April 23, 2004, the Petitioner signed a Form RD-1980-21, Request for Single Family Housing Loan Guarantee. RX-1.
2. By signing the certification included in Form RD-1980-21, Petitioner agreed to reimburse USDA-RD for any loss claim paid by USDA-RD to the Lender. RX-1.
3. On April September 28, 2004, Petitioner received a loan from AMSouth Bank (“AM South”) to purchase real property located in Brandon, Mississippi. RX-2.
4. AM South assigned the loan to JP Morgan Chase Bank (“Chase”), but the Assignment of the Deed of Trust was not signed until May 5, 2008. RX-2, page 4.
5. Despite this lapse in documentation, Chase became the entity that serviced Petitioner’s loan immediately after the loan was made. PX 2; PX-4; PX-5.
6. In 2006, Chase offered Petitioner a moratorium on payments on his loan. PX-4; PX-5.
7. Thereafter, Chase found that Petitioner was in default. PX-4; PX-5.
8. On June 22, 2006, Petitioner received a letter from lawyers for Chase seeking to collect the entire principal and interest due on the loan as well as fees through foreclosure. PX 2.
9. Petitioner had tried to sell the property, but could not get clear title. PX-1.
10. The property was sold to Chase at foreclosure sale on May 13, 2009, after it spent years clearing title for itself. PX-1.
11. Chase did not appear to assist Petitioner in clearing title, nor in properly servicing the account. PX 1 through 4.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

12. Chase presented a loss claim to USDA-RD, which refused to pay the claim without additional documentation. PX-1.

13. USDA-RD Loan Specialist Robert Rubin conducted an inquiry into the circumstances underlying this transaction and concurred that one of the lenders had failed to properly file the assignment of the property and failed to properly record the deed of trust. PX 1.

14. USDA-RD finally paid the loss claim to Chase on April 25, 2011. RX-6 – RX-8.

15. Chase sold the property, and USDA-RD recovered \$1,760.00 credit against the claim it paid. *Id.*

16. USDA-RD established the loss claim as an account payable by Petitioner. RX-9.

17. USDA-RD referred Petitioner's account to the U.S. Department of Treasury ("Treasury") for collection pursuant to applicable law. RX-10.

**Conclusions of Law**

1. The Secretary has jurisdiction in this matter.
2. Petitioner's request for a hearing was timely filed.
3. The failure to properly record a deed of trust and assignment colored title to the property, and, therefore, USDA paid an entity under the guarantee agreement that had not been legally established as the holder of the note when the purported default on the account occurred.
4. Although the foreclosure action was concluded after the assignment was made, Petitioner had no recourse with respect to his account, which was not properly assigned to Chase until years after that lender evicted Petitioner.
5. Chase's initiation of a foreclosure action during a period when it (1) was not legal title holder to the real property; and (2) according to its

Neil Buntyn  
71 Agric. Dec. 712

own records, had placed Petitioner's account in a state of moratorium, is inconsistent and not supported by law.

6. There is no evidence that Petitioner was in default with Chase when it initiated foreclosure action in 2006.

7. Chase's failure to prosecute a foreclosure action for a number of years due to the flaws in legal filings demonstrates that Chase failed to comply with USDA regulations.

8. USDA-RD has failed in its burden of proof of establishing a debt in this matter.

9. Petitioner's accounts with USDA-RD and Treasury shall be abolished and no action shall be taken to collect any alleged debt related to this claim.

10. Any amount collected from the Petitioner arising out of the loss claim was improper and should be refunded to him.

11. Petitioner has not benefited from the forgiveness of a debt due to the United States, as the record does not support the existence of a debt related to a loss claim; accordingly, Petitioner has not realized imputed income and a Form 1099 cannot be issued.

12. Both Petitioner and USDA-RD may have a cause of action against Chase for its conduct with respect to this case.

### **ORDER**

For the foregoing reasons, no debt being established, the wages of the Petitioner may **NOT** be subjected to administrative wage garnishment.

Any amounts collected from the Petitioner subsequent to acceleration of his account in 2006 **SHALL** be refunded.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

Any account established for collection of alleged indebtedness related to the payment of a loss claim to Chase **shall be cancelled and abolished.**

No entity of the United States shall issue Petitioner a Form 1099, as Petitioner has not realized imputed income as the result of this transaction.

This matter is DISMISSED, with prejudice.

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

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**In re: EUGENE CRANMER.  
Docket No. 12-0365.  
Decision and Order.  
Filed August 8, 2012.**

**AWG.**

Petitioner, pro se.  
Michelle Tanner for RD.

*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

**DECISION AND ORDER**

1. The hearing was held as scheduled by telephone on August 8, 2012. Eugene Cranmer ("Petitioner Cranmer") did not participate. (Petitioner Cranmer did not participate by telephone: Petitioner Cranmer provided no telephone number on his Hearing Request; and in response to my Order issued June 12, 2012, Petitioner Cranmer provided no telephone number where he could be reached for the hearing by telephone.)
2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Michelle Tanner.

Eugene Cranmer  
71 Agric. Dec. 716

### Summary of the Facts Presented

3. Petitioner Cranmer owes to USDA Rural Development a balance of **\$50,616.31** (as of June 18, 2012) in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service **Guarantee** (see RX 1, esp. p. 2) for a loan made on July 5, 2007, by Wells Fargo Bank, N.A., for a home in New York, the balance of which is now unsecured (“the debt”). See USDA Rural Development Exhibits RX 1 through RX 10, plus Narrative, Witness & Exhibit List (filed June 22, 2012), which are admitted into evidence, together with the testimony of Michelle Tanner.

4. This **Guarantee** establishes an **independent** obligation of Petitioner Cranmer, “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 1, 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 **\$50,616.31** would increase the current balance by \$14,172.57, to \$64,788.88. See USDA Rural Development Exhibits, esp. RX 10, p. 2.

6. The amount Petitioner Cranmer borrowed was \$75,849.00 on July 5, 2007. RX 2. Petitioner Cranmer defaulted on the mortgage loan payments to Wells Fargo Bank, N.A. (“Wells Fargo”), and the loan was accelerated for foreclosure. The Due Date of Last Payment Made was July 1, 2008. RX 6, p. 4. Foreclosure was initiated on February 10, 2009. A foreclosure sale was held on March 10, 2010, at which Wells Fargo acquired the property back into inventory with the highest bid, \$59,500.00. RX 3.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

7. The “As Is” value from one appraisal as of March 19, 2010 was \$59,000.00. RX 4, RX 6, p. 5. The “As Is” Value per the Brokers Price Opinion (BPO) as of March 13, 2010 was \$49,900.00. RX 6, p. 5. Wells Fargo placed the home “as is” on the market for resale for \$59,000.00. RX 5, pp. 1-3. Thus, the Original List Price was \$59,000.00. The Final List Price was \$47,642.50. The property sold to a third party for \$43,500.00, with the closing date being August 3, 2010. RX 5, pp. 6-9.

8. Mr. Cranmer stated in his Hearing Request: “Never dealt with Department of Agriculture. Don’t know what it for.” But Mr. Cranmer had been contacted by the Department of Agriculture by letter dated August 13, 2011, explaining the loss claim that the Department of Agriculture, Rural Development, paid to Wells Fargo on March 9, 2011 in the amount of \$51,922.41. RX 8, RX 6, p. 11, and USDA Rural Development Narrative. Thus \$51,922.41, the amount USDA Rural Development paid, is the amount USDA Rural Development recovers from Petitioner Cranmer under the *Guarantee*. No more interest accrues; no interest, no penalties. The interest stopped accruing when Wells Fargo timely submitted its loss claim.

9. Collections by Treasury from Petitioner Cranmer in 2012, *offsets*, applied to reduce the debt (after the collection fees were subtracted) leave **\$50,616.31** unpaid as of June 18, 2012 (excluding the potential remaining collection fees). See RX10, esp. p. 1.

10. Although my Hearing Notice and Prehearing Deadlines, dated June 12, 2012, invited financial disclosure from Petitioner Cranmer, such as filing a Consumer Debtor Financial Statement, he filed nothing. Thus I cannot calculate Petitioner Cranmer’s current disposable pay. (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.) There is no evidence before me to use to consider the factors to be considered under 31 C.F.R. § 285.11. In other words, I cannot tell whether garnishment to repay “the debt” (see paragraph 3) in the amount of 15% of Petitioner Cranmer’s disposable pay creates a financial hardship.

Eugene Cranmer  
71 Agric. Dec. 716

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

### **Discussion**

12. Garnishment of Petitioner Cranmer's disposable pay is authorized. I encourage **Petitioner Cranmer and Treasury's collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Cranmer, 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 Cranmer, 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. Petitioner Cranmer, you may want to have someone else with you on the line if you call.

### **Findings, Analysis and Conclusions**

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

14. Petitioner Cranmer owes the debt described in paragraphs 3 through 9.

15. **Garnishment up to 15% of Petitioner Cranmer's disposable pay** is authorized. There is no evidence that financial hardship will be created by the garnishment. 31 C.F.R. § 285.11.

16. **No refund** to Petitioner Cranmer of monies already collected or collected prior to implementation of this Decision is appropriate, and no refund is authorized.

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

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

**ORDER**

18. Until the debt is repaid, Petitioner Cranmer 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).

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

20. I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through *offset* or garnishment of Petitioner Cranmer's pay, to be returned to Petitioner Cranmer.

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

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**In re: RUBEN MENDOZA.**  
**Docket No. 12-0460.**  
**Decision and Order.**  
**Filed August 9, 2012.**

**AWG.**

Petitioner, pro se.  
Michelle Tanner for RD.  
*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

**DECISION AND ORDER**

1. The hearing was held as scheduled on August 8, 2012. Ruben Mendoza ("Petitioner Ruben Mendoza") did not participate; Petitioner Ruben Mendoza had no notice of the hearing: the Hearing Clerk's attempts to reach him by mail failed; USDA Rural Development's attempt to deliver copies to him by UPS failed. The address used was the same address that the U.S. Department of the Treasury used to send to Petitioner Ruben Mendoza, in February 2010, the "Notice of Intent to

Ruben Mendoza  
71 Agric. Dec. 720

Initiate Administrative Wage Garnishment Proceedings”. The address was for the home that had been lost to foreclosure in 2002 - - perhaps not the current address for Petitioner Ruben Mendoza.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (“USDA Rural Development”) and is represented by Michelle Tanner.

### **Summary of the Facts Presented**

3. The hearing was prompted by a copy of Petitioner Ruben Mendoza’s divorce decree from 1999 having been FAXed in May 2012 to the U.S. Department of the Treasury, from USDA Rural Development in Amarillo, Texas. A copy of this Decision will be forwarded to that office, for forwarding to Petitioner Ruben Mendoza. In the divorce decree, Petitioner Ruben Mendoza’s co-borrower (his former wife, Loretta Mendoza, also known as Loretta Sandoval) was awarded the “real property commonly known as 1012 W. Grand, Dimmitt, Castro County, Texas . . . . **and any indebtedness on the real property.**” Emphasis added. Petitioner Ruben Mendoza has no doubt grown weary of payments being taken from him to pay the debt that the divorce decree made his former wife’s responsibility.

4. Legally, USDA Rural Development (the U.S. Department of the Treasury collects for USDA Rural Development) could collect the entire debt from Petitioner Ruben Mendoza. Because of the divorce decree, Petitioner may have recourse against his co-borrower, Loretta Mendoza, also known as Loretta Sandoval, to be reimbursed for amounts he has paid on the debt. Petitioner Ruben Mendoza may want to consult with an attorney about that; he may want to pursue that.

5. When Petitioner Ruben Mendoza entered into the borrowing transaction in 1990 with his co-borrower, Loretta Mendoza, certain responsibilities were fixed, as to each of them. The debt is Petitioner Ruben Mendoza and his co-borrower’s joint-and-several obligation. The divorce decree did not change the fact that each of them is liable to USDA Rural Development. So far, it appears that all the collections

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

have been taken from Petitioner Ruben Mendoza and none from his former wife the co-borrower.

6. Beginning in 2007, through 2012, Petitioner Ruben Mendoza's income tax refunds and stimulus money were intercepted and applied to reduce the debt. *See* RX 6, p. 1. These *offsets* of Petitioner Ruben Mendoza's **income tax refunds** or other **Federal monies** payable to the order of Mr. Mendoza had reduced the loan (the loan that in 1990 was the larger of the 2 loans), to a remaining balance of \$136.61 as of June 21, 2012. RX 6, pp. 1-2.

7. Beginning in 2010, through 2012, Petitioner Ruben Mendoza's wages have been garnished to reduce the debt. *See* RX 6, pp. 5-7. These wage garnishments of Petitioner Ruben Mendoza's **disposable pay** had reduced the loan (the loan that in 1990 was the smaller of the 2 loans), to a remaining balance of \$2,138.95 as of June 21, 2012. RX 6, pp. 5-8.

8. Adding together the remaining balances of both loans, as of June 21, 2012, Petitioner Ruben Mendoza owed to USDA Rural Development a balance of **\$2,275.56** in repayment of two United States Department of Agriculture / Farmers Home Administration loans made in 1990 for a home in Texas, the balance of which is now unsecured ("the debt"). [Petitioner Ruben Mendoza's co-borrower (his former wife, Loretta Mendoza, also known as Loretta Sandoval) owed this, too.] *See* USDA Rural Development Exhibits RX 1 through RX 6, especially RX 6, plus Narrative, Witness & Exhibit List (filed June 22, 2012), which are admitted into evidence, together with the testimony of Michelle Tanner.

9. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **\$2,275.56** would increase the current balance by \$637.16, to \$2,912.72. *See* RX 6 plus USDA Rural Development Narrative.

10. Petitioner Ruben Mendoza is responsible and able to negotiate the repayment of the debt with Treasury's collection agency.

Ruben Mendoza  
71 Agric. Dec. 720

### **Discussion**

11. I encourage **Petitioner Ruben Mendoza and Treasury's collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Ruben Mendoza, 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 Ruben Mendoza, 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 ask that **the debt be apportioned between you and your co-borrower**. Petitioner Ruben Mendoza, you may choose to have someone on the line with you when you call.

### **Findings, Analysis and Conclusions**

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

13. Petitioner Ruben Mendoza had no notice of the hearing that I held on August 8, 2012, and he is entitled to another hearing before an administrative law judge at the U.S. Department of Agriculture, if he requests one from the U.S. Department of the Treasury.

14. Petitioner Ruben Mendoza may want to contact Michelle Tanner of USDA Rural Development in St. Louis, Missouri to request that the documents be sent to him again. [These documents are the USDA Rural Development Exhibits RX 1 through RX 6 plus Narrative, Witness & Exhibit List (filed June 22, 2012).] Michelle Tanner's contact information is below.

### **ORDER**

15. Until the debt is repaid, Petitioner Ruben Mendoza 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).

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties, and a **courtesy copy sent to USDA Rural Development in Amarillo, Texas**, attn. Melissa Torrez (contact information below).

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**In re: CONNIE PARRISH.**  
**Docket No. 12-0431.**  
**Decision and Order.**  
**Filed August 10, 2012.**

AWG.

Petitioner, pro se.  
Michelle Tanner for RD.

*Decision and Order entered by James P. Hurt, Hearing Official.*

**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 7, 2012, 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-4 on June 27, 2012. Ms. Parrish filed her financial statements on July 2, 2012 and July 20, 2012 which I now label as PX-1 and PX-2, respectively. At my request on August 8, 2012, Ms. Parrish filed a statement (which I now label as PX-3) of her recollection of the facts and circumstances surrounding the Power of Attorney used to bind her to the RD loan (See RX- 1 @ page 7 of 11).

Connie Parrish  
71 Agric. Dec. 724

On July 18, 2012 and at the time set for the hearing, both parties were available. Ms. Michelle Tanner represented RD. Ms. Parrish was self represented. The parties were sworn.

Petitioner has been employed for more than one year.

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 7, 1995, Petitioner obtained a loan for the purchase of a primary home in the amount of \$51,700.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) to purchase her home on a property located in Blanchard, Louisiana. RX-1 @p. 7 of 11.
2. The borrower was called to active military duty and was stationed out of the country at the time of the closing of the mortgage. She states that she granted a notarized limited power of attorney (to her then fiancé – Kenneth Wayne Parrish) to complete the settlement documents for the RD loan. PX-3.
3. The Power of Attorney document was accepted by RD loan processors as “Duly authorized pursuant to Power of Attorney dated March 22, 1995.” RX-1 @ 7 of 11.
4. Neither party could produce a copy of the Power of Attorney.
5. The borrower abandoned the property and moved to another state. RX-1 @ 8 of 11. The Borrower’s account was delinquent. The loan was accelerated for foreclosure.
6. The home was sold to a third party who assumed the loan in the amount of \$46,000 under new rates and terms on March 4, 1998. Narrative, RX-1 @ p. 9 of 11.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

7. Prior to the sale the Borrower owed RD for principal, interest, fees, plus late fees for a total of \$59,328.75 to pay off the RD loan. Narrative, RX-3.

8. After application of the proceeds of the sale to the third party, an additional \$1,030.50 was credited to the unpaid amount prior to the transfer of the delinquent account to Treasury. RX-3.

9. Treasury has collected an additional \$1,936.32 (net) towards the debt. RX-3, RX-4 @ p. 1 of 3.

10. The remaining amount due of \$10,361.93 was transferred to Treasury for collection on June 25, 2012. RX-4 @ p.2 of 3.

11. The potential Treasury collection fees stated were \$2,901.34 RX-4 @ p. 2 of 3. (See paragraph 13 below).

12. The loan servicing company (or bank) improperly issued a IRS 1099-c form for "Debt Cancellation" and "Interest Forgiven." PX -2.

13. IRS collected \$2,482.00 as additional income taxes as a result of the improperly issued IRS 1099-c. RX-2 @ p. 17 of 31. I determine that her debt related to the RD loan should be reduced by \$2,482.00 from the amount claimed by RD.

14. Ms. Parrish has been employed for more than one year. There are two income earners in her household. There is an autistic minor child in the home. Ms. Parrish's paystub indicates she works less than a 40 week and that her net income is approximately 52% of the household income.

15. Petitioner raised the issue of financial hardship and I utilized her financial statements and payroll information to prepare a Financial Hardship Calculation<sup>1</sup>.

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<sup>1</sup> The Financial Hardship Calculation is not posted on the OALJ website.

Connie Parrish  
71 Agric. Dec. 724

### **Conclusions of Law**

1. Petitioner is indebted to USDA Rural Development in the amount of \$7,879.93 (\$10,361.93 - \$2,482.00) exclusive of potential Treasury fees for the mortgage loan extended to her.
2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of \$2,206.38 (28% of \$7,879.93).
3. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.
4. 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.

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**ADMINISTRATIVE WAGE GARNISHMENT ACT**

**In re: BARBARA A. SMITH.**

**Docket No. 12-0499.**

**Decision and Order.**

**Filed August 13, 2012.**

**AWG.**

Petitioner, pro se.

Michelle Tanner for RD.

*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

**DECISION AND ORDER**

1. The hearing by telephone, scheduled for August 23, 2012, is CANCELED, because the issue of whether Barbara A. Smith, the Petitioner (“Petitioner Smith”) can withstand garnishment without it causing financial hardship, can be decided based on the written record.
2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent (“USDA Rural Development”), is represented by Michelle Tanner.

**Summary of the Facts Presented**

3. Chief Judge Peter M. Davenport’s Decision and Order filed November 18, 2010 determined that Petitioner Smith is indebted to USDA Rural Development. USDA Rural Development’s Exhibit RX 2. USDA Rural Development’s Exhibits RX 1 through RX 3, plus Narrative, Witness & Exhibit List (filed on July 24, 2012), are admitted into evidence. Michelle Tanner’s testimony will not be required.
4. Petitioner Smith’s completed “Consumer Debtor Financial Statement” plus two recent pay stubs (filed on August 10, 2012), are admitted into evidence, together with Petitioner Smith’s Hearing Request (dated June 3, 2012), which included a completed “Consumer Debtor Financial Statement” plus her 2011 W-2 and a recent pay stub. Petitioner Smith’s testimony will not be required.
5. Petitioner Smith owes to USDA Rural Development **\$12,638.78** (as of July 21, 2012) in repayment of a USDA Farmers Home

Barbara A. Smith  
71 Agric. Dec. 728

Administration loan borrowed in 1994 for a home in Florida, the balance of which is now unsecured (“the debt”). *See* USDA Rural Development Exhibits.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **\$12,638.78** would increase the balance by \$3,538.86, to \$16,177.64. *See* USDA Rural Development Exhibits, esp. RX 3, p. 4.

7. Petitioner Smith’s co-borrower, her former husband, Kenneth Smith, is making considerable progress repaying the debt. Petitioner Smith’s Consumer Debtor Financial Statement indicates that her former husband is disabled; the monthly *offsets* (*see* RX 3, pp. 5-7) may be coming from his disability payments. [He may want to file his own Hearing Request.] Petitioner Smith’s income tax refund repaid a considerable amount in February 2011, but she owes the IRS for 2011 taxes.

8. Petitioner Smith’s disposable pay (within the meaning of 31 C.F.R. § 285.11) has historically been a little more than \$1,000.00 every 2 weeks, roughly \$2,100.00 - \$2,200.00 per month. [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance and, here, disability insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.] Lately, though, Petitioner Smith has not been getting full-time hours. (“My work has been slow so I have been doing two days a week 24 hr. When I can I do overtime.”) Based on the two most recent pay stubs, Petitioner Smith’s disposable pay has been roughly \$685.00 every 2 weeks, roughly \$1,500.00 per month. Petitioner Smith is trying to help family members cope, including those with medical challenges and the expenses that result. At this time, Petitioner Smith cannot afford to be garnished without it causing Petitioner Smith and the family who depend on her financial hardship (within the meaning of 31 C.F.R. § 285.11).

9. To prevent financial hardship, potential garnishment to repay “the debt” (*see* paragraph 5) must be limited to **0%** of Petitioner Smith’s disposable pay through September 2014; then, beginning October 2014, **up to 5%** of Petitioner Smith’s disposable pay. 31 C.F.R. § 285.11.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

10. Petitioner Smith is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

**Discussion**

11. Garnishment is authorized in limited amount (5% of disposable pay) beginning October 2014. See paragraphs 8, 9. I encourage **Petitioner Smith and Treasury's collection agency to negotiate** the repayment of the debt. Petitioner Smith, 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 Smith, 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. Petitioner Smith, you may want to request apportionment of debt between you and the co-borrower. Petitioner Smith, 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. Petitioner Smith, you may wish to include someone else with you in the telephone call if you call to negotiate.

**Findings, Analysis and Conclusions**

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

13. **Garnishment is not authorized through September 2014;** thereafter, garnishment is authorized, **up to 5%** of Petitioner Smith's disposable pay. 31 C.F.R. § 285.11.

14. I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through **offset** or garnishment of Petitioner Smith's pay, to be returned to Petitioner Smith.

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

Annie G. Denmark  
71 Agric. Dec. 731

### **ORDER**

16. Until the debt is repaid, Petitioner Smith 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 of Petitioner Smith's disposable pay through September 2014. Beginning October 2014, garnishment **up to 5%** of Petitioner Smith'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.

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**In re: ANNIE G. DENMARK, N/K/A ANNIE G. WALTON.**  
**Docket No. 12-0450.**  
**Decision and Order.**  
**Filed August 14, 2012.**

AWG.

Petitioner, pro se.

Giovanna Leopardi for RD.

*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

### **DECISION AND ORDER**

1. The hearing by telephone was held as scheduled on August 14, 2012. Annie G. Denmark, full name Annie Gail Denmark Walton (Petitioner Walton) did not participate. (Petitioner Walton did not participate by telephone: she did not answer at the "alternate" telephone number she had provided in May 2012 with her Hearing Request, and voice mail had not been set up, so no message could be left. Further, in response to my instructions in the Hearing Notice filed June 27, 2012, Petitioner Walton

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

provided no telephone number where she could be reached for the hearing by telephone.)

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (“USDA Rural Development”) and is represented by Giovanna Leopardi.

**Summary of the Facts Presented**

3. Admitted into evidence are Giovanna Leopardi’s testimony and USDA Rural Development’s Exhibits RX 1 through RX 5, plus Narrative, Witness & Exhibit List, which were filed on June 22, 2012.

4. Petitioner Walton owes to USDA Rural Development **\$5,090.09** (as of June 20, 2012, *see esp.* RX 5, pp. 1, 2), in repayment of a United States Department of Agriculture / Farmers Home Administration loan made in 1991, for a home in Georgia. The balance 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 **\$5,090.09**, would increase the balance by \$1,425.23 to \$6,515.32. *See esp.* RX 5, p. 2.

7. The amount Petitioner Walton borrowed in 1991 was \$40,000.00. RX 1. Foreclosure was begun in 2004. A Chapter 13 Bankruptcy was dismissed on January 3, 2005. A short sale took place in February 2005, for \$24,000.00 (RX 3, pp. 7 and 9). By the time the sale proceeds (\$24,000.00) were applied to reduce the balance, the USDA Rural Development debt had grown to \$41,386.09 (RX 4):

\$ 35,415.65	Principal
\$ 4,822.32	Interest
\$ 1,061.29	Recoverable Costs
<u>\$ 86.83</u>	Interest on Recoverable Costs
\$ 41,386.09	Amount Due when sale funds were applied on the loan
=====	

Annie G. Denmark  
71 Agric. Dec. 731

RX 4, and USDA Rural Development Narrative.

The sale proceeds of \$24,000.00 were applied to the Amount Due. Interest stopped accruing when the sale funds were applied on the loan. An additional foreclosure fee of \$175.00 was added to the balance, resulting in \$17,561.09 being due. Collections from Treasury (through *offsets* of Petitioner Walton's income tax refunds that were intercepted and applied to the debt, and her stimulus money (*see* RX 5, p. 1), reduced the debt from \$17,561.09 to **\$5,090.09** unpaid as of June 20, 2012 (excluding the potential remaining collection fees). *See* RX 5 and USDA Rural Development Narrative.

8. Petitioner Walton still owes the balance of **\$5,090.09** (as of June 20, 2012, excluding the potential remaining collection fees), and USDA Rural Development may collect that amount from her. The issue is whether she should be garnished. Petitioner Walton failed to file a Consumer Debtor Financial Statement, or anything, in response to my instructions in the Hearing Notice [filed June 27, 2012]. Thus I cannot calculate Petitioner Walton's current disposable pay. (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.)

9. There is no evidence before me to use to consider the factors to be considered under 31 C.F.R. § 285.11. In other words, I cannot determine whether garnishment to repay "the debt" (*see* paragraph 4) in the amount of 15% of Petitioner Walton's disposable pay would create financial hardship. What I can determine is that Petitioner Walton is doing an excellent job of getting the debt repaid through *offsets* of her income tax refunds, and she pays a smaller amount toward collection fees through *offsets*, than she will if she makes payments, so I encourage Petitioner Walton to continue to repay the debt in the way she has been doing. RX 5, p. 1.

#### Discussion

10. Petitioner Walton, if you wish to contact Treasury's collection agency to negotiate a compromise of the debt, you may telephone Treasury's

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Walton, 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. Petitioner Walton, 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. Petitioner Walton, you may wish to include someone else with you in the telephone call when you call to negotiate.

**Findings, Analysis and Conclusions**

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

12.Petitioner Walton owes the debt described in paragraphs 4 through 8.

13.**Garnishment is not authorized through September 2015.** Beginning October 2015, potential garnishment to repay the debt **up to 15%** of Petitioner Walton's disposable pay is authorized. 31 C.F.R. § 285.11.

14.**No refund** to Petitioner Walton of monies already collected or collected prior to implementation of this Decision is appropriate, and no refund is authorized.

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

**ORDER**

16.Until the debt is repaid, Petitioner Walton 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 in any amount **through**

Herbert Brooks  
71 Agric. Dec. 735

**September 2015.** USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment **up to 15%** of Petitioner Walton's disposable pay beginning **October 2015**. 31 C.F.R. § 285.11.

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

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**In re: HERBERT BROOKS.**  
**Docket No. 12-0350.**  
**Decision and Order.**  
**Filed August 15, 2012.**

AWG.

Petitioner, pro se.  
Michelle Tanner for RD.

*Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.*

### **DECISION AND ORDER**

This matter is before the Administrative Law Judge upon the request of Herbert Brooks, 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, 2012, 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 case for a telephonic hearing on June 28, 2012.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on May 14, 2012. The Petitioner failed to file any additional material with the Hearing Clerk; however, in his Request for Hearing, Mr. Brooks stated that the signature on the documents was not his and had been signed by his ex wife. A comparison of the signatures on the Request for Hearing and the Loan

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

Guarantee application raised sufficient doubt that Rural Development was asked to see if an individual could be located at the time the document was signed to verify that it was in fact Mr. Brooks that signed the loan guarantee application. Rural Development failed to provide such a person, but instead has submitted a copy of Mr. Brooks' Driver License from the State of Georgia.

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**

1. On June 31, 2008, an individual whose identity has not been established applied for and received a home mortgage loan guarantee from Rural Development (RD), United States Department of Agriculture (USDA). RX-1. The loan guarantee application form does not require notarization and no individual has been produced who was present at the time the document was signed.
2. On July 31, 2008, Herbert T. Brooks and Keyonta Brooks obtained a home mortgage loan for property located in Winder, Georgia from Homestar Financial Corporation for \$170,917.00 and before a Notary Public executed a note and Security Deed secured by the property. RX-2.
3. Homestar Financial Corporation subsequently sold the note and mortgage to Chase Manhattan Mortgage. RX-2.
4. In 2009, the mortgage loan was defaulted on and foreclosure proceedings were initiated. RX-3.
5. JP Morgan Chase submitted a loss claim and USDA paid Chase the sum of \$80,321.87 for unpaid principal, accrued interest, protective advances, liquidation costs and property sale costs. RX-9.
6. The record does not contain any court records pertaining to foreclosure proceedings, but contains a deed executed by Chase Home Finance, LLC under the powers granted in the Security Deed to Homestar Financial Corporation. The record recites assignment of the

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note and mortgage to Chase Home Finance, LLC; however, those assignments are not part of the record.

7. The debt was submitted to Treasury for collection on June 8, 2011 and Petitioner's salary is being garnished.

### **Conclusions of Law**

1. USDA Rural Development failed to establish that Herbert T. Brooks executed the loan guarantee application upon which the debt is alleged to be due.
2. The Respondent is not entitled to administratively garnish the wages of the Petitioner.

### **ORDER**

1. For the foregoing reasons, the wages of Herbert T. Brooks may NOT be subjected to administrative wage garnishment.
2. All amounts collected from the Petitioner by Treasury shall be refunded.
3. As no debt was established, no 1099 may be issued.

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

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**ADMINISTRATIVE WAGE GARNISHMENT ACT**

**In re: DOROTHY JOHNSON.**

**Docket No. 12-0461.**

**Decision and Order.**

**Filed August 16, 2012.**

**AWG.**

Petitioner, pro se.

Giovanna Leopardi for RD.

*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

**DECISION AND ORDER**

1. The hearing by telephone was held on August 15, 2012. Dorothy Johnson, also known as Dorothy A. Johnson and as Dorothy M. Johnson (Petitioner Johnson) participated, accompanied by Mssrs. Michael Large and Gus Smith of South Carolina Legal Services.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (“USDA Rural Development”) and is represented by Giovanna Leopardi.

**Summary of the Facts Presented**

3. Admitted into evidence are Petitioner Johnson’s testimony and her August 13, 2012 filing, including Petitioner’s Exhibits PX 1 through PX 6; her July 20, 2012 filing; and her Hearing Request dated May 23, 2012.

4. Admitted into evidence are Giovanna Leopardi’s testimony and USDA Rural Development’s June 25, 2012 filing, including Exhibits RX 1 through RX 5, plus Narrative, Witness & Exhibit List.

5. Petitioner Johnson owes to USDA Rural Development **\$26,566.58** (as of June 22, 2012, *see esp.* RX 5, pp. 1, 2), in repayment of a United States Department of Agriculture / Farmers Home Administration loan made in 1992, for a home in Virginia. The balance is now unsecured (“the debt”).

Dorothy Johnson  
71 Agric. Dec. 738

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **\$26,566.58**, would increase the balance by \$7,438.64 to \$34,005.22. *See* esp. RX 5, p. 2.

7. The amount Petitioner Johnson borrowed in 1992 was \$64,000.00. RX 1. Foreclosure was begun in 1997. The foreclosure sale took place on August 19, 1998. USDA Rural Development received the sale proceeds (\$44,056.25) on November 13, 1998. By then, the USDA Rural Development debt had grown to \$74,090.22 (RX 4):

\$ 62,969.92	Principal
\$ 9,175.61	Interest
\$ 1,942.53	Recoverable Costs
\$ <u>2.16</u>	Interest on Recoverable Costs
\$ 74,090.22	Amount Due when sale funds were applied on the loan
<u>=====</u>	

RX 4, RX 3, USDA Rural Development Narrative, and Giovanna Leopardi's testimony.

The sale proceeds of \$44,056.25 were applied to the Amount Due. Interest stopped accruing either on the day of the foreclosure sale (August 19, 1998) OR when the sale proceeds were applied on the loan (November 13, 1998, RX 3, p. 3). [Based on the Notice of Acceleration which identifies a daily interest rate of \$14.2329 after June 10, 1997 (RX 2, p. 1), I believe interest stopped accruing on the day of the foreclosure sale.] An additional foreclosure fee of \$425.00 was added to the balance, resulting in \$30,458.97 being due (the deficiency) from Petitioner Johnson.

8. USDA Rural Development received no debt settlement package from Petitioner Johnson. (If the forms had been submitted, there would have been an offer of settlement from her with extensive financial documentation to prove what she could afford to pay). By letter dated December 30, 2000, Petitioner Johnson was notified that USDA Rural

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

Development was referring the debt to Treasury for collection. Collections from Treasury (through *offsets* of Petitioner Johnson's income tax refunds that were intercepted and applied to the debt, beginning in 2001, and her stimulus money (*see* RX 5, p. 1)), reduced the debt from \$30,458.97 to **\$26,566.58** unpaid as of June 22, 2012 (excluding the potential remaining collection fees). *See* RX 5, RX 3 and USDA Rural Development Narrative.

9. Petitioner Johnson still owes the balance of **\$26,566.58** (as of June 22, 2012, excluding the potential remaining collection fees), and USDA Rural Development may collect that amount from her. The issue is whether she should be garnished. Petitioner Johnson's Consumer Debtor Financial Statements, earnings records, Affidavit, and all her extraordinarily thorough documentation, permit me to calculate her current disposable pay. (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.) Further, I see Petitioner Johnson's entire financial circumstances, including her earnings history for more than four decades. Petitioner Johnson should **not** be garnished, ever.

10. Garnishment to repay "the debt" (*see* paragraph 5) in the amount of 15% of Petitioner Johnson's disposable pay, or in any amount, would create financial hardship. Petitioner Johnson has gotten nearly \$4,000.00 of the debt repaid through *offsets* of her income tax refunds and a stimulus payment; it is clear that the loss of those funds has caused her financial hardship.

**Discussion**

11. Petitioner Johnson, if you wish to contact Treasury's collection agency to negotiate a compromise of the debt, you may telephone Treasury's collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Johnson, 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. Petitioner Johnson, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the

Dorothy Johnson  
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claim for less. Petitioner Johnson, you may wish to include someone else with you in the telephone call when you call to negotiate.

### **Findings, Analysis and Conclusions**

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

13. Petitioner Johnson owes the debt described in paragraphs 5 through 9.

14. **Garnishment is not authorized.** Petitioner Johnson's filings and testimony persuade me that garnishment in any amount will cause financial hardship; I conclude that it is highly probable that this will remain true throughout the future. 31 C.F.R. § 285.11.

15. **No refund** to Petitioner Johnson of monies already collected or collected prior to implementation of this Decision through *offset* is appropriate, and no refund of *offsets* is authorized. If, however, any amounts have been collected through garnishment of Petitioner Johnson's pay prior to implementation of this Decision, those amounts shall be returned to Petitioner Johnson.

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

### **ORDER**

17. Until the debt is repaid, Petitioner Johnson 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).

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

18. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment in any amount, ever. 31 C.F.R. § 285.11. USDA Rural Development, and those collecting on its behalf, will be required to **return to Petitioner Johnson** any amounts already collected through garnishment of Petitioner Johnson's pay, if any there be, prior to implementation of this Decision.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties. **The Hearing Clerk shall use the mailing address for Petitioner Johnson that she provided on her Contact Information Sheet (p. 2 of her August 13, 2012 filing).**

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**In re: JAMIE BARELA.**  
**Docket No. 12-0487.**  
**Decision and Order.**  
**Filed August 21, 2012.**

AWG.

Petitioner, pro se.  
Giovanna Leopardi for RD.  
*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

**DECISION AND ORDER**

1. The hearing by telephone was held on August 21, 2012, having been postponed from August 15, 2012 at the request of Jamie Barela, also known as Jamie A. Barela, the Petitioner (Petitioner Barela). Petitioner Barela did not participate. (Petitioner Barela did not participate by telephone: there was no answer at the telephone number for Ms. Barela provided in her Hearing Request; and in response to my instructions in the Hearing Notice [filed June 28, 2012], Petitioner Barela provided no telephone number where she could be reached for the hearing by telephone.)

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Giovanna Leopardi.

Jamie Barela  
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### Summary of the Facts Presented

3. Petitioner Barela owes to USDA Rural Development a balance of **\$95,246.05** (as of July 11, 2012, *see* RX 10, p. 2), in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service *Guarantee* (*see* RX 1, esp. p. 2) for a loan made in 2008, the balance of which is now unsecured (“the debt”). Petitioner Barela borrowed, with the co-borrower, Brian G. Sanders, to buy a home in Oregon. *See* USDA Rural Development Exhibits RX 1 through RX 11, together with the Narrative, Witness & Exhibit List (filed July 18, 2012); and the testimony of Giovanna Leopardi, all of which I admit into evidence.

4. The *Guarantee* (RX 1) establishes an **independent** obligation of Petitioner Barela, “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 1, 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 **\$95,246.05** would increase the current balance by \$26,668.89, to \$121,914.94 (as of July 11, 2012). RX 10, p. 2.

6. Petitioner Barela and her co-borrower, Brian G. Sanders, are jointly and severally liable to pay the debt. Brian G. Sanders is held responsible to pay the debt just as Petitioner Barela is, as shown by RX 10. USDA Rural Development may legally collect more than half, even all, from either one of them. Once Petitioner Barela entered into the borrowing transaction with her co-borrower, certain responsibilities were fixed. Petitioner Barela still owes the balance of **\$95,246.05** (excluding potential collection fees), as of July 11, 2012, and so does her co-

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

borrower. Even if Petitioner Barela has legal recourse against her co-borrower for monies collected from her on the debt, that does not prevent USDA Rural Development from collecting from her, pursuant to the *Guarantee*. RX 1.

7. Petitioner Barela failed to file a Consumer Debtor Financial Statement, or anything, in response to my instructions in the Hearing Notice [filed June 28, 2012]. Thus I cannot calculate Petitioner Barela's current disposable pay. (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. There is no evidence before me to use to consider the factors to be considered under 31 C.F.R. § 285.11. In other words, I cannot tell whether garnishment to repay "the debt" (*see* paragraph 3) in the amount of 15% of Petitioner Barela's disposable pay creates a financial hardship. Petitioner Barela's Hearing Request dated June 6, 2012 does indicate that she is a single mother of two children and will declare bankruptcy. I encourage Petitioner Barela to obtain advice from a bankruptcy law expert; that may be a good option. Petitioner Barela filed no financial information for me to consider: no Consumer Debtor Financial Statement, no pay stubs, nothing.

9. Petitioner Barela may choose, before filing bankruptcy, to negotiate the repayment of the debt with Treasury's collection agency.

**Discussion**

**10. Petitioner Barela, if you choose to negotiate with Treasury's collection agency, 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 Barela, 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 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 request apportionment of the debt between you and the co-borrower.**

Jamie Barela  
71 Agric. Dec. 742

Petitioner Barela, you may wish to include someone else with you in the telephone call if you call to negotiate.

### **Findings, Analysis and Conclusions**

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

12. Petitioner Barela owes the debt described in paragraphs 3 through 6.

13. **Garnishment up to 15% of Petitioner Barela's disposable pay** is authorized. There is no evidence that financial hardship will be created by garnishment. 31 C.F.R. § 285.11.

14. **No refund** to Petitioner Barela of monies already collected or collected prior to implementation of this Decision is appropriate, and no refund is authorized.

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

### **ORDER**

16. Until the debt is repaid, Petitioner Barela 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 authorized to proceed with **garnishment up to 15% of Petitioner Barela'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.

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**ADMINISTRATIVE WAGE GARNISHMENT ACT**

**In re: SARA E. BARROW, N/K/A SARA E. DAVIS.**  
**Docket No. 12-0485.**  
**Decision and Order.**  
**Filed August 22, 2012.**

**AWG.**

Petitioner, pro se.  
Giovanna Leopardi for RD.  
*Decision and Order entered by James P. Hurt, Hearing Official.*

**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 27, 2012, 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-5 on July 24, 2012. Petitioner submitted no exhibits. Petitioner was afforded a prior hearing on December 1, 2010 and a Decision and Order was issued by Administrative Law Judge, Victor W. Palmer, on December 2, 2010. That Order determined the debt owed by Petitioner, but suspended wage garnishment for six (6) months. On August 16, 2012, at the time set for the hearing, both parties were available. Ms. Giovanna Leopardi represented RD. Ms. Barrow was self represented. The parties were sworn.

Petitioner has been self-employed as a home health care giver for more than one year. She does not work for an agency and she has only one patient who pays her directly for her services. As a self-employed contractor, RD conceded that her "wages" could not be garnished, however the debt would remain and could be collected by Treasury, if

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and when, Petitioner begins receiving Federal benefits such as social security.

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 December 2, 2010, Administrative Law Judge, Victor W. Palmer determined the Petitioner's debt to Rural Development (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) to be \$14,554.26 plus potential fees to Treasury of \$4,075.19.
2. The debt remains at that amount. RX-5 @ p. 2 of 4.
3. Ms. Barrow's (k/n/a Sara E. Davis) present husband is not liable on the Petitioner's debt, however Petitioner and her former husband, Patrick G. Barrow are jointly and severally liable on the debt.
4. Ms. Barrow provided contact information for Patrick G. Barrow.
5. Ms. Barrow is now living in Jonestown, Texas and working as a self-employed home health giver.

#### **Conclusions of Law**

1. Petitioner is jointly and severally indebted to USDA Rural Development in the amount of \$14,554.26 exclusive of potential Treasury fees for the mortgage loan extended to her.
2. In addition, Petitioner is jointly and severally indebted for potential fees to the US Treasury in the amount of \$4,075.19.
3. All procedural requirements for administrative wage offset set forth in 31 C.F.R. § 285.11 have been met.
4. The Respondent is entitled to administratively garnish the wages of the Petitioner.

**ADMINISTRATIVE WAGE GARNISHMENT ACT****ORDER**

For the foregoing reasons, if and when Petitioner earns wages - then the wages of Petitioner shall be subjected to administrative wage garnishment. 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.

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**In re: DUSTIN MCQUIGG.**  
**Docket No. 12-0500.**  
**Decision and Order.**  
**Filed August 23, 2012.**

**AWG.**

Petitioner, pro se.

Michelle Tanner for RD.

*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

**DECISION AND ORDER**

1. The hearing was held as scheduled by telephone on August 23, 2012. Dustin McQuigg, also known as Dustin L. McQuigg ("Petitioner McQuigg") did not participate. (Petitioner McQuigg did not participate by telephone: no one answered at the telephone number Petitioner McQuigg provided on his Hearing Request; and contrary to my Order issued July 25, 2012, Petitioner McQuigg provided no telephone number where he could be reached for the hearing by telephone.)
2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Michelle Tanner.

Dustin McQuigg  
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### Summary of the Facts Presented

3. Petitioner McQuigg owes to USDA Rural Development a balance of **\$54,786.16** (as of July 21, 2012) in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service *Guarantee* (see RX 1, esp. p. 2) for a loan made on September 29, 2006 by First National Bank and Trust for a home in Nebraska, the balance of which is now unsecured (“the debt”). See USDA Rural Development Exhibits RX 1 through RX 11, plus Narrative, Witness & Exhibit List (filed July 24, 2012), which are admitted into evidence, together with the testimony of Michelle Tanner.

4. This *Guarantee* establishes an **independent** obligation of Petitioner McQuigg, “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 1, 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 **\$54,786.16** would increase the current balance by \$15,340.12, to \$70,126.28. See USDA Rural Development Exhibits, esp. RX 10, p. 2.

6. The amount Petitioner McQuigg borrowed was \$67,450.00 on September 29, 2006. RX 2. The loan was sold to US Bank Home Mortgage (“US Bank”). Petitioner McQuigg defaulted on the mortgage loan payments to US Bank, and the loan was accelerated for foreclosure. The Due Date of Last Payment Made was May 1, 2009. RX 6, p. 5. Foreclosure was initiated on November 13, 2009. A foreclosure sale was held on February 26, 2010, at which US Bank acquired the property back into inventory with the highest bid, \$59,500.00. RX 6, p. 5.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

7. The “As Is” value from one appraisal as of March 18, 2010 was \$45,000.00. RX 6, p. 6. The “As Is” Value per the Brokers Price Opinion (BPO) as of March 11, 2010 was \$52,500.00. RX 6, p. 6. US Bank placed the home “as is” on the market for resale for \$52,500.00. RX 6, p. 6. Thus, the Original List Price was \$52,500.00. The Final List Price was \$39,900.00. The lender US Bank marketed the home but did not accomplish a sale within the prescribed marketing period, which ended on August 25, 2010. RX 6, p. 6.

A liquidation appraisal was done for USDA Rural Development on October 19, 2010 (*see* RX 5, p. 8; RX 6, p. 6).<sup>1</sup>

8. USDA Rural Development reimbursed the lender **\$54,786.16** on July 29, 2011. RX 6, p. 11. Thus **\$54,786.16**, the amount USDA Rural Development paid, is the amount USDA Rural Development recovers from Petitioner McQuigg under the *Guarantee*. RX 7. No more interest accrues; no interest, no penalties. The interest stopped accruing on the date of the liquidation appraisal, which was October 19, 2010 (*see* RX 5, p. 8; RX 6, p. 6). RX 7 details the loss claim paid under the *Guarantee*, showing how the debt became **\$54,786.16**, including showing the \$25,000.00 liquidation value as a credit.

9. Petitioner McQuigg stated in his Hearing Request: “Co-Signor Melinda VanEperen is responsible for Half!!!” Petitioner McQuigg and his co-borrower, Melinda VanEperen, are jointly and severally liable to pay the debt. Melinda VanEperen is held responsible to pay the debt just as Petitioner McQuigg is, as shown by RX 10. USDA Rural Development may legally collect more than half, even all, from either one of them. Once Petitioner McQuigg entered into the borrowing transaction with his co-borrower, certain responsibilities were fixed. Petitioner McQuigg owes the balance of **\$54,786.16** (excluding potential collection fees) as of July 21, 2012, and so does his co-borrower. Even if Petitioner McQuigg has legal recourse against his co-borrower for monies collected from him on the debt, that does not prevent USDA Rural Development from collecting from him, pursuant to the *Guarantee*. RX 1.

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<sup>1</sup> The liquidation value, used because the home did not sell within the prescribed period, was only \$25,000.00. RX 5, p. 8; RX 6, p. 6.

Dustin McQuigg  
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10. Although my Hearing Notice and Prehearing Deadlines, dated July 25, 2012, invited financial disclosure from Petitioner McQuigg, such as filing a Consumer Debtor Financial Statement, he filed nothing. Thus I cannot calculate Petitioner McQuigg's current disposable pay. (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.) There is no evidence before me to use to consider the factors to be considered under 31 C.F.R. § 285.11. In other words, I cannot tell whether garnishment to repay "the debt" (*see* paragraph 3) in the amount of 15% of Petitioner McQuigg's disposable pay creates a financial hardship.

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

#### **Discussion**

12. Garnishment **up to 15%** of Petitioner McQuigg's disposable pay is authorized. Petitioner McQuigg, if you choose to negotiate with Treasury's collection agency, 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**. I encourage **Petitioner McQuigg and Treasury's collection agency to negotiate promptly** the repayment of the debt. Petitioner McQuigg, 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 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 request apportionment of the debt between you and the co-borrower.** Petitioner McQuigg, you may wish to include someone else with you in the telephone call if you call to negotiate.

#### **Findings, Analysis and Conclusions**

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

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

14. Petitioner McQuigg owes the debt described in paragraphs 3 through 8.

15. **Garnishment up to 15% of Petitioner McQuigg's disposable pay** is authorized. There is no evidence that financial hardship will be created by the garnishment. 31 C.F.R. § 285.11.

16. **No refund** to Petitioner McQuigg of monies already collected or collected prior to implementation of this Decision is appropriate, and no refund is authorized.

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

**ORDER**

18. Until the debt is repaid, Petitioner McQuigg 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).

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

20. I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through *offset* or garnishment of Petitioner McQuigg's pay, to be returned to Petitioner McQuigg.

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

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Elva Garza  
71 Agric. Dec. 753

**In re: ELVA GARZA, A/K/A ELVA E. GARZA.  
Docket No. 12-0346.  
Decision and Order.  
Filed August 28, 2012.**

AWG.

Mike P. Fortune, Esq. for Petitioner.  
Michelle Tanner for RD.

*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

### **DECISION AND ORDER**

1. The hearing by telephone was held on June 26 and August 21, 2012. The attorney representing Elva Garza, also known as Elva E. Garza, the Petitioner ("Petitioner Garza"), Mike P. Fortune, Esq.,<sup>1</sup> participated on her behalf.
2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Michelle Tanner.

### **Summary of the Facts Presented**

3. Petitioner Garza's filings are admitted into evidence, including email sent July 16, 2012 by Mike P. Fortune, Esq., providing copies of the Summons and Complaint filed by Chase Home Finance, LLC, in Case Code 30404 in the Circuit Court, Dodge County, Wisconsin on January 7, 2010; letter over the signature of Mike P. Fortune dated May 25, 2012; email providing Petitioner's contact information filed May 8, 2012; and Petitioner's Hearing Request dated February 2, 2012, including letter over the signature of Mike P. Fortune dated March 2, 2012.
4. USDA Rural Development's Exhibits RX 1 through RX 10, plus Narrative, Witness & Exhibit List, were filed on May 24, 2012, and are admitted into evidence, together with the testimony of Michelle Tanner.

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<sup>1</sup> Mr. Fortune represents both Ms. Elva Garza and her co-borrower Mr. Javier Garza, but Mr. Garza is not a party to this case.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

5. Petitioner Garza bought a home in Wisconsin in 2007, borrowing \$148,700.00 to pay for it. RX 2. USDA Rural Development's position is that Petitioner Garza owes to USDA Rural Development **\$82,797.27** (as of May 23, 2012), in repayment of the United States Department of Agriculture / Rural Development / Rural Housing Service **Guarantee** (see RX 1, esp. p. 2; RX 10, esp. p. 2) for the loan made in 2007 ("the debt"). The loan was made by Mortgage Specialists LLC, a Wisconsin Limited Liability Company; subsequently sold to Trustcorp Mortgage Co. (RX 2, p. 4); and then sold to Chase Home Finance, LLC. The **Guarantee** remained in force.

6. Petitioner Garza's position is that Petitioner Garza owes **nothing** to USDA Rural Development and is **due a refund** for amounts taken from her, because there is no valid debt. [Garnishment was ongoing; and her income tax refunds were intercepted (*offset*). See RX 10, p. 1.]

7. Petitioner Garza proved that Chase Home Finance, LLC, in court filings, **waived** "judgment for any deficiency against every party who is personally liable for the debt" and "expressly (**waived**) its right to obtain a deficiency judgment against any defendant in this action". Accordingly, the Circuit Court Judge for Dodge County, Wisconsin entered "Findings of Fact, Conclusions of Law and Judgment" on February 16, 2010 that include (a) judgment in the amount of \$154,566.46 in favor of Chase Home Finance, LLC; (b) contemplation of a sheriff's sale, a six-month redemption period, and confirmation of the sale ending the Garzas' possession of the premises; and (c) NO DEFICIENCY JUDGMENT against the Garzas.

8. After careful review of all of the evidence, I agree with Petitioner Garza's position. There is **no valid debt** owed by Petitioner Garza to USDA Rural Development. The **amounts taken from Petitioner Garza's pay and from her income tax refunds shall be returned to her.**]

9. The **Guarantee** (RX 1) establishes an **independent** obligation of Petitioner Garza "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

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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 1, p. 2.

10. USDA Rural Development did pay a loss claim on the requested loan to the lender. USDA Rural Development reimbursed the lender Chase Home Finance, LLC \$88,298.64 on March 30, 2011. RX 6, p. 11; RX 7. That amount, \$88,298.64, is what USDA Rural Development seeks to recover from Petitioner Garza under the **Guarantee**. RX 7, USDA Rural Development Narrative, and testimony.

11. I find that because of the actions of the lender Chase Home Finance, LLC during foreclosure, **waiving** the deficiency, the **Guarantee** is not enforceable. I find that, instead of benefitting from the **Guarantee**, as it easily could have, Chase Home Finance, LLC failed to protect the Government's interest during foreclosure and thereby rendered the loan note **Guarantee** unenforceable.

12. When the lender Chase Home Finance, LLC **waived** the deficiency in the Complaint filed January 7, 2010 in the Circuit Court, Dodge County, Wisconsin, Case Code 30404, instead of maximizing recovery, Chase Home Finance, LLC prevented USDA Rural Development from collecting the deficiency from Petitioner Garza. See Complaint attached to email sent July 16, 2012 by Mike P. Fortune, Esq. See also 7 C.F.R. § 1980.301, *et seq.*, especially 7 C.F.R. § 1980.308 and 7 C.F.R. § 1980.374.

13. Similarly, Chase Home Finance, LLC **waived** the deficiency in a case involving a **Guarantee** on a loan for a home in South Carolina. In *In re Ronald Haynes*, my colleague, Judge Janice K. Bullard, found that USDA Rural Development had failed to establish the existence of a valid debt.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

*See*

[http://www.dm.usda.gov/oaljdecisions/120516\\_12-0272\\_DO\\_RonaldHaynes.pdf](http://www.dm.usda.gov/oaljdecisions/120516_12-0272_DO_RonaldHaynes.pdf)

**Findings, Analysis and Conclusions**

14. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Garza and USDA Rural Development; and over the subject matter (administrative wage garnishment, which requires determining whether Petitioner Garza owes a valid debt to USDA Rural Development).

15. USDA Rural Development relies on *Bank Mutual v. S.J. Boyer Construction, Inc., et al.*, decided by the Wisconsin Supreme Court on July 9, 2010, which shows that a lender that elects a shortened redemption period and thereby waives its right to collect any deficiency from the debtor (S.J. Boyer) under Wis. Stat. § 846.103(2), may still obtain a judgment against the guarantors (the Boyers). *Bank Mutual* does not assist here, because the guarantors (the Boyers) did not seek recourse against the debtor (S.J. Boyer).

<http://www.wicourts.gov/sc/opinions/08/pdf/08-0912.pdf> *See* especially, footnote 25 on page 44. Here, USDA Rural Development, the guarantor, does seek recourse against the debtor - - except that Petitioner Garza was no longer a debtor once the foreclosure was completed, because no deficiency could be established.

16. The lender Chase Home Finance, LLC during foreclosure *waived* the deficiency as to Petitioner Garza in the Complaint it filed on January 7, 2010 in the Circuit Court, Dodge County, Wisconsin, Case Code 30404. Consequently, Circuit Court Judge Andrew P. Bissonnette, Dodge County, Wisconsin, entered "Findings of Fact, Conclusions of Law and Judgment" on February 16, 2010 that included (in accordance with Wis. Stat. § 846.101(2)):

"IT IS BY THE COURT FOUND,  
DETERMINED AND ADJUDGED:

\*\*\*\*

Elva Garza  
71 Agric. Dec. 753

12. THAT NO DEFICIENCY  
JUDGMENT MAY BE OBTAINED  
AGAINST ANY DEFENDANT.”

Petitioner Garza was a Defendant. No deficiency judgment may be obtained against her.

17. By waiving its right to collect any deficiency from Petitioner Garza, the lender Chase Home Finance, LLC has prevented USDA Rural Development from collecting any deficiency from Petitioner Garza.

18. In general, USDA Rural Development may collect administratively pursuant to a *Guarantee*, even where NO judgment has been entered against a borrower and NO personal deficiency has been established. Here, however, Chase Home Finance, LLC by its filings in the foreclosure action has prevented collection of a deficiency, even administratively. In my opinion, Chase Home Finance, LLC, having done so, should not have been paid \$88,298.64, or anything, on its loss claim (RX 6, p. 11), and USDA Rural Development would do well to reclaim its money.

19. Petitioner Garza does **NOT** owe a valid debt to USDA Rural Development; Petitioner Garza does **not** owe the debt described in paragraphs 4, 5, 9 and 10.

20. Garnishment is **not** authorized. *Offset* of Petitioner Garza's **income tax refunds** or other **Federal monies** payable to the order of Ms. Garza is **not** authorized.

21. Any amounts collected from Petitioner Garza, including collections from Treasury (*offsets*, which were intercepted income tax refunds due to Petitioner Garza; plus any amounts collected through garnishment of Petitioner Garza's pay prior to implementation of this Decision) **shall be returned to Petitioner Garza**.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

**ORDER**

22. USDA Rural Development shall cancel the debt as to Petitioner Garza.

23. USDA Rural Development, and those collecting on its behalf, shall **return to Petitioner Garza** any amounts already collected through garnishment or *offset*.

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

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**In re: SAVANNAH TICE.**  
**Docket No. 12-0488.**  
**Decision and Order.**  
**Filed August 28, 2012.**

**AWG.**

Petitioner, pro se.  
Giovanna Leopardi for RD.  
*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

**DECISION AND ORDER**

1. The hearing by telephone was held on August 15 and 24, 2012. Savannah Tice, once known as Savannah Sanders (Petitioner Tice) participated, accompanied by her grandmother and Terry Wood, Esq. of Adamsville, Tennessee.
2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (“USDA Rural Development”) and is represented by Giovanna Leopardi.

Savannah Tice  
71 Agric. Dec. 758

### Summary of the Facts Presented

3. Petitioner Tice's Hearing Request dated May 30, 2012, with all attachments, is admitted into evidence, together with the testimony of Petitioner Tice.
4. USDA Rural Development's Exhibits RX 1 through RX 9, plus Narrative, Witness & Exhibit List, were filed on August 27, 2012, and are admitted into evidence, together with the testimony of Giovanna Leopardi.
5. Petitioner Tice's fiancé Joseph C. Sanders (whom she later married), bought a home in Tennessee in 2005 (before they were married), borrowing \$36,000.00 to pay for it. RX 2. USDA Rural Development's position is that Petitioner Tice owes to USDA Rural Development **\$15,528.37** (as of August 24, 2012), in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service **Guarantee** (see RX 1, esp. p. 3; RX 9, esp. p. 3) for the loan made to Joseph C. Sanders in 2005 ("the debt"). The loan was made by JP Morgan Chase Bank, N.A. Chase Home Finance, LLC became the holder of or agent for the holder of the indebtedness. RX 3, p. 9.
6. Petitioner Tice's position is that Petitioner Tice owes **nothing** to USDA Rural Development and is **due a refund** for amounts taken from her, because there is no valid debt as to her. [Garnishment of her pay has been ongoing; and her income tax refunds were intercepted (*offset*). See RX 9, pp. 1-2.]
7. Petitioner Tice proved through her testimony that the **Guarantee** form she signed (see RX 1, esp. p. 3) should never have been used. I find that USDA Rural Development documents indicating that Petitioner Tice obtained a mortgage loan are in error; see, for example, RX 1, pp. 4-5.
8. Petitioner Tice testified convincingly that when she and her fiancé Joseph C. Sanders met with Rowena Pope on May 3, 2005 at American Heritage Home Loans, Ms. Pope had them sign **separate Guarantee** forms because Ms. Pope thought Mr. Sanders might qualify for the loan based on his income alone. He did. Mr. Sanders borrowed the money,

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

bought the house, and then married Petitioner Tice. They were later divorced. He has filed bankruptcy.

9. Petitioner Tice testified that Ms. Pope's comment on May 3, 2005 was to the effect, "no sense in you both being on it."

10. The crossing-out on RX 1, p. 3 of Rowena Pope's signature and date of signing: ~~5/3/05 Rowena Pope~~ - - and the insertion instead, of "6/23/05" and "Josh Mohamed" is of concern, and where RX 1, p. 1 shows a different spelling "Joshua Mohomoed" as the Lender Contact Person. It is reasonable to infer that Rowena Pope, who understood the application process, was no longer in control of the paperwork, which could explain how Petitioner Tice's name was placed by the lender on documents forwarded to USDA Rural Development. *See* RX 2, p. 5.

11. After careful review of all of the evidence, I agree with Petitioner Tice's position. There is **no valid debt** owed by Petitioner Tice to USDA Rural Development. **The amounts taken from Petitioner Tice's pay and from her income tax refunds shall be returned to her.]**

**Findings, Analysis and Conclusions**

12. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Tice and USDA Rural Development; and over the subject matter (administrative wage garnishment, which requires determining whether Petitioner Tice owes a valid debt to USDA Rural Development).

13. USDA Rural Development did pay a loss claim on the requested loan to the lender. USDA Rural Development reimbursed the lender \$20,738.65 on October 13, 2009. RX 6, p. 7; RX 7. That amount, \$20,738.65, is what USDA Rural Development seeks to recover from Petitioner Tice under the **Guarantee**. RX 1, esp. p. 3; RX 7; USDA Rural Development Narrative; and testimony. Alas, there is no operative **Guarantee** as to Petitioner Tice; any **Guarantee** was by only Joseph C. Sanders. RX 1, p. 2.

14. Petitioner Tice does **NOT** owe a valid debt to USDA Rural Development; Petitioner Tice does **not** owe the debt described in paragraphs 4, 5 and 13.

Savannah Tice  
71 Agric. Dec. 758

15. Garnishment is **not** authorized. **Offset** of Petitioner Tice's **income tax refunds** or other **Federal monies** payable to the order of Ms. Tice is **not** authorized.

16. Any amounts collected from Petitioner Tice, including collections from Treasury (**offsets**, which were intercepted income tax refunds due to Petitioner Tice; plus any amounts collected through garnishment of Petitioner Tice's pay prior to implementation of this Decision) **shall be returned to Petitioner Tice**.

17. Petitioner Tice calculates the amounts that shall be returned to her to include the amounts garnished from her pay (*see* RX 9, pp. 1-2) and

\$2,127.00 for income tax refunds,  
consisting of \$1,077.00 from the 2009  
tax return and \$1,050.00 from the 2010  
tax return.

#### **ORDER**

18. USDA Rural Development shall cancel the debt as to Petitioner Tice.

19. USDA Rural Development, and those collecting on its behalf, shall **return to Petitioner Tice** any amounts already collected through garnishment or **offset**.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties, with a courtesy copy sent also to Terry Wood, Esq.

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**ADMINISTRATIVE WAGE GARNISHMENT ACT****In re: VICTOR ALVAREZ.****Docket No. 12-0506.****Decision and Order.****Filed September 6, 2012.****AWG.**

Petitioner, pro se.

Linda Russell for RD.

*Decision and Order entered by Janice K. Bullard, Administrative Law Judge.***DECISION AND ORDER**

This matter is before the Office of Administrative Law Judges (“OALJ”) upon the timely request of Victor Alvarez (“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 2, 2012, 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 5, 2012.

The Respondent USDA-RD filed a Narrative, together with supporting documentation<sup>1</sup> on July 24, 2012 and Petitioner filed a Consumer Debtor Financial Statement<sup>2</sup> on August 15, 2012. On that date, Respondent filed an amended Narrative and document. The hearing commenced as scheduled, with Petitioner representing himself. Respondent was represented by Giovanna Leopardi, Appeals Coordinator for USDA. Both representatives testified and I admitted their evidence to the record.

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

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<sup>1</sup> References to Respondent’s exhibits herein shall be denoted as “RX-#”.

<sup>2</sup> This exhibit has been identified, and shall be referred to herein as, “PX-1”.

Victor Alvarez  
71 Agric. Dec. 762

### **Findings of Fact**

1. On March 21, 2005, Petitioner and his wife obtained a home mortgage loan in the amount of \$67,346.00 from Major Mortgage to purchase residential property located in Lexington, Maine. RX-2.
2. Before executing the promissory note for the loan, on February 4, 2005, Petitioner and his wife requested a Single Family Housing Loan Guarantee from the United States Department of Agriculture (USDA), Rural Development (RD), which was granted. RX-1.
3. By executing the guarantee request, Petitioner certified that he would reimburse USDA for the amount of any loss claim on the loan paid to the lender or its assigns.
4. The loan guarantee included a “guaranty fee” of \$1,346.00, which U.S. Bank included as part of the principal due on the loan. RX-1.
5. The loan was assigned to U.S. Bank, N.A.
6. The Petitioner subsequently defaulted on the loan and it was accelerated for foreclosure.
7. A foreclosure sale was held on February 24, 2010 and U.S. Bank acquired the property for \$48,450.00. RX-3.
8. On April 21, 2011, the property was sold for \$28,000.00. RX-5.
9. At the time of the foreclosure, the total amount due on the loan was \$72,687.31, representing principal, accrued interest, protective advances, attorney fees, appraisal and property inspection fees, and lender closing costs. RX-6; RX-7.
10. USDA paid U.S. Bank a loss claim in the amount of \$40,603.64. RX-6; RX-7.
11. USDA sent offers of debt settlement but received no response from Petitioner or his wife. RX-8.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

12. USDA-RD entered the amount of the loss claim that it paid as a debt due from Petitioner and his wife and referred the debt to the United States Department of Treasury ("Treasury") for collection. RX 9.

13. Treasury offsets were applied against the loan and the balance stands at \$36,129.13 exclusive of Treasury fees. RX-10. Treasury, through its agent, issued a notice to Petitioner of intent to garnish his wages.

14. Petitioner timely requested a hearing, which was held on September 5, 2012.

15. Petitioner does not contest the validity of the debt, but contends that the wage garnishment effected against his salary represented a substantial financial hardship.

16. The Petitioner's spouse is not currently employed, but anticipates returning to work when her infant is older.

17. The family income exceeds the family monthly expenses, except that some of the expenses do not fall within the definition of "necessary" for purposes of calculating ability to withstand wage garnishment.

18. Petitioner's wages are currently subject to garnishment for repayment of debts to creditors that have been reduced to judgment, but his income should withstand garnishment upon his wife's return to work.

19. Even allowing for Petitioner's wife's return to work, the family income will not withstand garnishment at the level of legal limits; however, Petitioner should be able to absorb garnishment at a percentage lower than the maximum.

**Conclusions of Law**

1. The Secretary has jurisdiction in this matter.
2. The initial Lender imposed a fee as principal on the loan that was not authorized under regulation or part of the loan agreement between USDA-RD and Lender

Victor Alvarez  
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3. There is no consideration for Petitioner paying a fee for guaranteeing the loan, which benefited the Lender by assuring the United States would indemnify losses.
4. Petitioner is entitled to a credit for the fee, plus the interest that had accrued through amortization for the period when the loan was made in March, 2005 until the foreclosure in April, 2005.
5. A credit should be applied to Petitioner's account in the amount of \$1,758.36, which consists of the fee of \$1,346.00 plus accrued, amortized interest in the amount of \$412.36 (calculated on the loan interest rate of 5.09% X 30 years= 6.76 per month X 61 months).
6. Petitioner is indebted to USDA Rural Development in the amount of \$34,370.77 (\$36,129.13 (-) 1,758.36) exclusive of potential Treasury fees.
7. USDA-RD may have a cause of action against the Lender Major Mortgage to recover the loss payment for the unauthorized fee and interest.
8. All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met.
9. The Petitioner is under a temporary financial hardship.
10. The Respondent is entitled to administratively garnish the wages of the Petitioner when the financial hardship is anticipated to ease within six months time; however Respondent shall not be entitled to garnish more than 5% of Petitioner's wage.
11. Treasury shall remain authorized to undertake any and all other appropriate collection action.

**ADMINISTRATIVE WAGE GARNISHMENT ACT****ORDER**

USDA-RD shall recall the loan from Treasury in order to make an adjustment to credit Petitioner's account in the amount of \$1,758.36, for an illicit fee that was included in the principal, and the accrued interest on that fee amount.

For the foregoing reasons, the wages of Petitioner shall **NOT** be subjected to administrative wage garnishment at this time. As of April 1, 2013, garnishment up to 5% of Petitioner's disposable pay is authorized. 31 C.F.R. §285.11.

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 further encouraged to consult legal advice regarding the reduction of his indebtedness to all of his creditors.

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

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 is also advised that so long as a debt remains unsatisfied, he is ineligible for other loans or benefits administered by the federal government.

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

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Lekenzi Ross  
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**In re: LEKENZI ROSS.  
Docket No. 12-0432.  
Decision and Order.  
Filed September 24, 2012.**

**AWG.**

Petitioner, pro se.  
Michelle Tanner for RD.

*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

### **DECISION AND ORDER**

1. The hearing by telephone was held on August 7 and August 24, 2012. Lekenzi Ross, the Petitioner (“Petitioner Ross”) participated, representing himself (appearing *pro se*).
2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent (“USDA Rural Development”), participated, represented by Michelle Tanner.

### **Summary of the Facts Presented**

3. USDA Rural Development’s Exhibits RX 1 through RX 5, plus Narrative, Witness & Exhibit List, filed on June 22, 2012, are admitted into evidence, together with the testimony of Michelle Tanner. Also admitted into evidence are RX 6 through RX 8, filed on August 13, 2012; and RX 9 through RX 11, filed on August 27, 2012.
4. Petitioner Ross’s Hearing Request dated in March 2012 is admitted into evidence, together with the testimony of Petitioner Ross. The record was held open through September 14, 2012 for Petitioner Ross to file a “Consumer Debtor Financial Statement” (or some other income / expense format), and documentation of his income (such as pay stubs), but Petitioner Ross did not submit any such evidence.
5. As of August 24, 2012, Petitioner Ross owed to USDA Rural Development a balance of **\$14,055.64** in repayment of the United States Department of Agriculture / Farmers Home Administration loan made to

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

his mother in 1990, for a home in Georgia. The loan balance (“the debt”) is now unsecured. Garnishment has been ongoing for more than 2-1/2 years, so the balance Petitioner Ross owes to USDA Rural Development is repeatedly being reduced. Petitioner Ross assumed the loan balance on June 28, 2000, after his mother’s death in 1999. *See* USDA Rural Development Exhibits RX 1 through RX 11, plus Narrative, Witness & Exhibit List, and the testimony of Petitioner Ross.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **\$14,055.64** would increase the current balance by \$3,935.58, to \$17,991.22. *See* RX 11.

7. The loan had been reamortized in December 1998, meaning that unpaid past due amounts were added to principal so that the loan could be made current. The reamortized principal balance in December 1998 was \$59,958.15. RX 8, p. 3. When Petitioner Ross assumed the loan, on June 28, 2000, the balance was \$59,508.88. After the last house payment made, the next payment due date was October 11, 2000. RX 2, p. 4. The house payments were no longer made. Petitioner Ross was at college out-of-state. The subsidy payments stopped when the borrower (Petitioner Ross) no longer occupied the home. *See* RX 6, p. 7. Petitioner Ross’s brother still lived in the home. Testimony of Petitioner Ross. A Notice of Acceleration and Intent to Foreclose sent to Petitioner Ross on April 12, 2002 (RX 2, pp. 1-3), showed \$58,735.15 unpaid principal and \$8,370.94 unpaid interest.

8. Petitioner Ross stated in his Hearing Request: “I do not owe the debt.” “House was sold (short sell) For more than owed (\$46,313.00) in ‘02”. I owed approx 34,000.00.” The sale was on September 3, 2002. The proceeds from sale of the home, available to apply on the loan, were \$46,313.00. RX 4. I find that Petitioner Ross is correct about the amount from the sale, but Petitioner Ross is not correct about the amount he owed: the amount was not approximately \$34,000.00; the amount owed was \$75,684.22.

9. The amount Petitioner Ross’s mother borrowed in 1990 was \$54,500.00. RX 1. By the time the home was sold on September 3, 2002, the debt had grown to \$75,684.22:

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\$ 58,735.15	Principal Balance prior to sale
\$ 10,456.44	Interest Balance prior to sale
\$ 6,101.60	Recoverable costs (such as unpaid taxes, insurance, foreclosure costs)
<u>\$ 391.03</u>	Interest on recoverable costs
<u>\$ 75,684.22</u>	Total Amount Due
=====	

RX 4, p. 1, RX 9, RX 10, and the testimony of Michelle Tanner.

10. Interest stopped accruing when sale proceeds were applied on the loan, in 2002. Proceeds from sale of the home reduced the Total Amount Due by \$46,313.00. Collections from Treasury applied to the debt (after collection fees are subtracted) have reduced the debt to **\$14,055.64** unpaid as of August 24, 2012 (excluding the potential remaining collection fees). See RX 4, RX 10 and RX 11, and the testimony of Michelle Tanner.

11. My Hearing Notice and Prehearing Deadlines, dated June 1, 2012, invited financial disclosure from Petitioner Ross, such as filing a Consumer Debtor Financial Statement. Petitioner Ross filed nothing. During both segments of the Hearing I encouraged Petitioner Ross to provide financial information. My notice that Hearing Will Resume filed August 7, 2012 requested Petitioner Ross to provide financial information. Petitioner Ross did not file a Consumer Debtor Financial Statement or pay stubs or any other documentation of his financial situation, so I cannot calculate Petitioner Ross's current disposable pay. (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.) There is no evidence before me to use to consider the factors to be considered under 31 C.F.R. § 285.11. In other words, I cannot tell whether garnishment to repay "the debt" (see paragraph 5) in the amount of 15% of Petitioner Ross's disposable pay creates a financial hardship.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

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

**Discussion**

13. Garnishment of Petitioner Ross's disposable pay is authorized. I encourage **Petitioner Ross and Treasury's collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Ross, 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 Ross, 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. Petitioner Ross, you may want to have someone else with you on the line if you call.

**Findings, Analysis and Conclusions**

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

15. Petitioner Ross owes the debt described in paragraphs 5 through 10.

16. **Garnishment up to 15% of Petitioner Ross's disposable pay** is authorized. There is no evidence that financial hardship will be created by the garnishment. 31 C.F.R. § 285.11.

17. **No refund** to Petitioner Ross of monies already collected or collected prior to implementation of this Decision is appropriate, and no refund is authorized.

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

**ORDER**

19. Until the debt is repaid, Petitioner Ross shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in

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his 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 authorized to proceed with **garnishment up to 15% of Petitioner Ross's disposable pay**. 31 C.F.R. § 285.11.

21. I am **not** ordering any amounts already collected prior to implementation of this Decision, whether through *offset* or garnishment of Petitioner Ross's pay, to be returned to Petitioner Ross.

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

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**In re: JED LECLAIRE.**  
**Docket No. 12-0438.**  
**Decision and Order.**  
**Filed September 26, 2012.**

AWG.

Petitioner, pro se.  
Michelle Tanner for RD.  
*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

### **DECISION AND ORDER**

1. The hearing by telephone was held on August 7, 2012. The Petitioner, Jed LeClaire, also known as Jed M. LeClaire ("Petitioner LeClaire"), participated, representing himself (appearing *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Michelle Tanner.

**ADMINISTRATIVE WAGE GARNISHMENT ACT****Summary of the Facts Presented**

3. Petitioner LeClaire's Hearing Request dated February 28, 2012 (filed May 14, 2012) is admitted into evidence, together with the testimony of Petitioner LeClaire. The record was held open through August 30, 2012 for Petitioner LeClaire to file a "Consumer Debtor Financial Statement" (or some other income / expense format), and documentation of his income (such as pay stubs), but Petitioner LeClaire did not submit any such evidence.
4. USDA Rural Development's Exhibits RX 1 through RX 10, plus Narrative, Witness & Exhibit List, were filed on June 22, 2012, and are admitted into evidence, together with the testimony of Michelle Tanner.
5. Petitioner LeClaire borrowed to buy a home in Minnesota. Petitioner LeClaire bought the home in Minnesota in 2005 and borrowed \$79,000.00 to pay for it. RX 2.
6. USDA Rural Development's position is that Petitioner LeClaire owes to USDA Rural Development **\$54,759.51** (as of about August 7, 2012), in repayment of the United States Department of Agriculture / Rural Development / Rural Housing Service *Guarantee* (see RX 1, esp. p. 2) for the loan made in 2005 ("the debt"). The loan was made by JP Morgan Chase Bank, N.A. and serviced by Chase Home Finance LLC; the *Guarantee* remained in force. See USDA Rural Development Exhibits RX 1 through RX 10, plus Narrative, Witness & Exhibit List, and the testimony of Michelle Tanner.
7. After careful review of all of the evidence, I agree with USDA Rural Development's position. [The loan balance will likely have been reduced from the August 7, 2012 balance of **\$54,759.51** (excluding collection costs), because garnishment is ongoing, including garnishments of Candice Rohde the co-borrower's pay.]
8. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **\$54,759.51** would increase the current balance by \$15,332.66, to \$70,092.17. See RX 10, p. 2, and the testimony of Michelle Tanner.

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9. The **Guarantee** (RX 1) establishes an **independent** obligation of Petitioner LeClaire, “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 1, p. 2.

10. The Due Date of the last payment made was December 1, 2009. RX 6, p. 5. The foreclosure was initiated on May 7, 2010. RX 6, p. 5. The foreclosure sale was held on June 29, 2010. The lender Chase (Chase Home Finance LLC) acquired the home, which became REO (Real Estate Owned), at the foreclosure sale for the highest bid of \$29,750.00. RX 3. The home was listed for sale “as is” for \$29,900.00 and sold on April 18, 2011 for \$25,900.00. RX 5.

11. The amount Petitioner LeClaire borrowed in 2005 was \$79,000.00. RX 2. By the time the home was sold on April 18, 2011, the debt had grown to \$90,743.49:

\$ 71,933.99	Principal Balance prior to sale
\$ 6,071.77	Interest Balance prior to sale
\$ 1,438.31	Protective Advances to Pay Taxes and Insurance
<u>\$ 25.98</u>	Interest on Protective Advances
<u>\$ 79,470.05</u>	
+ \$ 11,273.44	Lender Expenses to Sell the Property
<u>\$ 90,743.49</u>	Amount Due

RX 7 and USDA Rural Development Narrative and the testimony of Michelle Tanner.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

12. Interest stopped accruing in 2011. Proceeds from sale of the home reduced the Amount Due by \$25,900.00. Recoveries/Credits/Reductions reduced the Amount Due by \$9,811.97. This left \$55,031.52 remaining due. RX 7. USDA Rural Development reimbursed the lender \$55,031.52 on July 20, 2011, which is the amount USDA Rural Development seeks to recover from Petitioner LeClaire under the *Guarantee*. RX 7.

13. Collections from Treasury applied to the debt after collection fees are subtracted have reduced the debt to **\$54,759.51** as of about August 7, 2012 (excluding the potential remaining collection fees).

14. My Hearing Notice and Prehearing Deadlines filed June 22, 2012 invited financial disclosure from Petitioner LeClaire, such as filing a Consumer Debtor Financial Statement. Petitioner LeClaire filed nothing. During the Hearing I encouraged Petitioner LeClaire to provide financial information. My notice of Record Held Open filed August 8, 2012 requested Petitioner LeClaire to provide financial information. Petitioner LeClaire did not file a Consumer Debtor Financial Statement or pay stubs or any other documentation of his financial situation, so I cannot calculate Petitioner LeClaire's current disposable pay. (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.)

15. Petitioner LeClaire testified that there are 4 in his household and he is the only one working. He testified that he has about \$20,000.00 to \$30,000.00 in medical debt. Without financial documentation, there is insufficient evidence before me to consider the factors under 31 C.F.R. § 285.11. In other words, there is not enough proof that garnishment to repay "the debt" (*see* paragraph 6) in the amount of 15% of Petitioner LeClaire's disposable pay will create a financial hardship.

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

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### **Discussion**

17. Garnishment of Petitioner LeClaire's disposable pay is authorized. I encourage Petitioner LeClaire and Treasury's collection agency to **negotiate** the repayment of the debt. Petitioner LeClaire, 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 LeClaire, you may want to request apportionment of debt between you and the co-borrower. Petitioner LeClaire, 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. Petitioner LeClaire, you may want to have someone else with you on the line if you call.

### **Findings, Analysis and Conclusions**

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

19. Petitioner LeClaire owes the debt described in paragraphs 5 through 13.

20. **Garnishment up to 15% of Petitioner LeClaire's disposable pay** is authorized. There is insufficient evidence that financial hardship will be created by the garnishment. 31 C.F.R. § 285.11.

21. **No refund** to Petitioner LeClaire of monies already collected or collected prior to implementation of this Decision is appropriate, and no refund is authorized.

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

### **ORDER**

23. Until the debt is repaid, Petitioner LeClaire shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

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

25. I am **not** ordering any amounts already collected prior to implementation of this Decision, whether through *offset* or garnishment of Petitioner LeClaire's pay, to be returned to Petitioner LeClaire.

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

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**In re: CRYSTAL DAVIS SNYDER<sup>1</sup>.**  
**Docket No. 12-0507.**  
**Decision and Order.**  
**Filed September 27, 2012.**

AWG.

Jane Doe, Esq. for Complainant.  
John Smith, Esq. for Respondent.

*Decision and Order entered by Janice K. Bullard, Administrative Law Judge.*

**DECISION AND ORDER**

This matter is before the Office of Administrative Law Judges ("OALJ") upon the July 23, 2012 request of Crystal Davis ("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 ("USDA-RD"), and if established, the propriety of imposing administrative wage garnishment. By Order issued on August 2, 2012, the parties were directed to provide information and documentation

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<sup>1</sup> Petitioner has remarried, and accordingly, the caption is amended to reflect her current name.

Crystal Davis Snyder  
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concerning the existence of the debt. The matter was set for a telephonic hearing to commence on September 5, 2012 and deadlines for filing documents with the Hearing Clerk's Office were established.

Both parties filed documents as instructed and the hearing commenced as scheduled. At the hearing, Petitioner represented herself and Appeals Coordinator Giovanna Leopardi represented USDA-RD. A review of documents prompted me to request a search for a request for re-amortization signed by Petitioner, but that document has not been filed. I nevertheless place considerable weight on the contemporaneous notes made to Petitioner's account and find that the account was re-amortized. My conclusion is bolstered by the judgment of foreclosure issued by Florida State court, which would have required all documents pertinent to the balance due on the loan. See, RX-2; RX-3.

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 October 27, 2005, the Petitioner and her ex-husband<sup>2</sup> received a home mortgage loan in the amount of \$96,600.00 from USDA-RD for the purchase of residential property located in Milton, Florida. RX-1.
2. The Petitioner subsequently defaulted on the loan and the account was accelerated on January 20, 2009, when the balance due on the loan was \$124,703.33. RX-2.
3. At a foreclosure sale held on August 17, 2011, the property was sold to a third party for \$28,100.00. RX-3.
4. After proceeds of the sale were applied against Petitioner's account, the account balance stood at \$96,603.33. RX-5.

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<sup>2</sup> For the sake of clarity, as this matter involves only Petitioner's potential wage garnishment, any reference to Petitioner's account shall include her ex-husband by reference.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

5. The outstanding balance was referred to the United States Department of Treasury ("Treasury") for collection. RX 7.
6. The balance is at Treasury in the amount of \$96,603.33 plus additional potential fees of \$27,048.93.
7. Petitioner timely requested a hearing, which was held on September 5, 2012.
8. Petitioner's income is erratic as she does not work full-time, and has only temporary employment, as documented on income tax returns.
9. Petitioner has a chronic medical condition that requires treatment for which she was not insured, causing accumulation of debt for medical expenses.
10. Much of Petitioner's income consists of child support for her three minor children.
11. Petitioner's debts include taxes due to Alabama.
12. The Petitioner's spouse is self-employed.
13. The family expenses exceed the family monthly expenses.
14. Given Petitioner's limited income, Petitioner is unlikely to be in a position to liquidate the debt owed at this time.
15. Petitioner did not dispute that debt was owed, but she believed that her ex-husband should also be charged for it.

**Conclusions of Law**

1. The Secretary has jurisdiction in this matter.
2. Petitioner is indebted to USDA Rural Development in the amount of \$96,603.33 exclusive of potential Treasury fees for the mortgage loan extended to her and her ex-husband.

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3. Petitioner's ex-husband is equally and jointly liable for the debt.
4. All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met.
5. Petitioner's expenses exceed her income and Petitioner is under a financial hardship at this time.
6. The Respondent is NOT entitled to administratively garnish the wages of the Petitioner.
7. 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 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 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.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

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**In re: STEPHANIE REARDON.**  
**Docket No. 12-0531.**  
**Decision and Order.**  
**Filed September 27, 2012.**

**AWG.**

Petitioner, pro se.  
Michelle Tanner for RD.  
*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

**DECISION AND ORDER**

1. The hearing by telephone was begun on August 29 and resumed on September 17, 2012. Stephanie Reardon, full name Stephanie Marie Reardon, the Petitioner (“Petitioner Reardon”), participated, self represented (appearing *pro se*).
2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent (“USDA Rural Development”), participated, represented by Michelle Tanner.

**Summary of the Facts Presented**

3. Petitioner Reardon’s earnings statement and accompanying note addressed “To Whom It May Concern” requesting that the wage garnishment stop (filed September 7, 2012), are admitted into evidence, together with the testimony of Petitioner Reardon. Also admitted into evidence is Petitioner Reardon’s Hearing Request dated July 3, 2012 with all accompanying documents.
4. USDA Rural Development’s Exhibits RX 1 through RX 10, plus Narrative, Witness & Exhibit List, were filed on August 6, 2012, and are admitted into evidence, together with the testimony of Michelle Tanner.
5. Petitioner Reardon bought a home in Ohio in 2006, borrowing \$223,206.00 to pay for it. The loan was made by Villa Mortgage, Inc.

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and immediately sold to U.S. Bank, N.A.; the *Guarantee* remained in force. RX 2. USDA Rural Development's position is that Petitioner Reardon owes to USDA Rural Development **\$159,452.49** (as of July 28, 2012), in repayment of the United States Department of Agriculture / Rural Development / Rural Housing Service *Guarantee* (see RX 1, esp. p. 2) for the loan made in 2006 ("the debt"). See USDA Rural Development's Exhibits RX 1 through RX 10, plus Narrative, Witness & Exhibit List.

6. After careful review of all of the evidence, I agree with USDA Rural Development's position. [The loan balance has changed from the July 28, 2012 balance of **\$159,452.49** (excluding collection costs), because garnishment was ongoing. Petitioner Reardon's testimony and Michelle Tanner's testimony. The balance has therefore been reduced and may continue to change.] Petitioner Reardon argues that by paying the USDA Rural Development fee for the *Guarantee* (see RX 1, p. 1, at the bottom), the borrowers as well as the lender should be protected by the *Guarantee*. The argument is clever, but I conclude that the *Guarantee* protects only the lender.

7. The *Guarantee* (RX 1) establishes an **independent** obligation of Petitioner Reardon, "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 1, p. 2.

8. The Servicing Lender was U.S. Bank Home Mortgage. RX 3; RX 6, p. 4. The Due Date of the last payment made was July 1, 2008. RX 6, p. 5. The foreclosure sale date was July 8, 2010. RX 6, p. 23. U.S. Bank acquired the home as the highest bidder for \$110,200.00. RX 3, p. 6. U.S. Bank sold the home for \$107,500.00 on December 27, 2010. RX 7 details the loss claim paid under the *Guarantee*, showing how the debt became **\$159,452.49**.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

\$217,892.44	Unpaid Principal Balance
\$ 35,368.91	Unpaid Interest Balance
\$ 8,959.81	Protective Advances to Pay Taxes and Insurance
<u>\$ 197.88</u>	Interest on Protective Advances
\$262,419.04	
+ <u>\$ 19,964.07</u>	Lender Expenses to Sell Property
	\$282,383.11 Total Debt Charged to Petitioner
	Reardon
=====	

The debt was then \$282,383.11. RX 7.

- <u>\$ 107,500.00</u>	Funds Received from Sale of the home
\$ 174,883.11	Amount Due Before \$15,430.62
	Recoveries/Credits/Reductions
=====	
- <u>\$ 15,430.62</u>	Recoveries/Credits/Reductions
<b><u>\$ 159,452.49</u></b>	
=====	

RX 7, USDA Rural Development Narrative, and testimony.

9. USDA Rural Development reimbursed the lender **\$159,452.49** on September 26, 2011 (RX 6, p. 11), which is the amount USDA Rural Development seeks to recover from Petitioner Reardon under the *Guarantee*. RX 7.

10. Interest stopped accruing when the sale funds were applied. Collections from Treasury (garnishments from Petitioner Reardon) applied to the debt (after collection fees are subtracted) have reduced the **\$159,452.49** balance (which excludes the potential remaining collection fees).

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11. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **\$159,452.49**, would increase the balance by \$44,646.69, to \$204,099.18. RX 10, p. 2.

12. Petitioner Reardon asks that the garnishments stop. Petitioner Reardon testified that earnings of \$12.40 per hour for 30-32 hours per week are barely adequate to support self and the 13 year-old son. The 13 year-old son has a medical card from the State. Petitioner Reardon testified of significant debt in addition to that owed to USDA Rural Development, including school loans, bills for surgery, and payments for a car that was repossessed about the time of the foreclosure.

13. Garnishment of Petitioner Reardon's disposable pay in any amount would currently cause Petitioner Reardon financial hardship. To prevent hardship, potential garnishment to repay the USDA Rural Development debt must be limited to **0%** of Petitioner Reardon's disposable pay through September 2014; then **up to 5%** of Petitioner Reardon's disposable pay beginning October 2014 through September 2016; then **up to 10%** of Petitioner Reardon's disposable pay beginning October 2016 through September 2018; then **up to 15%** of Petitioner Reardon's disposable pay thereafter. 31 C.F.R. § 285.11.

14. Petitioner Reardon, you may want to negotiate the disposition of the debt with Treasury's collection agency.

### **Discussion**

15. I encourage **Petitioner Reardon and Treasury's collection agency** to **negotiate** the repayment of the debt. Petitioner Reardon, 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 Reardon, you may want to mention the bankruptcy discharge of your co-borrower's obligation to pay the debt. Petitioner Reardon, 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. Petitioner Reardon, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

settle the claim for less. You may wish to include someone else with you in the telephone call if you call to negotiate.

**Findings, Analysis and Conclusions**

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

17. Petitioner Reardon owes the debt described in paragraphs 5 through 11.

18. Garnishment is authorized, but to prevent financial hardship shall be limited as follows: through September 2014 garnishment limited to **0%** of Petitioner Reardon's disposable pay; beginning October 2014 through September 2016 garnishment **up to 5%** of Petitioner Reardon's disposable pay; beginning October 2016 through September 2018 garnishment **up to 10%** of Petitioner Reardon's disposable pay; and thereafter, garnishment **up to 15%** of Petitioner Reardon's disposable pay. 31 C.F.R. § 285.11.

19. **No refund** to Petitioner Reardon of monies already collected or collected prior to implementation of this Decision is appropriate, and no refund is authorized.

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

**ORDER**

21. Until the debt is repaid, Petitioner Reardon shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in 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 **0%** of Petitioner Reardon's disposable pay through September 2014; then **up to 5%** of

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Petitioner Reardon's disposable pay beginning October 2014 through September 2016; then **up to 10%** of Petitioner Reardon's disposable pay beginning October 2016 through September 2018; then **up to 15%** of Petitioner Reardon'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.

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**In re: ERIN RAE MCINTIRE.**  
**Docket No. 12-0569.**  
**Decision and Order.**  
**Filed September 27, 2012.**

AWG.

Petitioner, pro se.

Michelle Tanner for RD.

*Decision and Order entered by Janice K. Bullard, Administrative Law Judge.*

### **DECISION AND ORDER**

This matter is before the Office of Administrative Law Judges ("OALJ") upon the August 6, 2012 request of Erin Rae McIntire ("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 22, 2012, the parties were directed to provide information and documentation concerning the existence of the debt and the matter was set for a telephonic hearing to commence on September 25, 2012.

The Respondent filed a Narrative, together with supporting documentation<sup>1</sup> on August 21, 2012 and Petitioner filed a Consumer Debtor Financial Statement<sup>2</sup> on September 18, 2012. At the hearing, Petitioner represented herself and testified. Michelle Tanner represented USDA-RD and testified.

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<sup>1</sup> References to Respondent's exhibits herein shall be denoted as "RX-#".

<sup>2</sup> This exhibit has been identified as, and shall be referred to herein as, "PX-1".

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

Before I closed the hearing, I offered to hold the record open for a brief period to allow Petitioner to augment her evidence with additional documents or testimony, but Petitioner declined the offer and requested a ruling based upon the extant record.

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 December 15, 2009, the Petitioner received a home mortgage loan in the amount of \$70,897.00 from USDA-RD to purchase residential real property located in Hillman, Michigan. RX-1.
2. The Petitioner experienced a loss of income and requested a moratorium which was eventually granted on May 11, 2011, some months after it was requested. RX-2; Petitioner's credible testimony.
3. Petitioner believed that she could not afford her home loan, and she listed the home for sale. Petitioner's testimony; RX-3.
4. Petitioner's realty agent found a buyer for the property, and the amount realized from the sale and applied to her loan was \$63,899.50. RX-3.
5. Because the amount realized from the sale exceeded the amount that Petitioner owed on the loan, she needed approval from the USDA-RD for the "short sale". Testimony of both parties.
6. After application of the sale proceeds, the amount unpaid on the loan was \$9,064.89. RX-4.
7. Petitioner testified that she was not aware that she owed the outstanding loan balance to USDA-RD, since a representative from USDA-RD assured her that the sale would take care of her loan
8. Despite this assertion, the record demonstrates that Petitioner had applied to compromise the remaining balance of the loan. RX-3; RX-5.

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9. USDA-RD offered to compromise the debt, but Petitioner failed to sign the agreement; Petitioner testified that she could not afford the proposed \$98.00 per month payment for a period of 60 months.

10. Petitioner's account was adjusted to a balance of \$7,801.89, which USDA-RD entered as a debt due from Petitioner, and referred to the United States Department of Treasury ("Treasury") for collection on May 7, 2012. RX 6.

11. Petitioner has recently lost her job and her sole income is unemployment insurance benefits.

12. Petitioner supports her two minor children.

13. Because Petitioner had worked until approximately one month previous to the hearing, she is not entitled to a statutory finding of presumptive hardship.

14. Petitioner has no wage to garnish at this time.

#### **Conclusions of Law**

1. The Secretary has jurisdiction in this matter.
2. Petitioner is indebted to USDA Rural Development in the amount of \$7,801.89 exclusive of potential Treasury fees for the mortgage loan extended to her.
3. All procedural requirements for administrative wage offset set forth at 31 C.F.R. § 285.11 have been met.
4. The Petitioner is currently not working, and wage garnishment cannot be effected.
5. Treasury shall remain authorized to undertake any and all other appropriate collection action.

**ADMINISTRATIVE WAGE GARNISHMENT ACT****ORDER**

For the foregoing reasons, Petitioner shall **NOT** be subjected to administrative wage garnishment at this time.

Petitioner is encouraged 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.

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.

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**In re: ISAIAS RODRIGUEZ.**  
**Docket No. 12-0332.**  
**Decision and Order.**  
**Filed September 28, 2012.**

AWG.

Petitioner, pro se.

Michelle Tanner for RD.

*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

**DECISION AND ORDER**

1. The hearing by telephone was begun on August 6 and resumed on August 10, 2012. Isaias Rodriguez, the Petitioner ("Petitioner

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Rodriguez”), who represents himself (appears *pro se*), participated on August 6. His wife, Mrs. Rodriguez, participated both on August 6, and August 10.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent (“USDA Rural Development”), participated, represented by Michelle Tanner.

### Summary of the Facts Presented

3. Petitioner Rodriguez’s filings on September 13, 2012, including his “Consumer Debtor Financial Statement” with additional extensive financial information, and his Unemployment Benefits Determination, are admitted into evidence, together with the testimony of Petitioner Rodriguez and his wife Mrs. Rodriguez. Also admitted into evidence is Petitioner Rodriguez’s Hearing Request dated February 28, 2012 with all accompanying documents.

4. USDA Rural Development’s Exhibits RX 1 through RX 10, plus Narrative, Witness & Exhibit List, were filed on May 4, 2012, and are admitted into evidence, together with the testimony of Michelle Tanner.

5. Petitioner Rodriguez bought a home in Minnesota in 2005, borrowing \$180,481.00 to pay for it. The loan was made by JP Morgan Chase Bank, N.A., with the servicing lender being Chase Home Finance, LLC. RX 2; RX 6, p. 4.

6. USDA Rural Development’s position is that Petitioner Rodriguez owes to USDA Rural Development **\$106,943.42** (as of May 3, 2012), in repayment of the United States Department of Agriculture / Rural Development / Rural Housing Service *Guarantee* (see RX 1, esp. p. 2) for the loan made in 2005 (“the debt”). See USDA Rural Development’s Exhibits RX 1 through RX 10, plus Narrative, Witness & Exhibit List.

7. After careful review of all of the evidence, I agree with USDA Rural Development’s position. The *Guarantee* remained in force, and on April 8, 2011, USDA Rural Development paid a loss claim of \$112,491.42 to the lender. RX 6, p. 11.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

8. The *Guarantee* (RX 1) establishes an **independent** obligation of Petitioner Rodriguez, "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 1, p. 2.

9. The Due Date of the last payment made was March 1, 2009. RX 6, p. 4. The foreclosure sale date was November 18, 2009. RX 6, p. 5. RX 7 details the loss claim paid under the *Guarantee*, showing how the loss claim of \$112,491.42 was calculated.

\$163,841.86	Unpaid Principal Balance
\$ 16,536.81	Unpaid Interest Balance
\$ 4,092.04	Protective Advances to Pay Taxes and Insurance
<u>\$ 4.54</u>	Interest on Protective Advances
\$184,475.25	
+ <u>\$ 9,218.19</u>	Lender Expenses to Sell Property
<u>\$193,693.44</u>	Total Debt Charged to Petitioner Rodriguez

The debt was then \$193,693.44. RX 7.

- <u>\$ 65,900.00</u>	Funds Received from Sale of the home
\$127,793.44	Amount Due Before \$15,302.02
	Recoveries/Credits/Reductions
- <u>\$ 15,302.02</u>	Recoveries/Credits/Reductions
\$112,491.42	

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RX 7, USDA Rural Development Narrative, and testimony.

10. The home was sold on March 4, 2011 for \$65,900.00. RX 6, p. 6. Interest stopped accruing when the sale funds were applied. USDA Rural Development reimbursed the lender \$112,491.42 on April 8, 2011 (RX 6, p. 11), which is the amount USDA Rural Development seeks to recover from Petitioner Rodriguez under the *Guarantee*. RX 7.

11. A collection from Treasury (interception of a \$5,565.00 income tax refund) which was applied to reduce the debt (after the \$17.00 collection fee was subtracted) resulted in the balance of **\$106,943.42** (which excludes the potential remaining collection fees).

12. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **\$106,943.42**, would increase the balance by \$29,944.16, to \$136,887.58 (as of May 3, 2012). RX 10, p. 2.

13. Garnishment of Petitioner Rodriguez's disposable pay in any amount would currently cause Petitioner Rodriguez financial hardship. Petitioner Rodriguez and his wife have 3 children to support, in addition to themselves. [Mrs. Rodriguez is not responsible to pay the USDA Rural Development debt.] Petitioner Rodriguez has been laid off from work since August 28, 2012. As his Unemployment Benefits Determination shows, and as his wife's testimony proved, Petitioner Rodriguez's work is seasonal, and during the winter when his income is lower, they get behind. One winter he was laid off for 6 months.

14. To prevent hardship, potential garnishment to repay the USDA Rural Development debt must be limited to **0%** of Petitioner Rodriguez's disposable pay through September 2014; then **up to 5%** of Petitioner Rodriguez's disposable pay beginning October 2014 through September 2016; then **up to 10%** of Petitioner Rodriguez's disposable pay beginning October 2016 through September 2018; then **up to 15%** of Petitioner Rodriguez's disposable pay thereafter. 31 C.F.R. § 285.11.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

15. Petitioner Rodriguez, you may want to negotiate the disposition of the debt with Treasury's collection agency.

**Discussion**

16. Petitioner Rodriguez, you may choose to call Treasury's collection agency to **negotiate** the repayment of the debt. Petitioner Rodriguez, 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 Rodriguez, 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. Petitioner Rodriguez, 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 wish to include someone else with you in the telephone call if you call to negotiate.

**Findings, Analysis and Conclusions**

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

18. Petitioner Rodriguez owes the debt described in paragraphs 5 through 12.

19. Garnishment is authorized, but to prevent financial hardship shall be limited as follows: through September 2014 garnishment limited to **0%** of Petitioner Rodriguez's disposable pay; beginning October 2014 through September 2016 garnishment **up to 5%** of Petitioner Rodriguez's disposable pay; beginning October 2016 through September 2018 garnishment **up to 10%** of Petitioner Rodriguez's disposable pay; and thereafter, garnishment **up to 15%** of Petitioner Rodriguez's disposable pay. 31 C.F.R. § 285.11.

20. **No refund** to Petitioner Rodriguez of monies already collected or collected prior to implementation of this Decision is appropriate, and no refund is authorized.

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21. Repayment of the debt may occur through *offset* of Petitioner Rodriguez's **income tax refunds** or other **Federal monies** payable to the order of Petitioner Rodriguez.

### **ORDER**

22. Until the debt is repaid, Petitioner Rodriguez shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in 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 authorized to proceed with garnishment limited to **0%** of Petitioner Rodriguez's disposable pay through September 2014; then **up to 5%** of Petitioner Rodriguez's disposable pay beginning October 2014 through September 2016; then **up to 10%** of Petitioner Rodriguez's disposable pay beginning October 2016 through September 2018; then **up to 15%** of Petitioner Rodriguez'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.

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**In re: BRIAN CALLAHAN.**  
**Docket No. 12-0285.**  
**Decision and Order.**  
**Filed October 3, 2012.**

**AWG.**

Petitioner, pro se.  
Michelle Tanner for RD.  
*Decision and Order entered by James P. Hurt, Hearing Official.*

**DECISION AND ORDER**

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

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 July 9, 2012, 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-9 prior to my order on April 10, 2012. Mr. Callahan originally stated that he had legal counsel, however no attorney has filed an appearance in the case. Mr. Callahan filed his financial statements, pay stubs and later documentation on certain monthly expenses on September 7, 2012 which I now label as PX-1, PX-2, and PX-3, respectively. After review of his financial statements, August 29, 2012, I issued an Order requesting further information related to his financial statement. RD requested a follow-up oral hearing and I concurred.

On September 27, 2012 and at the time set for the follow up hearing, both parties were available. Ms. Michelle Tanner represented RD. Mr. Callahan was self represented. The parties were sworn.

Petitioner has been employed for more than one year. Mr. Callahan is remarried. He and his wife have recently had a child. His wife will return to work on/about October 17, 2012. He provided her net bi-weekly income which was used in the Financial Hardship calculation as family monthly disposable income. The family unit owes substantial IRS payments for the next 7 months (April 2013). His wife is the owner of the residence that the family lives in and they share all household expenses. There are five persons in the household and two automobiles. Mr. Callahan has court-ordered child support related to his prior marriage. He and his current wife work at a location where there are highway tolls in both directions. The family unit has balances on five credit cards with large balances. He states that daycare for the two minor children will be required. There are no school loans. There is a monthly payment on one of the two automobiles. There are anticipated monthly

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out-of-pocket medical expenses. Petitioner's pay statement shows he is paid bi-weekly - instead of bi-monthly (26 not 24 pay periods per year). I added a Medicare tax at 1.45% of his gross wages.

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 June 28, 2003, Petitioner obtained a loan for the purchase of a primary home in the amount of \$117,918.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) to purchase his home on a property located in Lakeland, Florida. RX-2 @ p. 3 of 3.
2. Prior to obtaining the loan, borrower signed a mortgage guarantee agreement on RD form 1980-21. RX-1.
3. The borrower defaulted on the loan and it was accelerated for foreclosure. RX – 3 @ p. 8 of 15 & 10 of 15.
4. At the foreclosure sale, Bank of America acquired and held the property for re-sale.
5. On/about June 30, 2010, the property was purchased by a third party for the listed price of \$104,900.
6. Prior to the sale the Borrower owed RD for \$110,857.65 as principal, \$8,577.42 as interest, \$8,694.83 as fees, plus interest on the fees of \$266.26 for a total of \$128,396.16 to pay off the RD loan. Narrative, RX-6.
7. In addition, borrower owes \$14,741.47 to RD under the terms of the loan guarantee. RX-6.
8. Treasury recovered \$3,291.43 after the foreclosure towards the loan. RX-6.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

9. After application of the proceeds of the sale to the third party, borrower owed \$34,946.20. RX-6.

10. The remaining amount due of \$34,946.20 was transferred to Treasury for collection on April 9, 2012. RX-9 @ p.2 of 3.

11. The potential Treasury collection fees were stated to be \$9,784.94 RX-9 @ p. 2 of 3.

12. Mr. Callahan has been employed for more than one year. There are two income earners in his household. There are three minor children in the home and Mr. Callahan is under a court ordered child support order for another child by a prior marriage.

13. Petitioner raised the issue of financial hardship and I utilized his financial statements and payroll information to prepare a Financial Hardship Calculation<sup>1</sup>.

**Conclusions of Law**

1. Petitioner is indebted to USDA Rural Development in the amount of \$34,946.20- exclusive of potential Treasury fees for the mortgage loan extended to him.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of \$9,784.94.

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

4. The Respondent is entitled to administratively garnish the wages of the Petitioner at the rate of one percent (1%) of his monthly disposable income through April 2013.

5. From and after April 2013, the Respondent is entitled to administratively garnish the wages of the Petitioner at the rate of nine percent (9%) of his monthly disposable income.

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<sup>1</sup> The Financial Hardship Calculation is not posted on the OALJ website.

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### **ORDER**

For the foregoing reasons, the wages of Petitioner shall be subjected to administrative wage garnishment at the rate of 1% of his monthly disposable income. After April 2013, the wages of Petitioner shall be subjected to administrative wage garnishment at the rate of 9% of his monthly disposable income.

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

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**In re: JEFFREY HOUTMAN.**  
**Docket No. 12-0417.**  
**Decision and Order.**  
**Filed October 15, 2012.**

**AWG.**

Petitioner, pro se.  
Giovanna Leopardi for RD.  
*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

### **DECISION AND ORDER**

1. The Hearing by telephone was held as scheduled on July 12, 2012. Jeffrey Houtman, the Petitioner (Petitioner Houtman), represents himself (appears *pro se*) and did not participate.
2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Giovanna Leopardi.

**ADMINISTRATIVE WAGE GARNISHMENT ACT****Summary of the Facts Presented**

3. Petitioner Houtman failed to file a completed “Consumer Debtor Financial Statement” or anything, and he failed to testify. Admitted into evidence are Petitioner Houtman’s Hearing Request dated April 12, 2012 and the accompanying Settlement Statement. The Settlement Statement shows that in July 2010 Petitioner Houtman sold the Greenville, Michigan home that secured the debt at issue here. The Settlement Statement shows that Petitioner Houtman received more than \$14,000.00 back from the sale after the “loan Payoff” of \$33,647.76 was subtracted from proceeds. [The \$33,647.76 was not adequate to pay off the loan but was adequate to get the property free and clear so it could be sold.]

4. USDA Rural Development’s Exhibits RX 1 through RX 10, plus Narrative, Witness & Exhibit List, were filed on June 13, 2012, and are admitted into evidence, together with the testimony of Giovanna Leopardi. Also admitted into evidence are Giovanna Leopardi’s Supplementation to the Narrative filed August 10, 2012, and her additional Narrative, Witness & Exhibit List filed October 11, 2012.

5. Petitioner Houtman bought a home in Michigan in February 2009, borrowing \$43,367.00 to pay for it. The loan was made by JP Morgan Chase Bank, N.A., with the servicing lender being Chase Home Finance, LLC. RX 2; RX 6, p. 4. Frequently I refer to the lender as “Chase”.

6. USDA Rural Development’s position is that Petitioner Houtman owes to USDA Rural Development **\$12,570.09** (as of May 31, 2012), in repayment of the United States Department of Agriculture / Rural Development / Rural Housing Service **Guarantee** (see RX 1, esp. p. 2) for the loan made in February 2009 (“the debt”). See USDA Rural Development’s Exhibits RX 1 through RX 10, plus Narratives.

7. The **Guarantee** (RX 1) establishes an **independent** obligation of Petitioner Houtman, “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

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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 1, p. 2.

8. USDA Rural Development paid a loss claim of \$12,973.09 to the lender Chase on April 11, 2011 (RX 6, p. 10). RX 7 details the loss claim paid. After careful review of all of the evidence, I agree with USDA Rural Development’s position.

9. The Due Date of the last payment made was April 1, 2009. RX 6, p. 5. The foreclosure sale date was May 13, 2010. RX 6, p. 5. RX 7 accurately shows that even after \$33,424.74 from the sale of the home was applied, Chase was still out \$12,973.09.

10. The actions of the lender Chase were to buy the home at the mortgage foreclosure sale for \$33,150.00 (*see* Sheriff’s Deed, RX 3, p. 1), and thereafter, during the redemption period, to certify that \$33,424.76 was payment in full for the redemption from Sheriff’s Sale on Foreclosure. RX 3, p. 2. Once Petitioner Houtman paid the \$33,424.76 (which was not enough to cover even the Principal amount of \$43,319.54) and redeemed the property, he had the right to sell the property. Nevertheless, Petitioner Houtman still owed Chase the deficiency (\$12,973.09), which Chase had the right to collect as unsecured debt. Chase claimed the \$12,973.09 from USDA Rural Development under the *Guarantee* (RX 1).

### **Findings, Analysis and Conclusions**

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Houtman and USDA Rural Development; and over the subject matter (administrative wage garnishment, which requires determining whether Petitioner Houtman owes a valid debt to USDA Rural Development).

12. USDA Rural Development paid a loss claim to the lender Chase, \$12,973.09 on April 11, 2011 (RX 6, p. 10). RX 7 details the loss claim. That amount, \$12,973.09, is what USDA Rural Development seeks to

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

recover from Petitioner Houtman under the *Guarantee*. RX 1, RX 7; USDA Rural Development Narratives; and testimony.

13. Petitioner Houtman owes a valid debt to USDA Rural Development. When the lender Chase certified that \$33,424.76 was payment in full for the redemption from Sheriff's Sale on Foreclosure (RX 3, p. 2), that amount was not the total that Petitioner Houtman owed Chase. Rather, that amount was all that was needed to redeem the property. That amount is calculated as required under Michigan law, and it is based on what the lender Chase bid in, at the Sheriff's Sale on Foreclosure. After Petitioner Houtman redeemed the home, Petitioner Houtman still owed the lender Chase money, but the remaining debt was merely unsecured.

14. USDA Rural Development may collect administratively pursuant to a *Guarantee*, even where NO judgment has been entered against a borrower and NO personal deficiency has been established.

15. Against the \$12,973.09 deficiency / loss claim, Petitioner Houtman is credited with the collection from Treasury (an *offset*, the \$420.00 TOP payment February 17, 2012). *See* RX 10. Thus, Petitioner Houtman owes to USDA Rural Development \$12,570.09 as of May 31, 2012 [plus potential Treasury collection fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%), which would increase the current balance by \$3,519.63, to \$16,089.72.] *See* RX 10, p. 2.

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

17. **No refund** to Petitioner Houtman of monies already collected or collected prior to implementation of this Decision will be ordered.

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

Barbara Greer  
71 Agric. Dec. 801

**ORDER**

19. Until the debt is repaid, Petitioner Houtman 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).

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

21. I am **not** ordering any amounts already collected prior to implementation of this Decision, whether through *offset* or garnishment of Petitioner Houtman's pay, to be returned to Petitioner Houtman.

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

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**In re: BARBARA GREER, F/K/A BARBARA EVANS, F/K/A  
BARBARA JEFFREY.  
Docket No. 12-0528.  
Decision and Order.  
Filed October 15, 2012.**

AWG.

John W. Erramouspe, III, Esq. for Petitioner.  
Michelle Tanner for RD.  
*Decision and Order entered by James P. Hurt, Hearing Official.*

**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 2, 2012, I issued a Prehearing Order to facilitate a meaningful conference with the parties as

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

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 prior to my order on August 1, 2012. At the date and time set for the oral hearing, Ms. Greer was self represented and although she did not have RD's documentation (see above) with her at the time of the hearing, she elected to proceed with the hearing. She acknowledged that she had received RD's Narrative and Exhibits. Ms. Greer f/k/a Evans is now represented by attorney John W. Erramouspe, III Esq. who filed his appearance after the oral hearing. On September 25, 2012, Ms. Greer through her counsel filed a proposal for settlement which was forwarded to RD. At my request, on October 4, 2012, Ms. Greer filed her financial statements, payroll stub (for herself and Darrin Jeffrey) and explanation of some overtime benefits (soon to be ended) which I now label as PX-1, PX-2, and PX-3, respectively. On September 11, 2012 at the time set for the hearing, both parties were available. Ms. Michelle Tanner represented RD. The parties were sworn.

Petitioner has been employed for more than one year. Ms. Greer is remarried. There are four minor children in the household. She receives child support for three of the minor children. She borrowed money from her mother and has submitted a schedule of regular payments for the past 33 months. She states that layoffs at her work place are expected. She provided net weekly income of Darrin Jeffrey which was used in the Financial Hardship calculation as family monthly disposable income. Ms. Greer has student loans and credit union loans. There are six persons in the household and one automobile. The family unit does not list any credit card balances. There is no automobile monthly payment listed. There are no listed anticipated monthly out-of-pocket medical expenses. Since there are four minor children, I will assume that failure to claim out-of-pocket medical expenses is an oversight and I will, sua sponta, make a monthly allowance in the Financial Hardship calculation. I will utilize only straight time pay rates in my calculation. Petitioner's pay statement shows she is paid bi-weekly - instead of bi-monthly (26 not 24 pay periods per year). She has a deduction for Medical insurance which

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will be considered, but the deduction for her 401K will not. I utilized a married filing separately tax rate to calculate the Federal income taxes with a standard deduction. I calculated Iowa income tax at 0.039%.

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 22, 1998, Petitioner and James Evans obtained a loan for the purchase of a primary home in the amount of \$55,000 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) to purchase their home on a property located in Cherokee, Iowa. RX-1 @ p. 3 of 3.
2. The borrowers defaulted on the loan and it was accelerated for foreclosure on November 5, 2001. RX-2 @ p. 1 of 7.
3. As a result of the discovery of the presence of asbestos siding and lead based paint, RD determined that the property was a valueless lien. RX-4.
4. As of July 29, 2002, the Borrowers owed RD for \$49,829.06 as principal, \$722.60 as recoverable fees, plus \$1,550.71 as negative escrow balance for a total of \$52,102.37 to pay off the RD loan. Narrative, RX-5.
5. Since 2002, Treasury recovered substantial portions of the debt through the tax offset program (TOP) such that the debt has been reduced to \$25,518.56. RX-5.
6. The remaining amount due of \$25,518.56 was transferred to Treasury for collection on July 28, 2012. RX-6 @ p.2 of 5.
7. The potential Treasury collection fees were stated to be \$7,145.20 RX-6 @ p. 2 of 5.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

8. Ms. (Evans) Greer has been employed for more than one year. There are two income earners in her household. There are four minor children in the home. Ms. Greer is receiving child support for children by prior marriage(s).

9. Petitioner raised the issue of financial hardship and I utilized her financial statements and payroll information to prepare a Financial Hardship Calculation<sup>1</sup>.

**Conclusions of Law**

1. Petitioner is jointly and severally indebted to USDA Rural Development in the amount of \$25,518.56 - exclusive of potential Treasury fees for the mortgage loan extended to her.

2. In addition, Petitioner is jointly and severally indebted for potential fees to the US Treasury in the amount of \$7,145.20.

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

4. The Respondent is entitled to administratively garnish the wages of the Petitioner at the rate of fifteen percent (15%) 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 15% of her monthly disposable income. In the event that the family unit income involuntarily decreases, RD shall recalculate the allowable garnishment proportionally.

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

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<sup>1</sup> The Financial Hardship Calculation is not posted on the OALJ website.

Brenda Gorder  
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**In re: BRENDA GORDER.**  
**Docket No. 12-0606.**  
**Decision and Order.**  
**Filed October 26, 2012.**

**AWG.**

Petitioner, pro se.  
Michelle Tanner for RD.

*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

#### **DECISION AND ORDER**

1. The hearing by telephone was held on October 23, 2012 (in two segments, each lasting about an hour). Brenda Gorder, the Petitioner, full name Brenda Lee Gorder (“Petitioner Gorder”), participated, representing herself (appears *pro se*).
2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent (“USDA Rural Development”), participated, represented by Michelle Tanner.

#### **Summary of the Facts Presented**

3. USDA Rural Development’s Exhibits RX 1 through RX 11, plus Narrative, Witness & Exhibit List (filed on September 13, 2012), are admitted into evidence, together with the testimony of Michelle Tanner.
4. Petitioner Gorder’s completed “Consumer Debtor Financial Statement” (submitted with her Hearing Request) and her Hearing Request (dated August 14, 2012) are admitted into evidence, together with her letter to the Hearing Clerk filed October 22, 2012, together with the testimony of Petitioner Gorder.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

5. Petitioner Gorder owes to USDA Rural Development **\$44,012.23** (as of September 11, 2012), in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service *Guarantee* (see RX 1, esp. p. 2) for a loan made in 2007, the balance of which is now unsecured (“the debt”). Petitioner Gorder borrowed to buy a home in Missouri. The lender was First Midwest Bank of Dexter, which sold to U.S. Bank N.A. (servicing lender U.S. Bank Home Mortgage). The *Guarantee* remained in effect. Frequently herein I refer to the lender as U.S. Bank.

6. The *Guarantee* (RX 1) establishes an **independent** obligation of Petitioner Gorder, “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 1, p. 2.

7. Petitioner Gorder borrowed \$128,750.00 on July 27, 2007 to buy the home. RX 2. Petitioner Gorder testified that she had moved in after a divorce, and within the second year she and her daughter had medical problems. The Due Date of Last Payment Made was September 1, 2008. RX 7, p. 4. Foreclosure was initiated on December 10, 2009. RX 7, p. 5. At the foreclosure sale on January 6, 2010, the lender U.S. Bank bid \$102,000.00 and acquired the home, which became REO (Real Estate Owned). RX 4, esp. p. 2. The lender U.S. Bank then sold the home for \$102,650.00 on March 23, 2010. RX 6, p. 8.

8. Petitioner Gorder owes the interest that accrued beginning September 1, 2008 through March 23, 2010 (about a year-and-a-half), plus the foreclosure costs, the sales costs afterward, and the costs of maintaining the home until it was sold March 23, 2010. The costs are summarized on RX 8. Petitioner Gorder testified that she is very responsible - - has been working since the 8th grade - - but had not been well for months. She testified that for months, her non-functioning gall bladder was not detected in spite of tests and specialists she saw. She had become toxic.

Brenda Gorder  
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Finally, following gall bladder surgery, she began to recover. She testified that, as a single mom, her own medical expenses, plus expenses for removal of her daughter's wisdom teeth, are a large part of her failure to stay current on her mortgage.

9. USDA Rural Development reimbursed the lender \$47,429.23 on June 24, 2010. RX 7, p. 9. RX 7 details the loss claim paid under the **Guarantee**, showing how the debt became \$47,429.23. USDA Rural Development's payment of \$47,429.23 is the amount USDA Rural Development seeks to recover from Petitioner Gorder under the **Guarantee**.

RX 8. Petitioner Gorder has made substantial progress repaying the debt, as shown on RX 11, p. 1. Her income tax refund of more than \$3,000.00 was intercepted and applied to reduce the debt (**offset**), and garnishment had begun at the job she used to have. As of September 11, 2012, Petitioner Gorder's debt had been reduced to **\$44,012.23**, RX 11.

10. Interest stopped accruing on March 23, 2010 when the home was sold, which makes repayment of the debt more manageable. The costs of collection are considerably lower when income tax refunds are **offset**, because the flat fee (now \$17.00) is usually lower than the percentage (up to 28%) that is applied to collection costs from garnishments and voluntary payments, before the balance is applied to reduce the debt.

11. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **\$44,012.23**, would increase the balance by \$12,323.42, to \$56,335.65. RX 11, p. 2.

12. Petitioner Gorder is no longer employed. She moved out-of-state about a month ago to be near her 77-year old mother to be able to provide assistance if necessary. Petitioner Gorder will be working again, but she will require some time to catch up on obligations from moving and needs that are not being met while she has no income.

13. To prevent hardship, potential garnishment to repay "the debt" (*see* paragraph 5) must be limited to **0%** of Petitioner Gorder's disposable pay through November 2013; then **up to 7%** of Petitioner Gorder's

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

disposable pay beginning December 2013 through November 2014; then **up to 15%** of Petitioner Gorder's disposable pay thereafter. 31 C.F.R. § 285.11.

14. Petitioner Gorder is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

**Discussion**

15. Through November 2013, no garnishment is authorized. Beginning December 2013 through November 2014, garnishment up to 7% of Petitioner Gorder's disposable pay is authorized; and thereafter, garnishment up to 15% of Petitioner Gorder's disposable pay is authorized. *See* paragraphs 12 and 13. I encourage **Petitioner Gorder and the collection agency to negotiate** the repayment of the debt. Petitioner Gorder, 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 Gorder, 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. Petitioner Gorder, you may want to have someone else with you on the line if you call.

**Findings, Analysis and Conclusions**

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

17. Petitioner Gorder owes the debt described in paragraphs 5 through 11.

18. **Garnishment is authorized**, as follows: through November 2013, **no** garnishment. Beginning December 2013 through November 2014, garnishment **up to 7%** of Petitioner Gorder's disposable pay; and thereafter, garnishment **up to 15%** of Petitioner Gorder's disposable pay. 31 C.F.R. § 285.11.

19. I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through *offset* or garnishment of Petitioner Gorder's pay, to be returned to Petitioner Gorder.

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20. Repayment of the debt may occur through *offset* of Petitioner Gorder's **income tax refunds** or other **Federal monies** payable to the order of Ms. Gorder (whether or not garnishment is authorized).

#### **ORDER**

21. Until the debt is repaid, Petitioner Gorder 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).

22. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through November 2013. Beginning December 2013 through November 2014, garnishment **up to 7%** of Petitioner Gorder's disposable pay is authorized; and garnishment **up to 15%** of Petitioner Gorder'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. **Petitioner Gorder's address has CHANGED.** The Hearing Clerk shall serve Petitioner Gorder at the address Petitioner Gorder provided during the hearing, which I will send to the Hearing Clerk by email.

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**ADMINISTRATIVE WAGE GARNISHMENT ACT**

**In re: BRENDA BISHOP MORGAN, FORMERLY BRENDA B. BISHOP.**

**Docket No. 12-0337.**

**Decision and Order.**

**Filed November 2, 2012.**

**AWG.**

Petitioner, pro se.

Michelle Tanner for RD.

*Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.*

**DECISION AND ORDER**

This matter is before the Administrative Law Judge 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, 2012, 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 on June 28, 2012.

During the hearing, the Petitioner testified raising questions concerning the amount owed and the recovery from the foreclosure sale of the property. She was also allowed additional time to submit additional information and filed a Consumer Debtor Financial Statement which was received by the Hearing Clerk on July 6, 2012.

Rural Development indicated that the original sale conducted on February 13, 2003 was voided because of government error in the legal description of the property and the property was not resold until July 21, 2004. Because of that error, the Agency expressed willingness to waive any interest accruing between February 13, 2003 and July 21, 2004, the date of the second sale.

By Order dated August 31, 2012, the parties were directed to provide the following information:

Brenda Bishop Morgan  
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1. Rural Development was to provide:
  - a. The payoff figure for the loan as of February 13, 2003.
  - b. A copy of any deficiency judgment entered by the United States District Court for the Northern District of Florida, Panama City Division in Docket No. 5:99-CV-127-SPM.
2. In light of her statement that she anticipated being unemployed as her job was ending, the Petitioner, Brenda Bishop Morgan, was to provide current information concerning her employment, if any, indicating if she was unemployed, and if so for how long.

Neither party having provided the information that they were directed to provide, on the basis of the record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

#### **Findings of Fact**

1. On October 6, 1994, the Petitioner (then known as Brenda B. Bishop) received a home mortgage loan in the amount of \$40,250.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) for property located in Cottdale, Florida. RX-1.
2. The loan was accelerated for foreclosure on August 26, 1998 as a result of monetary default and a Judgment of Foreclosure was entered on November 2, 1999. RX-2, 4.
3. On November 24, 1999, Petitioner filed for protection under Chapter 13 of the Bankruptcy Act and the foreclosure proceedings were stayed.
4. The bankruptcy proceedings were dismissed on March 8, 2002, the foreclosure proceedings were resumed and the property was sold by the U.S. Marshal on the steps of the Jackson County Courthouse in Marianna, Florida on February 13, 2003. RX-4.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

5. The sale by the U.S. Marshal was found to be defective by reason of an error in the property description and was voided. A revised Judgment of Foreclosure was entered on March 19, 2004 and the property was again sold on July 21, 2004. RX-4, 5.

6. The amount due as of February 13, 2003 will be found to be \$46,831.74. RX-5.

7. Funds received from the sale amounted to \$45,329.39. The additional amount of \$534.04 was received as an insurance refund; however, it appears that amount was advanced by USDA to keep the property insured and will not be credited to the Petitioner. RX-6.

8. After application of the proceeds of sale, the remaining unpaid debt is in the amount of \$1,502.35 exclusive of potential Treasury fees.

**Conclusions of Law**

1. Petitioner is indebted to USDA Rural Development in the amount of \$1,502.35 for the mortgage loan extended to her.

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

3. The Respondent is entitled to administratively garnish the wages of the \_\_\_\_\_ Petitioner.

**ORDER**

For the foregoing reasons, the wages of Petitioner 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. § 285.11(i).

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

\_\_\_\_\_

Steven Johnson  
71 Agric. Dec. 813

**In re: STEVEN JOHNSON.**  
**Docket No. 12-0574.**  
**Decision and Order.**  
**Filed November 8, 2012.**

AWG.

Petitioner, pro se.

Giovanna Leopardi for RD.

*Decision and Order entered by Janice K. Bullard, Administrative Law Judge.*

#### **DECISION AND ORDER**

This matter is before the Office of Administrative Law Judges upon the request of Steven Johnson (“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 (“USDA-RD”); and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. The petition was not timely filed, and therefore, wage garnishment has been in place.

By Order issued August 24, 2012 the parties were directed to exchange information and documentation and the matter was set for a telephonic hearing. Petitioner did not submit any documentation, nor did he provide in his petition or in any other manner, a telephone number where he could be reached for the telephonic hearing. The Order of August 24, 2012 was not returned as undeliverable.

USDA-RD filed a Narrative, together with supporting documentation. On the scheduled date for the hearing, September 27, 2012, USDA-RD’s representative, Giovanna Leopardi appeared and testified. I held the hearing open to allow Petitioner to participate at a later date. By Order issued September 28, 2012, I directed Petitioner to provide contact information to the Hearing Clerk for the Office of Administrative Law Judges by not later than October 7, 2012. Petitioner has not responded to my Order as of the date of this Decision and Order, and the Order directing contact was not returned as undeliverable.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

Consequently, I find it appropriate to decide this matter on the record before me, and the following Findings of Fact, Conclusions of Law, and Order shall be entered:

**Findings of Fact**

9. On February 15, 2008, the Petitioner<sup>1</sup> received a loan in the amount of \$61,200.00 from JP Morgan Chase Bank, N.A. (“Lender”) for the purchase of real property located in Poplar Bluff, Missouri, evidenced by Promissory Note. RX-2.

10. Prior to signing the promissory note, Petitioner signed RD Form 1980-21, whereby he promised to repay the US for any loss claim that USDA-RD paid to the Lender as the result of Petitioner’s default. RX-1.

11. The loan fell into default and on January 13, 2011, a foreclosure sale was scheduled and held. RX-3.

12. At the sale, a division of the Lender, Homesales Inc., acquired the property for \$31,875.00. RX-3.

13. The property was sold to a third party on April 25, 2011 for \$45,585.00. RX-5.

14. At the time of the sale to the third party, the amount due on Petitioner’s loan was \$72,317.12, comprised of principal, interest, fees, and costs related to the foreclosure and sale. RX-6; RX-7.

15. USDA-RD paid a loss claim of \$25,898.75 to the Lender, for the difference between the amount due and the amount realized by the Lender upon the sale. RX-6; RX-7.

16. Petitioner did not respond to USDA-RD’s attempts to settle this outstanding amount due. RX-8.

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<sup>1</sup> Another Borrower also received the loan, but information pertaining to that Borrower is not relevant as the instant action is confined to Petitioner.

Steven Johnson  
71 Agric. Dec. 813

17. USDA-RD referred Petitioner's account to the U.S. Department of Treasury ("Treasury") for collection on January 9, 2012 pursuant to applicable law. RX-9.

18. Petitioner's wages have been garnished and the amount due has been reduced to \$25,227.21, plus potential fees. RX-10.

#### **Conclusions of Law**

4. The Secretary has jurisdiction in this matter.
5. Respondent USDA-RD has established the existence of a valid debt from Petitioner to USDA-RD.
6. All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met.
7. Upon consideration of all of the evidence, I find that wage garnishment is appropriate.
8. USDA-RD/Treasury may administratively garnish Petitioner's wages at the statutory maximum rate of 15% of his disposable income.
9. Petitioner is advised that only Treasury has authority to compromise the amount of the debt, and that he may be able to negotiate settlement of the debt with the representatives of Treasury.
10. The toll free number for Treasury's agent is **1-888-826-3127**.
11. Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner, including income tax refunds.
12. 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.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

**ORDER**

1. Administrative wage garnishment at the statutory maximum of 15% of Petitioner's disposable income may be effected.
2. Treasury may continue to collect the debt through offset of any funds due to Petitioner from the United States.
3. Until the debt is satisfied, Petitioner shall give to USDA-RD or those collecting on its behalf at Treasury, notice of any change in his address, phone numbers, or other means of contact.
4. Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

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**In re: MICHAEL A. BEENE.**  
**Docket No. 12-0647.**  
**Decision and Order.**  
**Filed November 9, 2012.**

**AWG.**

Petitioner, pro se.  
Michelle Tanner for RD.  
*Decision and Order entered by Janice K. Bullard, Administrative Law Judge.*

**DECISION AND ORDER**

This matter is before the Office of Administrative Law Judges upon the September 24, 2012, request of Michael A. Beene ("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 ("USDA-RD"); and if established, the terms of any repayment prior to imposition of an administrative wage garnishment.

Michael A. Beene  
71 Agric. Dec. 816

By Order issued October 5, 2012 the parties were directed to exchange information and documentation and the matter was set for a telephonic hearing. Petitioner did not submit any documentation. USDA-RD filed a Narrative, together with supporting documentation.

On the scheduled date for the hearing, November 8, 2012, USDA-RD's representative, Michelle Tanner appeared and testified. I admitted USDA-RD's evidence, RX-1 through RX-6 to the record. Petitioner did not answer at the telephone number that he provided. The Order issued on October 5, 2012 was not returned as undeliverable. I held the record open until the close of business on the date of the hearing, but Petitioner did not respond to a voice mail message left for him.

Consequently, I find it appropriate to decide this matter on the record before me, and the following Findings of Fact, Conclusions of Law, and Order shall be entered.

#### **Findings of Fact**

19. On March 26, 1990, the Petitioner<sup>1</sup> received a loan in the amount of \$32,000.00 from USDA-RD for the purchase of real property located in Deming, New Mexico evidenced by Promissory Note. RX-1.

20. The loan fell into default and was accelerated on October 20, 2003. RX-2.

21. A foreclosure sale was held on October 27, 2004 and the property was sold to the highest bidder for the amount of \$29,050.00. RX-4.

22. At the time of the sale, the amount due on Petitioner's loan was \$40,029.93, comprised of principal, interest, fees, and costs related to the foreclosure and sale. RX-5.

23. USDA-RD applied the proceeds of the sale to the Petitioner's account and a balance of \$10,979.93 remained due. RX-5.

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<sup>1</sup> Another Borrower also received the loan, but information pertaining to that Borrower is not relevant as the instant action is confined to Petitioner.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

24. Petitioner did not respond to USDA-RD's attempts to settle the outstanding amount due. RX-8.

25. USDA-RD referred Petitioner's account to the U.S. Department of Treasury ("Treasury") for collection on May 9, 2005, pursuant to applicable law. RX-4.

26. At the time of the submission of USDA-RD's exhibits to this record, the amount of Petitioner's account at Treasury was \$4,965.99, plus remaining potential fees.

**Conclusions of Law**

13. The Secretary has jurisdiction in this matter.

14. Respondent USDA-RD has established the existence of a valid debt from Petitioner to USDA-RD.

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

16. Upon consideration of all of the evidence, I find that wage garnishment is appropriate.

17. USDA-RD/Treasury may administratively garnish Petitioner's wages at the statutory maximum rate of 15% of his disposable income.

18. Petitioner is advised that only Treasury has authority to compromise the amount of the debt, and that he may be able to negotiate settlement of the debt with the representatives of Treasury.

19. The toll free number for Treasury's agent is **1-888-826-3127**.

20. Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner, including income tax refunds.

David Maynez  
71 Agric. Dec. 819

21. 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.

### **ORDER**

1. Administrative wage garnishment at the statutory maximum of 15% of Petitioner's disposable income may be effected.
2. Treasury may continue to collect the debt through offset of any funds due to Petitioner from the United States.
3. Until the debt is satisfied, Petitioner shall give to USDA-RD or those collecting on its behalf at Treasury, notice of any change in his address, phone numbers, or other means of contact.
4. Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

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**In re: DAVID MAYNEZ.**  
**Docket No. 12-0608.**  
**Decision and Order.**  
**Filed November 14, 2012.**

**AWG.**

Petitioner, pro se.  
Michelle Tanner for RD.

*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

### **DECISION AND ORDER**

1. The hearing, by telephone, was held on October 23, 2012. David Maynez, the Petitioner ("Petitioner Maynez") participated, representing himself (appearing *pro se*). The record was held open for Petitioner Maynez to file a new Consumer Debtor Financial Statement.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent (“USDA Rural Development”), participated, represented by Michelle Tanner.

**Summary of the Facts Presented**

3. Petitioner Maynez’s filings on October 31, 2012, including his “Consumer Debtor Financial Statement” dated October 29, 2012, and copies of numerous recent bills documenting debt, especially for his wife’s health care including hospitalization, are admitted into evidence. Petitioner Maynez’s filings on October 24, 2012, including his 2 most recent pay stubs, are admitted into evidence. Petitioner Maynez’s filings on October 9, 2012, including his 3-page letter and his “Consumer Debtor Financial Statement” dated September 27, 2012, are admitted into evidence. Petitioner Maynez’s Hearing Request dated August 6, 2012 with all accompanying documents, including his “Consumer Debtor Financial Statement” dated August 6, 2012, is also admitted into evidence, together with the testimony of Petitioner Maynez.

4. USDA Rural Development’s Exhibits RX 1 through RX 9, plus Narrative, Witness & Exhibit List, were filed on September 10, 2012, and are admitted into evidence, together with the testimony of Michelle Tanner.

5. Petitioner Maynez bought a home in Texas in 2008, borrowing \$89,100.00 to pay for it. The loan was made by American Southwest Mortgage Corp., then sold to JP Morgan Chase Bank, N.A. (RX 2, p. 7), with the servicing lender being Chase Home Finance, LLC.

6. USDA Rural Development’s position is that Petitioner Maynez owes to USDA Rural Development **\$19,998.62** (as of September 7, 2012), in repayment of the United States Department of Agriculture / Rural Development / Rural Housing Service *Guarantee* (see RX 1, esp. p. 2) for the loan made in 2008 (“the debt”). See USDA Rural Development’s Exhibits RX 1 through RX 9, plus Narrative, Witness & Exhibit List.

7. Petitioner Maynez’s letter dated 10/08/2012 documents his efforts to pay Chase; and he testified that the Branch refused his payments after he

David Maynez  
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got behind. Petitioner Maynez testified that Chase did not treat him fairly.

8. After careful review of all of the evidence, I agree with USDA Rural Development's position. The *Guarantee* (RX 1) establishes an **independent** obligation of Petitioner Maynez, "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 1, p. 2.

9. Pursuant to the *Guarantee*, on September 12, 2011, USDA Rural Development paid a loss claim of \$22,600.16 to the lender (Chase). RX 5, p. 11. The Due Date of the last payment made was November 1, 2009. RX 5, p. 4. The foreclosure sale date was October 5, 2010. RX 5, p. 5. RX 6 details the loss claim paid under the *Guarantee*, showing how the loss claim of \$22,600.16 was calculated.

10. At the foreclosure sale on October 5, 2010, the Bank (through a substitute Trustee) was the highest bidder (\$68,000.00). RX 2, p. 9. Thereafter, Chase sold the home for \$83,900.00 on May 13, 2011 RX 4, p. 2. Interest stopped accruing when the sale funds were applied. USDA Rural Development reimbursed the lender \$22,600.16 on September 12, 2011 (RX 5, p. 11), which is the amount USDA Rural Development seeks to recover from Petitioner Maynez under the *Guarantee*. RX 6.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

\$ 87,489.45	Unpaid Principal Balance
\$ 6,419.09	Unpaid Interest Balance [11/01/2009 to 05/13/2011]
<u>\$ 229.88</u>	Protective Advances to Pay Taxes and Insurance
\$ 94,138.42	
+ <u>\$ 12,797.98</u>	Lender Expenses to Sell Property
<u>\$106,936.40</u>	Total Debt Charged to Petitioner Maynez

The debt was then \$106,936.40. RX 6.

- <u>\$ 83,900.00</u>	Funds Received from Sale of the home
\$ 23,036.40	Amount Due Before \$436.24 Recoveries/Credits/Reductions
<u>=====</u>	
- <u>\$ 436.24</u>	Recoveries/Credits/Reductions
<u>\$ 22,600.16</u>	

RX 6, RX 5, USDA Rural Development Narrative, and testimony.

11. Collections from Treasury (interception of a \$2,079.00 income tax refund, plus numerous garnishments) which have been applied to reduce the debt, have resulted in the balance of **\$19,998.62** as of September 7, 2012 (which excludes the potential remaining collection fees).

12. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **\$19,998.62**, would increase the balance by \$5,599.61, to \$25,598.23 (as of September 7, 2012). RX 9, p. 2.

13. Garnishment began because Petitioner Maynez's Hearing Request was LATE. RX 9, p. 1. The "Notice of Intent to Initiate Administrative

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Wage Garnishment Proceedings,” dated June 7, 2012, gave Petitioner Maynez until June 28, 2012 to request a hearing:

Request A Hearing. You may request a hearing from the Federal Agency by completing and mailing the enclosed Request for Hearing to the address listed below (Pioneer Credit Recovery, Inc., in Arcade, New York). If we receive your written request for a hearing on or before 06/28/2012, Treasury will not issue a wage garnishment order on behalf of the Federal Agency until your hearing is held and a decision is reached.

Petitioner Maynez’s Hearing Request was not received until August 2012, so it was LATE.

14. Garnishment of Petitioner Maynez’s disposable pay has caused Petitioner Maynez financial hardship. Petitioner Maynez and his wife have 4 children to support, in addition to themselves. [Mrs. Maynez is not responsible to pay the USDA Rural Development debt.] Petitioner Maynez has no health insurance. His wife was injured, requiring surgery and hospitalization. The bill for Emergency Room service to his wife on August 28, 2011 from University Medical Center was nearly \$2,000.00. The past due balance owed to Acute Surgical Care Specialist LLP at the end of 2011 was greater than \$4,500.00. The Del Sol Medical Center delinquent account alone is currently greater than \$10,000.00. Petitioner Maynez has an excellent job, but his income does not stretch far enough to cover all his responsibilities. Petitioner Maynez testified that he is barely making ends meet.

15. To prevent hardship, potential garnishment to repay the USDA Rural Development debt must be limited to **0%** of Petitioner Maynez’s disposable pay through November 2014; then **up to 5%** of Petitioner Maynez’s disposable pay beginning December 2014 through November 2016; then **up to 10%** of Petitioner Maynez’s disposable pay beginning December 2016 through November 2018; then **up to 15%** of Petitioner Maynez’s disposable pay thereafter. 31 C.F.R. § 285.11.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

16. Petitioner Maynez, you may want to negotiate the disposition of the debt with Treasury's collection agency.

**Discussion**

17. Petitioner Maynez, you may choose to call Treasury's collection agency to **negotiate** the repayment of the debt. Petitioner Maynez, 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 Maynez, 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. Petitioner Maynez, 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 wish to include someone else with you in the telephone call if you call to negotiate.

**Findings, Analysis and Conclusions**

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

19. Petitioner Maynez owes the debt described in paragraphs 5 through 12.

20. Garnishment is authorized, but to prevent financial hardship shall be limited as follows: through November 2014 garnishment limited to **0%** of Petitioner Maynez's disposable pay; beginning December 2014 through November 2016 garnishment **up to 5%** of Petitioner Maynez's disposable pay; beginning December 2016 through November 2018 garnishment **up to 10%** of Petitioner Maynez's disposable pay; and thereafter, garnishment **up to 15%** of Petitioner Maynez's disposable pay. 31 C.F.R. § 285.11.

21. **No refund** to Petitioner Maynez of monies already collected or collected prior to implementation of this Decision is appropriate, and no refund is authorized.

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22. Repayment of the debt may occur through *offset* of Petitioner Maynez's **income tax refunds** or other **Federal monies** payable to the order of Petitioner Maynez.

### **ORDER**

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

24. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment limited to **0%** of Petitioner Maynez's disposable pay through November 2014; then **up to 5%** of Petitioner Maynez's disposable pay beginning December 2014 through November 2016; then **up to 10%** of Petitioner Maynez's disposable pay beginning December 2016 through November 2018; then **up to 15%** of Petitioner Maynez'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.

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**In re: OTHA HARRIS.**  
**Docket No. 12-0529.**  
**Decision and Order.**  
**Filed November 21, 2012.**

**AWG.**

Petitioner, pro se.  
Michelle Tanner for RD.  
*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

### **DECISION AND ORDER**

1. The hearing by telephone was begun on August 30, 2012, resumed on September 17, and was completed on October 9, 2012. Otha Harris, also

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

known as Otha Ree Harris and as Otha M. Harris and called “Marie” (“Petitioner Harris”), participated, representing herself (appeared *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent (“USDA Rural Development”), also participated, represented by Michelle Tanner.

**Summary of the Facts Presented**

3. Petitioner Harris’s completed “Consumer Debtor Financial Statement” plus pay stubs (filed on October 18, 2012), are admitted into evidence, together with the testimony of Petitioner Harris, together with her Hearing Request (filed in mid-2012).

4. USDA Rural Development’s Exhibits RX 1 through RX 6, plus Narrative, Witness & Exhibit List (filed on August 6, 2012), are admitted into evidence, together with the testimony of Michelle Tanner.

5. Petitioner Harris owed to USDA Rural Development **\$15,341.18** (as of July 28, 2012) in repayment of a USDA Farmers Home Administration loan borrowed in 1994 for a home in Texas, the balance of which is now unsecured (“the debt”). *See* USDA Rural Development Exhibits, esp. RX 1, 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 **\$15,341.18**, would increase the current balance by \$4,295.53, to \$19,636.71. *See* USDA Rural Development Exhibits, esp. RX 6.

7. The amount Petitioner Harris borrowed from USDA Farmers Home Administration in 1994 was \$40,720.00. RX 1. The loan became delinquent and was reamortized. Reamortization made the loan current, by adding the delinquent amount to the principal balance. Reamortization did not change the total amount owed, which all became principal. Because of the reamortization, more principal was owed on August 9, 2000 than had been owed at the beginning: \$46,325.00 principal owed. RX 2.

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8. Petitioner Harris testified that she left the home in 1999. [My baby daughter went to college and I left, too.] Petitioner Harris testified that the previous year, in 1998, Petitioner Harris's son died, on Petitioner Harris's birthday. The loss of her son was devastating, and the memories in the house were overwhelming. Petitioner Harris testified that she gave up.

9. USDA Rural Development's "Notice of Acceleration" was dated August 9, 2000, and the foreclosure sale was held on April 3, 2001. RX 5. At the time of the foreclosure sale in 2001, the debt balance was \$51,042.47.

\$ 46,325.80 unpaid principal  
\$ 3,464.86 unpaid interest  
\$ 1,245.56 fees/costs (taxes, insurance, costs)  
\$ 6.25 interest on fees/costs

\$ 51,042.47  
=====

RX 5 and Michelle Tanner's testimony.

10. The highest bid at the foreclosure sale was \$36,000.00, bid by USDA. The \$36,000.00 was applied to reduce the debt (leaving a balance owed of \$15,042.47). Then additional costs and fees were billed and a refund applied (leaving a balance owed of **\$15,341.18**). RX 5 and Michelle Tanner's testimony. Since 2001, no additional interest has accrued.

11. Petitioner Harris owes the balance of **\$15,341.18** (excluding potential collection fees) as of July 28, 2012, and USDA Rural Development may collect that amount from her.

RX 6.

12. Michelle Tanner testified that from 2002 until 2011, U.S. Treasury had the wrong social security number for Petitioner Harris. This was discovered in 2011, when an income tax refund was intercepted to be applied to reduce the debt, but it was learned that the social security

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

number belonged to a gentleman who does not owe the debt. RX 4, p. 2. The income tax refund was returned to the gentleman. RX 6, p. 1.

13. Petitioner Harris testified that she supports herself. When she can, Petitioner Harris sends some support to her daughter, who has 3 children. Petitioner Harris works hard; she is a Certified Nursing Assistant (CNA), and she works 2 jobs. She testified that she had a recent knee injury and has other health problems; she requires blood pressure medication and has high cholesterol. Petitioner Harris's disposable pay (within the meaning of 31 C.F.R. § 285.11) is as much as \$2,000.00 per month combined (both jobs). [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance; and in certain situations minus other employee benefits contributions that are required to be withheld.]

14. Garnishment at 15% of Petitioner Harris's disposable pay could yield as much as \$300.00 per month to repay the USDA Rural Development debt, but garnishment in that amount now would cause Petitioner Harris financial hardship (within the meaning of 31 C.F.R. § 285.11). Petitioner Harris's Consumer Debtor Financial Statement (filed October 18, 2012) shows that her living expenses are reasonable, frugal in fact. It is important that she contribute to the well-being of her daughter and her daughter's 3 children.

15. To prevent financial hardship, potential garnishment to repay "the debt" (*see* paragraph 5) must be limited to **5%** of Petitioner Harris's disposable pay through November 2013; then **up to 10%** of Petitioner Harris's disposable pay thereafter. 31 C.F.R. § 285.11.

16. Petitioner Harris is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

**Discussion**

17. Garnishment is authorized. *See* paragraphs 13 through 15. I encourage **Petitioner Harris and Treasury's collection agency to negotiate** the repayment of the debt. Petitioner Harris, 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

Otha Harris  
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Harris, 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. Petitioner Harris, you may want to have someone else with you on the line if you call.

### **Findings, Analysis and Conclusions**

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

19. Petitioner Harris owes the debt described in paragraphs 5 through 12.

20. **Garnishment is authorized**, as follows: through November 2013, garnishment **up to 5%** of Petitioner Harris's disposable pay; and thereafter, garnishment **up to 10%** of Petitioner Harris's disposable pay. 31 C.F.R. § 285.11.

21. I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through *offset* or garnishment of Petitioner Harris's pay, to be returned to Petitioner Harris.

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

### **ORDER**

23. Until the debt is repaid, Petitioner Harris 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).

24. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment **up to 5%** of Petitioner Harris's disposable pay through November 2013. Beginning December 2013 and thereafter, garnishment **up to 10%** of Petitioner Harris's disposable pay is authorized. 31 C.F.R. § 285.11.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

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

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**In re: JOSEPH BURTON.**  
**Docket No. 13-0015.**  
**Decision and Order.**  
**Filed November 28, 2012.**

**AWG.**

Petitioner, pro se.  
Giovanna Leopardi for RD.  
*Decision and Order entered by Janice K. Bullard, Administrative Law Judge.*

**DECISION AND ORDER**

This matter is before the Office of Administrative Law Judges upon the October 11, 2012 request of Joseph Burton (“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 (“USDA-RD”), and if established, the propriety of administrative wage garnishment.

By Order issued October 15, 2012 the parties were directed to exchange information and documentation and the matter was set for a telephonic hearing. Petitioner did not submit any documentation. USDA-RD filed a Narrative, together with supporting documentation. On the scheduled date for the hearing, November 27, 2012, USDA-RD’s representative, Giovanni Leopardi, appeared and testified. I admitted USDA-RD’s evidence, RX-1 through RX-6 to the record. Petitioner also appeared and testified.

The following Findings of Fact, Conclusions of Law, and Order is based upon the entire record.

Joseph Burton  
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### **Findings of Fact**

27. On May 29, 1987, the Petitioner<sup>1</sup> received a loan in the amount of \$42,400.00 from USDA-RD for the purchase of real property located in Hitchcock, Texas, evidenced by Promissory Note and Real Estate Deed. RX-1.

28. Petitioner and his ex-wife divorced, and he conveyed the property to her as part of the divorce proceedings; Petitioner's ex-wife occupied the house after the divorce.

29. Subsequently, the loan fell into default and was accelerated on December 23, 2002. RX-2.

30. A foreclosure sale was held on March 2, 2004 and the property was sold to the highest bidder for the amount of \$49,000.00. RX-4.

31. At the time of the sale, the amount due on Petitioner's loan was \$66,490.82, comprised of principal, interest, fees, and costs related to the foreclosure and sale. RX-5.

32. USDA-RD applied the proceeds of the sale to the Petitioner's account and a balance of \$17,490.82 remained due. RX-5.

33. Petitioner filed an untimely response to USDA-RD's attempts to settle this outstanding amount due, which was received on December 6, 2006 after the debt had been referred to the United States Department of Treasury ("Treasury"). RX-4.

34. USDA-RD referred Petitioner's account to Treasury for collection on June 7, 2004, pursuant to applicable law. RX-3.

35. Offsets and collections by Treasury have reduced the debt by \$16,780.78. RX-5.

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<sup>1</sup> Petitioner's ex-wife also signed the note.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

36. At the time of the submission of USDA-RD's exhibits, the amount of Petitioner's account at Treasury was \$1,088.04, plus remaining potential fees.

37. Additional amounts have been applied to the account due to ongoing wage garnishments.

**Conclusions of Law**

22. The Secretary has jurisdiction in this matter.

23. Respondent USDA-RD has established the existence of a valid debt from Petitioner to USDA-RD.

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

25. Petitioner's request for a hearing on wage garnishment was not timely filed, and therefore his wages have been garnished.

26. Upon consideration of all of the evidence, I find that USDA-RD/Treasury may administratively garnish Petitioner's wages; however Petitioner's income and expenses cannot sustain the maximum rate of 15% of his disposable income.

27. Petitioner is advised that only Treasury has authority to compromise the amount of the debt, and that he may be able to negotiate settlement of the debt with the representatives of Treasury.

28. In order to allow Petitioner to consider negotiations with Treasury, garnishment shall be suspended for a period of sixty (60) days.

29. At the expiration of the sixty (60) days suspension, garnishment of Petitioner's wages may be imposed at a rate of not more than 5% of his disposable income.

30. Petitioner is encouraged to contact Treasury's agent is **1-888-826-3127** if Petitioner is in the position to negotiate the debt.

Joseph Burton  
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31. Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner, including income tax refunds.

32. 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.

### **ORDER**

1. Administrative wage garnishment is hereby suspended for a period of sixty (60) days.
  2. At the expiration of the sixty (60) day suspension period, Petitioner's wages may be garnished at the rate of no more than 5% of Petitioner's disposable income.
  3. Treasury may continue to collect the debt through offset of any funds due to Petitioner from the United States.
  4. Until the debt is satisfied, Petitioner shall give to USDA-RD or those collecting on its behalf at Treasury, notice of any change in his address, phone numbers, or other means of contact.
  5. Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.
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**ADMINISTRATIVE WAGE GARNISHMENT ACT**

**In re: GEORGE STEWART.**

**Docket No. 13-0003.**

**Decision and Order.**

**Filed December 7, 2012.**

**AWG.**

Petitioner, pro se.

Giovanna Leopardi for RD.

*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

**DECISION AND ORDER**

1. The hearing by telephone was held on December 4, 2012. George Stewart, also known as George Stewart, Jr., the Petitioner (“Petitioner Stewart”), failed to participate. He represents himself (appears *pro se*).
2. The mobile phone number on Petitioner Stewart’s Consumer Debtor Financial Statement was disconnected. The phone number on Petitioner Stewart’s Hearing Request had an automated recording that said no calls were being taken at that time. Petitioner Stewart gave us no other way to contact him for the hearing, even though the Hearing Notice advised him to.
3. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (“USDA Rural Development”). USDA Rural Development participated, represented by Giovanna Leopardi.

**Summary of the Facts Presented**

4. Petitioner Stewart’s completed “Consumer Debtor Financial Statement” (filed November 14, 2012) is admitted into evidence, together with his Hearing Request dated September 13, 2012.
5. USDA Rural Development’s Exhibits RX 1 through RX 5, plus Narrative, Witness & Exhibit List (filed November 30, 2012) are admitted into evidence, together with the testimony of Giovanna Leopardi.

George Stewart  
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6. The loan was made by the United States Department of Agriculture, Farmers Home Administration, in 1984, for a home in Mississippi. RX 1, pp. 1-10. Petitioner Stewart and his wife Gwendolyn Stewart, on January 20, 1995, signed a Deed of Trust for the home (RX 1, pp. 13-17), the loan having been assumed on that date. Petitioner Stewart then assumed the loan on March 23, 1995 (“the debt”). RX 1, pp. 11-12.

7. USDA Rural Development’s position is that Petitioner Stewart owes to USDA Rural Development **\$14,963.21** as of November 28, 2012. After careful review of all of the evidence, I agree with USDA Rural Development’s position.

8. The Notice of Acceleration dated October 21, 1998 (RX 2, pp. 14-16), indicates that the balance of the account was \$36,383.92 unpaid principal plus \$5,066.83 unpaid interest as of October 21, 1998. At the foreclosure sale on June 7, 1999, a third party bought the home. RX 3, p. 9. No interest has accrued since the proceeds were applied, in June 1999.

9. The proceeds, \$30,715.00, were applied first to pay recoverable costs that included unpaid taxes and unpaid insurance and the costs of sale (\$1,775.39); then applied to pay the unpaid interest, which by then was \$6,722.14; and then applied to pay \$22,217.47 of the principal. The remaining balance owed was \$14,166.45. To that amount, adjustments were made to add interest (\$69.28) and to add costs (\$727.48), resulting in **\$14,963.21** unpaid (excluding the potential remaining collection fees). See RX 4.

10. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **\$14,963.21**, would increase the balance by \$4,189.70, to \$19,152.91. [My calculation differs from that found on RX 5, p. 2 by nearly \$300.00].

11. Petitioner Stewart’s Consumer Debtor Financial Statement shows that his current living expenses are minimal, and that his only income is Supplemental Security Income (SSI) of \$698.34 monthly. He pays \$300.00 monthly on a \$7,000.00 debt to Triple-B, a car payment. He is eligible for Medicaid.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

12. It does not appear that Petitioner Stewart has any disposable pay that could be garnished to pay the debt. To prevent hardship, potential garnishment to repay the USDA Rural Development debt must be limited to **0%** of Petitioner Stewart's disposable pay.

Petitioner Stewart's SSI will not be *offset* to pay the debt.

13. Petitioner Stewart, you may want to negotiate the disposition of the debt with Treasury's collection agency.

**Discussion**

14. I recommend that Petitioner Stewart be granted **a financial hardship discharge** of the debt. Petitioner Stewart, this will require **you** to telephone Treasury's collection agency after you receive this Decision. To be considered (the decision whether to grant you a financial hardship discharge will be made by Treasury's collection agency), you will be required to provide, timely, all financial documentation requested. The toll-free number for you to call is **1-888-826-3127**. Petitioner Stewart, if you are not granted a financial hardship discharge (and it is difficult to qualify), 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. Petitioner Stewart, you may wish to include someone else with you in the telephone call when you call to negotiate.

**Findings, Analysis and Conclusions**

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

16. Petitioner Stewart owes the debt described in paragraphs 6 through 10.

17. **Garnishment is not authorized.** Garnishment in any amount would cause Petitioner Stewart financial hardship. 31 C.F.R. § 285.11.

Patricia Green  
71 Agric. Dec. 837

18. I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through *offset* or garnishment of Petitioner Stewart's pay, to be returned to Petitioner Stewart.

19. Repayment of the debt may occur through *offset* of Petitioner Stewart's **income tax refunds** or other **Federal monies** payable to the order of Mr. Stewart. [Petitioner Stewart's SSI will not be *offset* to pay the debt.]

### **ORDER**

20. Until the debt is repaid, Petitioner Stewart 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).

21. 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.

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**In re: PATRICIA GREEN.**  
**Docket No. 12-0588.**  
**Decision and Order.**  
**Filed December 14, 2012.**

AWG.

Petitioner, pro se.  
Esther McQuaid for RD.  
*Decision and Order entered by James P. Hurt, Hearing Official.*

**DECISION AND ORDER**

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

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 October 11, 2012, 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-10 on October 17, 2012. On November 28<sup>1</sup>, 2012, at the time set for the hearing, both parties were available. Ms. Esther McQuaid represented RD. Ms. Green was self-represented. The parties were sworn.

Petitioner did not submit any written evidence. Her defense to RD's claim of unauthorized rental assistance is that she did not contract as alleged.

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**

38. On July 1, 2007 (RX-9 @ p. 1 of 28), and on July 1, 2008 (RX-9 @ p. 6 of 28), and on July 1, 2009 (RX-9 @ p. 10 of 28) and on July 1, 2010 (RX-9 @ p. 17 of 28) and on July 1, 2011 (RX-9 @ 24 of 28), Ms. Green signed RD 3560-6. (The USDA-Rural Housing Service Tenant Certification).

39. In each case, Ms. Green's signature appeared on the form below the printed words "I will reimburse the agency the unauthorized amount."

40. Along with each annual certification, Ms. Green submitted a separate "UNEMPLOYMENT STATEMENT" that she was "currently unemployed."

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<sup>1</sup> The hearing date was corrected from November 31, 2012.

Patricia Green  
71 Agric. Dec. 837

41. For all of the annual rental assistance renewal periods, Ms. Green was gainfully employed at Trinity Industries. RX-4.

42. On February 1, 2012, Ms. Green met with the apartment management company, where her finances were reviewed and where it was determined that Ms. Green was ineligible for rental assistance. RX-3.

43. Based upon Wage match records from the state of Louisiana (RX-7) and the prescribed calculations for unauthorized rental assistance, RD calculated her unauthorized rental assistance to be \$18,114.00. RX-10.

44. Ms. Green raised an additional issue that her adult son was not in the household for a portion of the 2011 certification period.

45. RD recalculated the unauthorized rental assistance without the income from the adult child for that period of time resulting in a lowered amount of unauthorized rental assistance to \$17,784. See Addition to Narrative, RX-11.

46. In addition, Ms. Green is liable for potential treasury fees of up to 28 percent of the amount of any garnished wages.

47. RD categorized Ms. Green's actions as "fraudulent." See Narrative page 1, third paragraph.

#### **Conclusions of Law**

33. Petitioner is indebted to USDA Rural Development in the amount of \$17,784 exclusive of potential Treasury fees for the unauthorized rental assistance given to her.

34. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of \$4,979.52.

35. Because RD classified her unauthorized rental assistance as "fraudulent," I decline to make a financial hardship calculation.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

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

37. The Respondent is entitled to administratively garnish the wages of the Petitioner at this time.

**ORDER**

For the foregoing reasons, the wages of Petitioner shall 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.

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**In re: ANDY SCHLAGETER, A/K/A ANDREW SCHLAGETER.  
Docket No. 12-0526.  
Decision and Order.  
Filed December 17, 2012.**

**AWG.**

Petitioner, pro se.  
Esther McQuaid for RD.  
*Decision and Order entered by James P. Hurt, Hearing Official.*

**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 October 11, 2012, 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.

Andy Schlageter  
71 Agric. Dec. 840

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 October 31, 2012. Petitioner submitted his financial statements along with his petition for hearing. On November 28, 2012, at the time set for the hearing, both parties were available. Ms. Esther McQuaid represented RD. Mr. Schlageter was self-represented. The parties were sworn.

Petitioner did not submit any written evidence relating to the unauthorized rental assistance. RD's exhibit Narrative at page 2 indicates that the Tenant Certification Form RD 3560-8 signed on on/about 9/22/2008. The usual accompanying documents to the tenant certification require the tenant to report any increases in income. RX-1 @ p. 4 of 6 however, RD's exhibits do not include any statement of tenant's duty signed by the tenant for the initial rent subsidy period. For the recertification of eligibility on/about September 1, 2009, RD's exhibits included a signed notice to the tenants that they had a duty to report any increase in income. RX-1 @ p. 4 of 6. The tenant failed to report an increase in income beginning the 4th quarter of 2008. An investigation of the family unit income shows that the undeclared employment income justified a recalculation of the tenant's eligibility or amount of authorized rental assistance.

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**

48. On October 1, 2008 (RX-1 @ p. 1 of 6), and on September 1, 2009 (RX-1 @ p. 5 of 6), Andy Schlageter and Dawn Schlageter signed RD 3560-6. (The USDA-Rural Housing Service Tenant Certification).

49. In each case, Mr. Schlageter's signature appeared on the form below the printed words "I will reimburse the agency the unauthorized amount."

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50. Along with the annual September 1, 2009 re-certification, Andy Schlageter and Dawn Schlageter signed a separate "Recertification Interview Checklist" that they had no form of income except child support." RX-1 @ p. 3 of 6.

51. In the same Recertification form, Andy Schlageter and Dawn Schlageter committed to report and increases in income. RX-1 @ p.3 of 6.

52. From the fourth quarter of 2008, Dawn Schlageter was gainfully employed at Target Corporation. RX-3 @ page 2 of 2.

53. From the first quarter of 2009, Andy Schlageter was gainfully employed at Action Temporary Services, and then Heartland Indiana Food Corp., and then Express Services, and then Gibson County Quality Assurance. RX-3 @ p. 1 of 2.

54. On February 26, 2010, Andy Schlageter and Dawn Schlageter vacated the premises. RX- 7 @ p. 2 of 2.

55. Based upon Wage match records from the state of Indiana (RX-3) and the prescribed calculations for unauthorized rental assistance, RD calculated their combined unauthorized rental assistance to be \$5,004.00. RX-5 @ p. 5 of 5.

56. Andy Schlageter is jointly and severally liable for the unauthorized rental assistance.

57. In addition, Andy Schlageter is jointly and severally liable for potential treasury fees of up to 28 percent of the amount of any garnished wages.

58. RD did not categorize Andy Schlageter's actions as "fraudulent," therefore I would consider his request for a future financial hardship calculation at the time when his income becomes subject to garnishment.

59. Andy Schlageter has worked only approximately 7 months without interruption or voluntary unemployment, therefore he is not subject to wage garnishment at this time.

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### **Conclusions of Law**

38. Petitioner is jointly and severally indebted to USDA Rural Development in the amount of \$5,004.00 exclusive of potential Treasury fees for the unauthorized rental assistance given to him.

39. In addition, Petitioner is jointly and severally indebted for potential fees to the US Treasury in the amount of \$1,401.12.

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

41. The Respondent is not entitled to administratively garnish the wages of the Petitioner at this time. RD may reconsider Petitioner's income in May 2013.

### **ORDER**

For the foregoing reasons, the wages of Petitioner shall not be subjected to administrative wage garnishment at this time. After 5 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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**ADMINISTRATIVE WAGE GARNISHMENT ACT****In re: ALLISON MOSSBERGER.****Docket No. 12-0637.****Decision and Order.****Filed December 18, 2012.**

AWG.

Petitioner, pro se.

Michelle Tanner for RD.

*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.***DECISION AND ORDER**

1. The Hearing (by telephone) was held on November 7, 2012. Ms. Allison Mossberger, also known as Allison L. Mossberger (“Petitioner Mossberger”) participated, representing herself (appearing *pro se*).
2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent (“USDA Rural Development”), participated, represented by Michelle Tanner.

**Summary of the Facts Presented**

3. Petitioner Mossberger’s documents filed on October 12, 2012 are admitted into evidence, together with the testimony of Petitioner Mossberger. The documents filed on October 12 include Petitioner’s “Consumer Debtor Financial Statement” and additional documents showing payments deferred and claims of financial hardship. Also admitted into evidence is Petitioner’s Hearing Request dated August 13, 2012.
4. USDA Rural Development’s Exhibits RX 1 through RX 10, plus Narrative, Witness & Exhibit List, were filed on October 9, 2012, and are admitted into evidence, together with the testimony of Michelle Tanner.
5. The first issue is whether Petitioner Mossberger owes to USDA Rural Development a balance of **\$40,427.49** (as of October 2, 2012) in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service *Guarantee* (see RX 1, esp. p. 2) for a loan made on January 5, 2005 by Draper and Kramer Mortgage

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Corp., for a home in Illinois, the balance of which is now unsecured (“the debt”). That alleged debt was \$51,290.49 (*see* RX 7), until Petitioner Mossberger’s income tax refund (\$9,992.00) was *offset* and her co-borrower’s income tax refund (\$905.00) was *offset*. *See* RX 10. Her co-borrower is Nickolas Zitek.

6. Draper and Kramer Mortgage Corp. sold the loan to JP Morgan Chase Bank, N.A., on the day the loan was made. RX 2, p. 5. JP Morgan Chase Bank, N.A. (the Holding Lender) is the parent company of Chase Home Finance LLC (the Servicing Lender). RX 3; RX 6, pp. 3-4. I refer to these entities as Chase, or the lender.

7. Petitioner Mossberger’s promise to pay USDA Rural Development, if USDA Rural Development paid a loss claim to the lender, is contained on the same page of the *Guarantee* that Petitioner Mossberger signed, and is recited in the following paragraph, paragraph 8.

8. The *Guarantee* establishes an **independent** obligation of Petitioner Mossberger, “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 1, p. 2.

9. USDA Rural Development paid Chase \$51,290.49 on April 12, 2010. RX 6, p. 8; RX 7. This, the amount USDA Rural Development paid, is the amount USDA Rural Development seeks to recover from Petitioner Mossberger under the *Guarantee* (less the amounts already collected from Petitioner Mossberger and her co-borrower, through *offset*). *See* RX 10.

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

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

3%) on **\$40,427.49** would increase the current balance by \$11,319.69, to \$51,747.18. *See* RX 10, p. 2.

11. The amount Petitioner Mossberger borrowed from Draper and Kramer Mortgage Corp. on January 5, 2005, was \$116,800.00. RX 2, pp. 1-3. The Due Date of the Last Payment Made was September 1, 2008. RX 6, p. 4. Petitioner Mossberger wrote (RX 8) and testified that the co-borrower, Nickolas Zitek, agreed to make all the payments; he stayed in the home when she left the home. She testified she was in the home only 6 weeks.

12. Foreclosure was initiated on February 13, 2009. RX 6, p. 4. At the Foreclosure Sale on September 30, 2009, the lender was not outbid, so the home sold to the lender, Chase. Chase then sold the REO (real estate owned) on January 8, 2010, for \$80,001.00. RX 6, p. 5; RX 7.

13. Getting the security (the home) resold was an expensive process. First, all the costs of foreclosure were incurred, and Petitioner Mossberger is expected to reimburse for those costs; because no one outbid the lender at the foreclosure sale, all the costs to sell the REO were then incurred, and Petitioner Mossberger is expected to reimburse for those costs as well. Meanwhile, interest continued to accrue, taxes continued to become due, and insurance premiums continued to be paid. Interest alone from September 1, 2008 (the Due Date of the Last Payment Made) until January 8, 2010 (when the REO was sold for \$80,001.00), was \$9,973.20. RX 7. No additional interest has accrued since January 8, 2010.

14. Interest stopped accruing when the proceeds of sale (\$80,001.00) were applied to the debt. Collections from Treasury since then (from Petitioner Mossberger, and from her co-borrower, through *offset*), leave **\$40,427.49** unpaid as of October 2, 2012 (excluding the potential remaining collection fees). *See* RX 10 and USDA Rural Development Narrative, plus Michelle Tanner's testimony.

15. Does Petitioner Mossberger owe to USDA Rural Development a balance of **\$40,427.49** (as of October 2, 2012) in repayment of a United States Department of Agriculture / Rural Development / Rural Housing

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Service *Guarantee* (see RX 1, esp. p. 2)? I conclude that she does. My reasons are the same as those found in RX 8, p. 3.

16. Although Petitioner Mossberger may well recover the amounts she has paid on the debt from her co-borrower, Nickolas Zitek, she remains legally liable to repay USDA Rural Development. The debt is Petitioner Mossberger's and her co-borrower's joint-and-several obligation. When Petitioner Mossberger entered into the borrowing transaction eight years ago with her co-borrower, Nickolas Zitek, certain responsibilities were fixed, as to each of them.

17. The second issue is whether Petitioner Mossberger can withstand garnishment without it causing financial hardship. Petitioner Mossberger's Consumer Debtor Financial Statement and other filings and her testimony provide the evidence necessary for me to evaluate the factors to be considered under 31 C.F.R. § 285.11. Petitioner Mossberger is responsible to support not only herself, but also her three children. She does have the help of child support, and help from her parents, but her day care expenses alone cost roughly \$1,300.00 per month. Petitioner Mossberger makes good money in car sales, but some seasons are better than others. Further, she was on maternity leave for nearly half-a-year in 2011 with her youngest child, and she is still catching up financially. She has had to adjust some payment schedules and carries unpaid credit card debt. Petitioner Mossberger's disposable pay (within the meaning of 31 C.F.R. § 285.11) is not sufficient to meet all the reasonable demands on that pay. [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.] 31 C.F.R. § 285.11.

18. Garnishment at 15% of Petitioner Mossberger's disposable pay would cause Petitioner Mossberger financial hardship. I find that Petitioner Mossberger's earnings, plus the child support, permit her to pay, after meeting her needs and those of her dependent children, garnishment of **no more than 5%** of her disposable pay. Consequently, to prevent further hardship, potential garnishment to repay "the debt" (see paragraph 5) shall be limited to **no more than 5%** of Petitioner

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Mossberger's disposable pay. 31 C.F.R. § 285.11. Further, even that should begin **no sooner than July 2013**.

19. Petitioner Mossberger is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

**Discussion**

20. Petitioner Mossberger, I do not have reason to invalidate your obligation under the *Guarantee*. Petitioner Mossberger, you may want to appeal my Decision in U.S. District Court.

21. Garnishment of Petitioner Mossberger's disposable pay is authorized in limited amount, **none** through **June 2013**; then **beginning July 2013, up to 5%** of Petitioner Mossberger's disposable pay. See paragraphs 17 & 18. Petitioner Mossberger, you may want to telephone Treasury's collection agency to **negotiate** repayment of the debt, after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Mossberger, 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 Mossberger, 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. Petitioner Mossberger, you may wish to include someone else with you in the telephone call if you call to negotiate.

**Findings, Analysis and Conclusions**

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

23. Petitioner Mossberger owes the debt described in paragraphs 5 through 16.

24. To prevent financial hardship, **garnishment is not authorized through June 2013**; thereafter, garnishment is authorized, **up to 5%** of Petitioner Mossberger's disposable pay. 31 C.F.R. § 285.11.

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25. I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through *offset* or garnishment of Petitioner Mossberger's pay, to be returned to Petitioner Mossberger.

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

#### **ORDER**

27. Until the debt is repaid, Petitioner Mossberger 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).

28. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment of Petitioner Mossberger's disposable pay **through June 2013**. **Beginning July 2013**, garnishment **up to 5%** of Petitioner Mossberger'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.

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**ADMINISTRATIVE WAGE GARNISHMENT ACT**

**In re: LARRY V. ROSCOE.**  
**Docket No. 12-0648.**  
**Decision and Order.**  
**Filed December 18, 2012.**

**AWG.**

Petitioner, pro se.  
Michelle Tanner for RD.

*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

**DECISION AND ORDER**

1. The hearing by telephone was held on November 7, 2012. Larry V. Roscoe, the Petitioner (“Petitioner Roscoe”) participated, representing himself (appearing *pro se*).
2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent (“USDA Rural Development”), participated, represented by Michelle Tanner.

**Summary of the Facts Presented**

3. Petitioner Roscoe’s letter dated August 30, 2012 is admitted into evidence, together with the testimony of Petitioner Roscoe.
4. USDA Rural Development’s Exhibits RX 1 through RX 6, plus Narrative, Witness & Exhibit List, filed on October 9, 2012, are admitted into evidence, together with the testimony of Michelle Tanner. Also admitted into evidence is RX 7, FAXed and filed on November 7, 2012.
5. Petitioner Roscoe owed to USDA Rural Development a balance of **\$4,773.37** (as of November 7, 2012), in repayment of two United States Department of Agriculture / Farmers Home Administration loans, for a home in Pennsylvania. The balance of the two loans (“the debt”) is now unsecured. Petitioner Roscoe’s income tax refunds have been *offset* several years (beginning in 2001), and garnishment began in August or September 2012, so the balance Petitioner Roscoe owes to USDA Rural

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Development has repeatedly been reduced. *See* USDA Rural Development Exhibit RX 7, especially p. 2.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **\$4,773.37** would increase the current balance by \$1,336.54, to \$6,109.91. *See* RX 7, p. 2.

7. Petitioner Roscoe's obligation to repay the loans was established on June 30, 1992, when he and his former wife (then, Tammy E. Roscoe) assumed one loan and borrowed a second loan. The total they owed on June 30, 1992 was \$76,491.19 (RX 1, p. 5). The debt was Petitioner Roscoe's and his co-borrower's joint-and-several obligation. Each of them was legally liable to repay USDA Rural Development. Payments were not made as required. Due to monetary default, a Notice of Acceleration and Intent to Foreclose was sent to Petitioner Roscoe on November 2, 1998 (RX 2, pp. 1-3). The Notice showed \$75,367.94 unpaid principal (for both loans together) and \$3,721.18 unpaid interest (which did not include both loans). *But see* RX 6, p. 1, which, although calculated as of more than 8 months later, correctly accounts for accrued interest on both loans.

8. Petitioner Roscoe testified that he wanted to hold onto the house. He testified that he was going through a divorce, and he was the only one working. He testified that a gentleman from Rural Housing in York talked to him and indicated that Rural Housing would work with him. But, his former wife would not work with him, and the home was sold in a short sale.

9. No payments were being made. The "next payment due date" was March 28, 1996. RX 2, p. 7. The home sold for \$74,900.00 on July 16, 1999. More than three years' worth of interest had accrued and not been paid - - from March 28, 1996 to July 16, 1999. What else was not being paid were real estate taxes and insurance. By the time the home was sold on July 16, 1999, the debt had grown to \$97,262.17 (both loans together, *see* RX 6, p. 1):

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\$ 75,367.94	Principal Balance prior to sale
\$ 8,082.19	Interest Balance prior to sale
\$ 1,132.89	Negative Escrow Balance
\$ 12,623.15	Recoverable Costs, Fees (unpaid taxes, insurance, maintenance, etc.)
<u>\$ 56.00</u>	Interest on Costs, Fees
\$ 97,262.17	Total Amount Due (on both loans)

RX 6, p. 1; and the testimony of Michelle Tanner.

10. Proceeds from sale of the home (\$73,402.00) paid (a) all the Recoverable Costs and Fees (\$12,623.15); (b) all the Interest on Costs and Fees (\$56.00); (c) all the Negative Escrow Balance (\$1,132.89); (d) all the Interest (\$8,082.19); and (e) all the principal on only one (\$37,537.72) of the two loans (the older loan, the one that had been assumed). Petitioner Roscoe also benefitted from a \$1,193.62 Refund and return of \$1,498.00, a 2% Down Payment. That left \$16,661.67 to be applied on the principal of the newer loan, the one that Petitioner Roscoe and his former wife borrowed as a new loan on June 30, 1992.

11. What was still owed after all those proceeds and refunds had been applied? Part of the principal balance (\$21,168.55) on the newer loan was still owed. No interest was owed though; additional interest has not been required after July 16, 1999. Once the short sale proceeds were applied on the loan, interest stopped accruing.

12. Petitioner Roscoe's loan balance was forwarded to U.S. Treasury for collection on April 12, 2002. RX 3, p. 26. Petitioner Roscoe's loan balance had been reduced even before the loan went to Treasury. *See* RX 6, p. 1. Numerous *offsets* beginning in 2001 (and an Escrow Refund) have reduced the debt to **\$4,773.37** unpaid as of November 7, 2012 (excluding the potential remaining collection fees). *See* RX 7, especially p. 2, and the testimony of Michelle Tanner. *See also* RX 6, p. 1.

13. Garnishment to repay "the debt" (*see* paragraph 5) in the amount of 15% of Petitioner Roscoe's disposable pay has created financial hardship for Petitioner Roscoe and his wife. (Disposable pay is gross pay minus

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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. Petitioner Roscoe's letter dated August 30, 2012, joined by his wife, shows that he is diabetic and requires medications. The letter states that garnishments would cause their home to be foreclosed upon.

### Discussion

14. Petitioner Roscoe, as I told you during the Hearing, I am proud of you for the steady progress you have made getting the debt repaid. The \$21,168.55 balance that remained after the short sale has been brought down to a **\$4,773.37** balance (excluding the potential remaining collection fees), mostly because of your income tax refunds. Petitioner Roscoe, you may choose to telephone Treasury's collection agency to **negotiate** the repayment of the remaining debt. Petitioner Roscoe, 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 Roscoe, 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**, your former wife. Petitioner Roscoe, 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. Petitioner Roscoe, you may wish to include someone else with you in the telephone call if you call to negotiate.

### Findings, Analysis and Conclusions

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

16. Petitioner Roscoe owes the debt described in paragraphs 5 through 12.

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17. To prevent financial hardship, **garnishment is not authorized through 2014**; thereafter, garnishment is authorized, **up to 5%** of Petitioner Roscoe's disposable pay. 31 C.F.R. § 285.11.

18. **No refund** to Petitioner Roscoe of monies already collected or collected prior to implementation of this Decision is appropriate, and I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through *offset* or garnishment of Petitioner Roscoe's pay, to be returned to Petitioner Roscoe.

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

**ORDER**

20. Until the debt is repaid, Petitioner Roscoe 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).

21. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment of Petitioner Roscoe's disposable pay **through 2014**. **Beginning January 2015**, garnishment **up to 5%** of Petitioner Roscoe'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.

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Angela R. Sheele  
71 Agric. Dec. 855

**In re: ANGELA R. SHEELE, N/K/A ANGELA R. KERSHAW.  
Docket No. 12-0649.  
Decision and Order.  
Filed December 21, 2012.**

AWG.

Petitioner, pro se.  
Giovanna Leopardi for RD.  
*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

### **DECISION AND ORDER**

1. The hearing by telephone was held on November 7, 2012. Angela R. Kershaw, formerly known as Angela R. Sheele (Petitioner Kershaw) participated, representing herself (appearing *pro se*).
2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent (“USDA Rural Development”), participated, represented by Giovanna Leopardi.

### **Summary of the Facts Presented**

3. Petitioner Kershaw’s Exhibits PX 1 through PX 9 (filed October 11 & 15, 2012) , and her Hearing Request dated August 21, 2012, are admitted into evidence, together with the testimony of Petitioner Kershaw.
4. USDA Rural Development’s Exhibits RX 1 through RX 4, plus Narrative, Witness & Exhibit List (filed October 18, 2012), are admitted into evidence, together with the testimony of Giovanna Leopardi.
5. Petitioner Kershaw owed to USDA Rural Development **\$10,220.81** (as of October 16, 2012) in repayment of a USDA Rural Development / Rural Housing Service loan borrowed in December 1999 for a home in New Mexico, the balance of which is now unsecured (“the debt”). *See* USDA Rural Development Exhibits, esp. RX 1, RX 4.
6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on

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**\$10,220.81**, would increase the balance by \$3,066.24, to \$13,287.05. RX 4, p. 2.

7. The amount Petitioner Kershaw borrowed from USDA Rural Development / Rural Housing Service in December 1999 was \$58,100.00. RX 1. The loan became delinquent. USDA Rural Development approved foreclosure September 15, 2004, showing \$55,673.87 principal due (RX 2, p. 24), and the foreclosure sale was held on April 7, 2005. RX 2, p. 29.

\$ 55,673.87 unpaid principal  
 \$ 3,704.59 unpaid interest  
 \$ 1,010.01 fees/costs (taxes, insurance, other costs)  
 \$ 357.07 late charges, other fees/costs

\$ 60,745.54  
 =====

RX 3.

8. Proceeds from the foreclosure sale were \$39,500.00. RX 2, p. 29. The \$39,500.00 was applied to reduce the debt (leaving a balance owed of \$21,245.54). RX 3. Then additional costs and fees were billed (\$1,761.69), leaving a balance owed of \$23,007.23. RX 3. U.S. Treasury *offsets* have since reduced the balance to **\$10,220.81**. RX 4. These *offsets* were substantial income tax refunds of Petitioner Kershaw, intercepted by U.S. Treasury in 2010, 2011, and 2012. RX 4. Since 2005 (when the proceeds from the foreclosure sale were applied), no additional interest has accrued.

9. Petitioner Kershaw owes the balance of **\$10,220.81** (excluding potential collection fees) as of October 16, 2012, and USDA Rural Development may collect that amount from her. RX 4.

10. Petitioner Kershaw testified and wrote (PX 9) that she and her 5-year old son have experienced financial hardship because of the *offsets* of her income tax refunds. She was newly divorced - - a single mom - - when the first one happened. She testified that now finally, her former husband has begun to pay child support regularly. Petitioner Kershaw

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works full-time and must provide day care for her son after school and on school holidays. Petitioner Kershaw had been in her current job only about one month at the time of the Hearing.

11. Petitioner Kershaw's disposable pay (within the meaning of 31 C.F.R. § 285.11) is required, together with child support, together with a small amount of support from New Mexico, to meet her reasonable and necessary living expenses for herself and her son. [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance; and in certain situations minus other employee benefits contributions that are required to be withheld.]

### Discussion

12. Petitioner Kershaw, you may choose to telephone Treasury's collection agency to **negotiate** the repayment of the remaining debt. Petitioner Kershaw, 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 Kershaw, 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. Petitioner Kershaw, 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. Petitioner Kershaw, you may wish to include someone else with you in the telephone call if you call to negotiate.

### Findings, Analysis and Conclusions

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

14. Petitioner Kershaw owes the debt described in paragraphs 5 through 9.

15. To prevent financial hardship, **garnishment is not authorized through 2014**; thereafter, garnishment is authorized, **up to 5%** of Petitioner Kershaw's disposable pay. 31 C.F.R. § 285.11.

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16. I am **not** ordering any amounts already collected prior to implementation of this Decision, whether through *offset* or garnishment of Petitioner Kershaw's pay, to be returned to Petitioner Kershaw.

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

**ORDER**

18. Until the debt is repaid, Petitioner Kershaw 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 of Petitioner Kershaw's disposable pay **through 2014**. **Beginning January 2015**, garnishment **up to 5%** of Petitioner Kershaw'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.

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Debra A. Hayes  
71 Agric. Dec. 859

**In re: DEBRA A. HAYES, N/K/A DEBRA A. CHRISTENSEN.  
Docket No. 12-0636.  
Decision and Order.  
Filed December 26, 2012.**

AWG.

Petitioner, pro se.  
Giovanna Leopardi for RD.  
*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

### **DECISION AND ORDER**

1. The hearing by telephone was held on November 7, 2012. Debra A. Christensen, formerly known as Debra A. Hayes (Petitioner Christensen) participated, representing herself (appearing *pro se*).
2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent (“USDA Rural Development”), participated, represented by Giovanna Leopardi.

### **Summary of the Facts Presented**

3. Petitioner Christensen’s documents including her Consumer Debtor Financial Statement (filed November 2, 2012), plus her Hearing Request and attached letter, both dated August 20, 2012, plus Notice of Default and Election to Sell (dated April 3, 2006), are admitted into evidence, together with the testimony of Petitioner Christensen.
4. USDA Rural Development’s Exhibits RX 1 through RX 6, plus Narrative, Witness & Exhibit List (filed October 16, 2012), are admitted into evidence, together with the testimony of Giovanna Leopardi.
5. Petitioner Christensen owed to USDA Rural Development **less than \$2,045.90** (as of November 7, 2012) in repayment of a USDA Farmers Home Administration loan borrowed in July 1994 for a home in Utah, the balance of which is now unsecured (“the debt”). *See* USDA Rural Development Exhibits, esp. RX 1, RX 6.

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **\$2,045.90**, would increase the balance by \$572.85, to \$2,618.75. RX 6, p. 2.

7. The amount Petitioner Christensen borrowed from USDA Farmers Home Administration in July 1994 was \$56,280.00. RX 1. The loan became delinquent and foreclosure was approved, but the foreclosure was canceled in May 2006. In August 2006 the home was sold in a short sale. The purchaser thereby obtained the real estate free and clear from the deed of trust, even though the sale proceeds did not pay in full the remaining loan balance owed.

8. The purchaser paid \$35,000.00, of which \$34,185.84 was available to apply on the remaining loan balance owed. RX 3, p. 39. The sale proceeds would not have paid even the principal balance owed, which was \$39,997.93. RX 3, p. 39. *See* RX 5, p. 1.

\$ 39,997.93	unpaid principal
\$ 1,845.72	interest
\$ 749.89	uncollected interest
<u>\$ 1,787.46</u>	fees/costs (taxes, insurance, other costs)
\$ 44,381.00	remaining loan balance owed
<u><u>                    </u></u>	

RX 5, p. 1.

9. The sale proceeds (\$34,185.84) were applied to reduce the remaining loan balance owed, leaving \$10,195.16 still owed. RX 5, p. 1. Then, the uncollected interest was waived (\$749.89), leaving a balance owed of \$9,445.27. RX 5, p. 1. Then, through debt settlement, Petitioner Christensen received **forgiveness** of \$6,445.27, so long as she would pay \$3,000.00. It is the \$3,000.00 that Petitioner Christensen is still working to repay. Since August 2006 (when the proceeds from the short sale were applied), no additional interest has accrued.

10. U.S. Treasury *offsets* and other payments processed at U.S. Treasury have since reduced the balance to **less than \$2,045.90**. *See* RX 6, esp. p. 1. Petitioner Christensen owes the balance of **less than \$2,045.90**

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(excluding potential collection fees) and USDA Rural Development may collect that amount from her. RX 6.

11. Petitioner Christensen testified and wrote that she has experienced financial hardship because of the *offsets* and other payments she has made. When the debt was still at USDA Rural Development (Centralized Servicing Agency), the plan (in anticipation of the short sale) was for Petitioner Christensen to pay \$50.00 per month for 60 months. RX 5, pp. 3 and 5. Petitioner Christensen never made any of those payments. Still USDA Rural Development did **not** add back in, the \$6,445.27 that was forgiven, which remains forgiven.

12. Petitioner Christensen is married, but her husband has no obligation to repay the debt. Her husband pays rent and utilities, which gives Petitioner Christensen greater freedom in paying her own bills. Petitioner Christensen's disposable pay (within the meaning of 31 C.F.R. § 285.11) is currently not adequate for her to make the \$100 and \$75 payments she has on occasion made to U.S. Treasury. [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance; and in certain situations minus other employee benefits contributions that are required to be withheld.]

### Discussion

13. Petitioner Christensen, you may choose to telephone Treasury's collection agency to **negotiate** the repayment of the remaining debt. Petitioner Christensen, 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 Christensen, 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. Petitioner Christensen, 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. Petitioner Christensen, you may wish to include someone else with you in the telephone call if you call to negotiate.

**ADMINISTRATIVE WAGE GARNISHMENT ACT****Findings, Analysis and Conclusions**

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

15. Petitioner Christensen owes the debt described in paragraphs 5 through 10.

16. To prevent financial hardship, **garnishment is not authorized through June 2013**; thereafter, garnishment is authorized, **up to \$50 per month** of Petitioner Christensen's disposable pay. 31 C.F.R. § 285.11.

17. I am **not** ordering any amounts already collected prior to implementation of this Decision, whether through *offset* or garnishment of Petitioner Christensen's pay, to be returned to Petitioner Christensen.

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

**ORDER**

19. Until the debt is repaid, Petitioner Christensen 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 of Petitioner Christensen's disposable pay **through June 2013**. **Beginning July 2013**, garnishment **up to \$50 per month** of Petitioner Christensen'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.

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Janet Pacheco  
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**In re: JANET PACHECO.**  
**Docket No. 13-0006.**  
**Decision and Order.**  
**Filed December 27, 2012.**

**AWG.**

Petitioner, pro se.

Michelle Tanner for RD.

*Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.*

### **DECISION AND ORDER**

1. The hearing by telephone was held on December 4, 2012. Janet Pacheco, the Petitioner (Petitioner Pacheco), participated, representing herself (appearing *pro se*).
2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent (“USDA Rural Development”), participated, represented by Michelle Tanner.
3. The record was held open through December 18, 2012.

### **Summary of the Facts Presented**

4. Petitioner Pacheco’s documents (filed on December 17, 2012) are admitted into evidence, together with her Hearing Request (dated September 21, 2012), together with the testimony of Petitioner Pacheco.
5. USDA Rural Development’s Exhibits RX 1 through RX 7, plus Narrative, Witness & Exhibit List (filed on October 25, 2012), are admitted into evidence, together with the testimony of Michelle Tanner.
6. Petitioner Pacheco owes to USDA Rural Development **\$60,035.77** (as of October 22, 2012) in repayment of a USDA Farmers Home Administration loan borrowed in 1986 for a home in New Jersey, the balance of which is now unsecured (“the debt”). *See* USDA Rural Development Narrative and RX 1. The Narrative **corrects and updates** RX 7, p. 2, explaining that \$24,272.91 was incorrectly charged by USDA

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

Rural Development before the account was sent to U.S. Treasury for collection.

7. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **\$60,035.77**, would increase the current balance by about \$16,810.02, to \$76,845.79. RX 7, p. 1, plus the Narrative.

8. The amount Petitioner Pacheco borrowed in 1986 from USDA Farmers Home Administration was \$50,000.00. RX 1. Reamortization in 1989 brought the past due amount current, by adding overdue amounts to the principal, resulting in a principal balance of \$48,316.11. RX 1, p. 3.

9. The loan was accelerated for foreclosure on June 28, 1999 due to “monetary default”. RX 2. The “next due” date was March 18, 1995; that is, the loan was 52 months past due when accelerated for foreclosure. RX 2, p. 4. The Notice of Acceleration (and of Intent to Foreclose) shows \$47,518.95 unpaid principal and \$16,461.74 unpaid interest (as of June 28, 1999). RX 2, p. 1. This did not include other costs, such as the unpaid insurance and unpaid real estate taxes that had to be advanced by USDA Rural Development.

10. Before a foreclosure sale was held, a buyer purchased the home by assuming the loan, based on an “As Is” appraised value of \$35,000.00 for the home. RX 3. The planned assumption was approved July 9, 1999. RX 3. The buyer (the one assuming the loan) was to borrow an additional \$40,000.00 to make repairs, with December 17, 1999 being the effective date of assumption. RX 3. [Petitioner Pacheco has no obligation regarding the buyer’s additional loan for making repairs.]

11. As of the date of the assumption (short sale) on December 17, 1999, the debt balance was \$97,048.63.

\$ 47,518.95 unpaid principal  
 \$ 18,589.02 unpaid interest  
 \$ 29,391.34 fees/costs (includes unpaid taxes, unpaid insurance, and other costs)  
 \$ 1,549.32 interest on fees/costs

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\$ 97,048.63  
=====

RX 6 and Michelle Tanner's testimony.

Interest had accrued to December 17, 1999 (56 months past due). RX 6. Since the loan assumption (short sale) on December 17, 1999, no additional interest has accrued.

The \$35,000.00 from the buyer (the one assuming the loan) was applied to reduce the debt, leaving a balance owed of \$62,048.63.

\$ 97,048.63  
- \$ 35,000.00  
  
\$ 62,048.63  
=====

The cost of 2 inspections and additional taxes were then added (\$749.14 added, leaving a balance owed of \$62,797.77). This \$62,797.77 figure is what should have been sent to U.S. Treasury for collection.

\$ 62,048.63  
+ \$ 749.14  
  
\$ 62,797.77  
=====

Michelle Tanner is thanked for her excellent work, finding and correcting the \$24,272.91 error. [U.S. Treasury corrected the balance by subtracting \$24,272.91 on October 27, 2012.]

12. U.S. Treasury intercepted an income tax refund of \$2,779.00 in February 2012; this *offset* of Petitioner Pacheco's income tax refund brought the balance to **\$60,035.77**. RX 7 and Michelle Tanner's testimony. Petitioner Pacheco still (as of October 22, 2012) owes the

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balance of **\$60,035.77** (excluding potential collection fees), and USDA Rural Development may collect that amount from her.

13. Petitioner Pacheco testified that she is unemployed, having had to stop working because of her chronic obstructive pulmonary disease (COPD). The plastic molding machines were intolerable. The letter from MedPlast dated September 21, 2012 and other documents filed December 17, 2012 prove that Petitioner Pacheco was involuntarily separated from her last job. When Petitioner Pacheco is successful in finding work that does not aggravate her condition, she will need some time to catch up financially before garnishment would be appropriate. Legally, she is allowed 12 months in her next job before her wages will be garnished.

14. Petitioner Pacheco's documents filed December 17, 2012 and her testimony persuade me that to prevent financial hardship, potential garnishment to repay "the debt" (*see* paragraph 6) must be limited to **0%** of Petitioner Pacheco's disposable pay through July 2014; then, subject to the limitation not to garnish for her first 12 months in her next job, **up to 5%** of Petitioner Pacheco's disposable pay beginning August 2014 through July 2015; and **up to 10%** of Petitioner Pacheco's disposable pay thereafter. 31 C.F.R. § 285.11.

15. Petitioner Pacheco is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

**Discussion**

16. Garnishment is **not** authorized until August 2014, and then only in limited amount. *See* paragraphs 13 and 14. I encourage **Petitioner Pacheco and Treasury's collection agency to negotiate** the repayment of the debt. Petitioner Pacheco, 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 Pacheco, 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. Petitioner Pacheco, 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.

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Petitioner Pacheco, you may wish to include someone else with you in the telephone call if you call to negotiate.

### **Findings, Analysis and Conclusions**

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

18. Petitioner Pacheco owes the debt described in paragraphs 6 through 12.

19. Garnishment is **not authorized through July 2014**. Subject to the limitation not to garnish for her first 12 months in her next job, beginning August 2014 through July 2015, garnishment **up to 5%** of Petitioner Pacheco's disposable pay, and thereafter, garnishment **up to 10%** of Petitioner Pacheco's disposable pay, is authorized. 31 C.F.R. § 285.11.

20. I am **not** ordering any amounts already collected prior to implementation of this Decision, whether through *offset* or garnishment of Petitioner Pacheco's pay, to be returned to Petitioner Pacheco.

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

### **ORDER**

22. Until the debt is repaid, Petitioner Pacheco 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 of Petitioner Pacheco's disposable pay through July 2014. Subject to the limitation not to garnish for her first 12 months in her next job, beginning August 2014 through July 2015, garnishment **up to 5%** of Petitioner Pacheco's

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disposable pay, and garnishment **up to 10%** of Petitioner Pacheco's disposable pay thereafter, is authorized. 31 C.F.R. § 285.11.

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

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**In re: STACY WANDER, N/K/A STACY SASSEN.  
Docket No. 12-0497.  
Decision and Order.  
Filed December 28, 2012.**

**AWG.**

James W. Hess, Esq. for Petitioner.  
Giovanna Leopardi for RD.  
*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

**DECISION AND ORDER**

1. The hearing by telephone was held on September 5 and 26, 2012. Stacy Sassen, formerly known as Stacy Wander (Petitioner Sassen) participated, represented by James W. Hess, Esq.
2. Rural Development, an agency of the United States Department of Agriculture (USDA), the Respondent ("USDA Rural Development"), participated, represented by Giovanna Leopardi.

**Summary of the Facts Presented**

3. Petitioner Sassen's documents (filed September 4, 20, and 26, 2012), together with the Milinkovich opinion dated October 17, 2012 (Exhibit A), together with Petitioner Sassen's Hearing Request dated June 7, 2012, are admitted into evidence, together with the testimony of Petitioner Sassen.
4. USDA Rural Development's Exhibits RX 1 through RX 11, plus Narrative, Witness & Exhibit List (filed July 17, 2012) and supplemental

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Narratives (filed September 26, 2012 and October 5, 2012), together with Notice of Mortgage Foreclosure Sale, and the RD Instruction 1980, are admitted into evidence, together with the testimony of Giovanna Leopardi.

5. My exhibit, ALJX 1 (filed October 17, 2012), which is the Lamoreaux Form 1099-A, is admitted into evidence.

6. USDA Rural Development's position is that Petitioner Sassen owes to USDA Rural Development **\$61,280.38** (as of July 13, 2012), in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service **Guarantee** (see RX 1, esp. p. 2) for a loan made in 2008 ("the debt"). The loan was made by Wells Fargo Bank, N.A. ("Wells Fargo"). RX 2.

7. Petitioner Sassen's position is that Petitioner Sassen owes **nothing** to USDA Rural Development and is **due a refund** for the amount taken from her, because there is no valid debt. Petitioner Sassen's income tax refund was intercepted (**offset**), \$2,386.00 taken in February 2012 (see RX 10, p. 1).

8. Petitioner Sassen testified that she understood from Wells Fargo that there was to be forgiveness of debt of the difference between the balance owed (\$157,769.84 principal) and the proceeds from sale of the home.

9. Wells Fargo did not need to look to Petitioner Sassen because it had the **Guarantee**. Wells Fargo looked to USDA Rural Development to be made whole under the **Guarantee**, and its claim was paid, \$63,666.38, on August 16, 2011. RX 6, p. 10. This case is an *administrative* collection action brought by an agency of the United States government, USDA Rural Development. The rules that apply here, concerning a **Guarantee** by which Petitioner Sassen promised to reimburse USDA Rural Development if it paid a loss claim to Wells Fargo, are different from the rules that would have applied in Minnesota courts if Wells Fargo sought to collect a personal deficiency. *Administrative* collections such as this do not require a valid judgment to support garnishment or **offset**.

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10. After careful review of all of the evidence and the excellent argument by Petitioner Sassen's attorney, James W. Hess, Esq., I agree with USDA Rural Development's position. This is in part because of the independent nature of the *Guarantee*; and in part because 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. Even if Petitioner Sassen was protected under Minnesota law from personal deficiency being entered against her in favor of Wells Fargo, USDA Rural Development may still collect from her administratively, pursuant to the *Guarantee*.

11. Petitioner Sassen owes to USDA Rural Development **\$61,280.38** (as of July 13, 2012), in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service *Guarantee* (see RX 1, esp. p. 2) for a loan made in 2008, the balance of which is now unsecured ("the debt"). Petitioner Sassen borrowed to buy a home in Minnesota.

12. The *Guarantee* (RX 1) establishes an **independent** obligation of Petitioner Sassen, "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 1, p. 2.

13. Petitioner Sassen borrowed \$159,000.00 on August 14, 2008 to buy the home. RX 2. The Due Date of Last Payment Made was June 1, 2009. RX 6, p. 4. Foreclosure was initiated on April 26, 2010. RX 6, p. 5.

14. At the foreclosure sale on August 12, 2010, the lender Wells Fargo bid \$126,650.00 and acquired the home, which became REO (Real Estate Owned). RX 3; RX 6, p. 5. From the date of the foreclosure sale, six months was allowed for redemption. RX 3. Thus, Wells Fargo would obtain marketable title February 14, 2011. RX 3; RX 6, p. 5; see

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note at bottom of RX 6, p. 9. The six-month marketing period would expire August 13, 2011. Wells Fargo sold the home for \$135,000.00 on April 20, 2011. RX 5, pp. 5-8.

15. USDA Rural Development reimbursed Wells Fargo \$63,666.38 on August 16, 2011. RX 6, p. 10. RX 7 details the loss claim paid under the *Guarantee*, showing how the debt became \$63,666.38. USDA Rural Development's payment of \$63,666.38 is the amount USDA Rural Development seeks to recover from Petitioner Sassen under the *Guarantee*.  
RX 8.

16. Petitioner Sassen's income tax refund of \$2,386.00 was intercepted and applied to reduce the debt (*offset*). As of July 13, 2012, Petitioner Sassen's debt had been reduced to **\$61,280.38**. RX 10.

17. Interest stopped accruing on April 20, 2011. Repayment of the debt is more manageable with no interest accruing. When income tax refunds are *offset*, the costs of collection to be paid by Petitioner Sassen, are the flat fee (now \$17.00). These costs can be considerably lower than the percentage (up to 28%) of the garnishment or voluntary payment applied to collection costs (before the balance is applied to reduce the debt).

18. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **\$61,280.38**, would increase the balance by \$17,158.51, to \$78,438.89. RX 10, p. 2.

### **Findings, Analysis and Conclusions**

19. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Sassen and USDA Rural Development; and over the subject matter (administrative wage garnishment, which requires determining whether Petitioner Sassen owes a valid debt to USDA Rural Development).

20. I determine that Petitioner Sassen does owe the debt described in paragraphs 6 through 18.

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21. Petitioner Sassen's attorney, James W. Hess, Esq., argued that Wells Fargo lost its opportunity to pursue a deficiency under Minnesota law, by choosing foreclosure **by advertisement** which, under Minnesota law, required it to forego obtaining a deficiency (instead of choosing foreclosure **by action**, which would have included establishing a deficiency). I conclude that the debt here is based not on Wells Fargo establishing a deficiency, but instead on Petitioner Sassen's promise to reimburse contained in the *Guarantee*, Form RD 1980-21. USDA Rural Development here, in this *administrative* collection action brought by an agency of the United States government, is not subject to state foreclosure laws or deficiency judgment statutes.

22. Mr. Hess argued that the Form 1099-A utilized by Wells Fargo (filed on September 20, 2012) **is** further proof of debt forgiveness, and the expert opinion of Peter L. Milinkovich dated October 17, 2012 (Exhibit A) supports the argument. The Wells Fargo Form 1099-A shows that the lender acquired the property on February 14, 2011 (when the 6-month redemption period expired and Wells Fargo obtained marketable title). It shows the "Balance of principal outstanding" to be \$157,769.84, and the "Fair market value of property" to be \$126,650.00 (Wells Fargo's bid at the foreclosure sale). Thus, a deficiency is suggested. Further, the box is checked, where the Form instructs, "Check here if the borrower was personally liable for repayment of the debt." The Form 1099-A is **not** a Form 1099-C. A Form 1099-C which would suggest that the remainder of the debt has been canceled.

23. Keeping Mr. Hess's argument and the evidence from Peter L. Milinkovich in mind, I compare the Wells Fargo Form 1099-A with the Lamoreaux Forms 1099-A (ALJX-1, filed October 17, 2012), prepared by Chase Home Finance LLC ("Chase"). The differences are striking. The Chase Form 1099-A shows the "Balance of principal outstanding" to be \$47,565.40, and the "Fair market value of property" to be \$65,000.00, **not** suggesting a deficiency. Further, the box "No" is checked, where the Form asks, "Was borrower personally liable for repayment of the debt." So, even though the Lamoreauxs won their administrative wage garnishment cases, the issues in their cases are distinguishable from the issues here. The Lamoreaux cases are found on the USDA website, search "OALJ" then choose "Miscellaneous Orders" 2012.

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[http://www.dm.usda.gov/oaljdecisions/120518\\_12-0312\\_OD\\_JamesLamoreaux.pdf](http://www.dm.usda.gov/oaljdecisions/120518_12-0312_OD_JamesLamoreaux.pdf)

[http://www.dm.usda.gov/oaljdecisions/120518\\_12-0311\\_OD\\_JenniferLamoreaux.pdf](http://www.dm.usda.gov/oaljdecisions/120518_12-0311_OD_JenniferLamoreaux.pdf)

24. I conclude that Form 1099s must be evaluated in context with all the other evidence to determine whether forgiveness or cancellation of the remaining debt happened. Here, I conclude that the debt was **not** forgiven and **not** canceled.

25. The Notice of Mortgage Foreclosure Sale (filed September 26, 2012) does **not** lead Petitioner Sassen to believe that no deficiency will be established. Thus, the issues in the Garza administrative wage garnishment case, which Garza won, are distinguishable from the issues here. The Garza case is found on the USDA website, search "OALJ" then choose "Initial Decisions" 2012.

[http://www.dm.usda.gov/oaljdecisions/120828\\_12-0346\\_DO\\_AWG\\_ElvaGarza.pdf](http://www.dm.usda.gov/oaljdecisions/120828_12-0346_DO_AWG_ElvaGarza.pdf)

26. The authority of USDA Rural Development to collect here can be found in the Debt Collection Act of 1982, as amended by the Debt Collection Improvement Act of 1996 (DCIA) (31 U.S.C. § 3701 *et seq.*). Under 31 U.S.C. § 3701(b), I find that Petitioner Sassen does owe the balance of **\$61,280.38** (as of July 13, 2012) to the United States, on account of a loan guaranteed by the Government. Next, I find that the regulations that apply here are 7 C.F.R. Part 3 (Debt Management), particularly 7 C.F.R. § 3.53, especially 7 C.F.R. § 3.53(d) and (e).

27. Petitioner Sassen's Consumer Debtor Financial Statement, payroll data, and other financial documentation (filed September 4, 2012) are thoroughly and beautifully presented. Petitioner Sassen has a demanding job, and she is well-compensated. She is responsible for three minor children in addition to herself. At present her reasonable and necessary living expenses consume her disposable pay plus child support. To prevent financial hardship, garnishment is authorized, as follows:

**ADMINISTRATIVE WAGE GARNISHMENT ACT**

through 2013, **no** garnishment. During 2014, garnishment **up to 7%** of Petitioner Sassen's disposable pay; and beginning 2015, garnishment **up to 15%** of Petitioner Sassen's disposable pay. 31 C.F.R. § 285.11.

28.I am **NOT** ordering any amounts already collected prior to implementation of this Decision, whether through *offset* or garnishment of Petitioner Sassen's pay, to be returned to Petitioner Sassen.

29.Repayment of the debt may occur through *offset* of Petitioner Sassen's **income tax refunds** or other **Federal monies** payable to the order of Ms. Sassen (whether or not garnishment is authorized).

30.Petitioner Sassen is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

**Discussion**

31.I encourage **Petitioner Sassen and Treasury's collection agency** to **negotiate** the repayment of the debt. Petitioner Sassen, 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 Sassen, 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. Petitioner Sassen, 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. Petitioner Sassen, you may wish to include someone else with you in the telephone call if you call to negotiate.

**ORDER**

32.Until the debt is repaid, Petitioner Sassen 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).

33.USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through 2013. During 2014, garnishment **up to 7%** of Petitioner Sassen's disposable pay is

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authorized; and beginning 2015, garnishment **up to 15%** of Petitioner Sassen'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.

**ANIMAL WELFARE ACT**

**ANIMAL WELFARE ACT**

**DEPARTMENTAL DECISIONS**

**In re: TERRANOVA ENTERPRISES, INC., A TEXAS CORPORATION, D/B/A ANIMAL ENCOUNTERS, INC.; DOUGLAS KEITH TERRANOVA, AN INDIVIDUAL; WILL ANN TERRANOVA, AN INDIVIDUAL; FARIN FLEMING, AN INDIVIDUAL; SLOAN DAMON, AN INDIVIDUAL; CRAIG PERRY, AN INDIVIDUAL D/B/A PERRY'S EXOTIC PETTING ZOO; PERRY'S WILDERNESS RANCH & ZOO, INC., AN IOWA CORPORATION; EUGENE "TREY" KEY, III, AN INDIVIDUAL; AND KEY EQUIPMENT COMPANY, INC., AN OKLAHOMA CORPORATION, D/B/A CULPEPPER & MERRIWEATHER CIRCUS.**

**Docket No. 09-0155.**

**Decision and Order.**

**Filed July 19, 2012.**

**AWA.**

Colleen A. Carroll, Esq. for Complainant.

Larry J. Thorson, Esq. for Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.

Initial Decision by Janice K. Bullard, Administrative Law Judge.

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

**DECISION AND ORDER AS TO CRAIG PERRY AND PERRY'S  
WILDERNESS RANCH & ZOO, INC.**

**Procedural History**

On July 23, 2009, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint. On June 8, 2010, the Administrator filed an Amended Complaint, which is the operative pleading in this proceeding. The Administrator alleges: (1) during the period August 7, 2008, through August 17, 2008, Craig Perry operated as an "exhibitor," as that term is

Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.  
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defined in the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act], and the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations], without an Animal Welfare Act license, in willful violation of 9 C.F.R. § 2.1(a); and (2) on December 15, 2009, during business hours, Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc. [hereinafter PWR], failed to allow Animal and Plant Health Inspection Service officials to enter Mr. Perry and PWR's place of business and conduct an inspection of their facilities, animals, and records, in willful violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a). The Administrator also alleges Mr. Perry and PWR willfully violated the Animal Welfare Act and the Regulations at the Iowa State Fair, during the period August 7, 2008, through August 16, 2008. These violations [hereinafter the Iowa State Fair violations] concern handling, care, housing, and feeding of elephants exhibited at the Iowa State Fair by Terranova Enterprises, Inc., and Douglas Keith Terranova [hereinafter the Terranova Respondents].<sup>1</sup> On June 30, 2010, Mr. Perry and PWR filed an answer denying the material allegations of the Amended Complaint and raising affirmative defenses.

During the period February 17, 2011, through February 25, 2011, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] conducted a hearing in person in Washington, DC, and, by audio-visual telecommunication with Mr. Perry and PWR who were located in Ames, Iowa. Larry J. Thorson, Ackley, Kopecky & Kingery, LLP, Cedar Rapids, Iowa, represented Mr. Perry and PWR. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator.

On December 20, 2011, after the parties submitted post-hearing briefs, the ALJ filed a "Decision and Order (Craig Perry d/b/a Perry's Exotic Petting Zoo; Perry's Wilderness Ranch & Zoo, Inc.)" [hereinafter the ALJ's Perry Decision] in which the ALJ concluded that, on December 15, 2009, Mr. Perry and PWR failed to allow Animal and Plant Health Inspection Service officials access to Mr. Perry and PWR's

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<sup>1</sup> Amended Compl. at 16-19 and 22 ¶¶ G 11-G 13, G 15-G 16, H 1.

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place of business to conduct an inspection, in violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126. The ALJ concluded Mr. Perry and PWR's violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126 was not willful and ordered Mr. Perry and PWR to cease and desist from further violations of the Animal Welfare Act and the Regulations. (ALJ's Perry Decision at 27.) The ALJ dismissed the remaining violations alleged against Mr. Perry and PWR (ALJ's Perry Decision at 26).

On January 27, 2012, the Administrator filed "Complainant's Petition for Appeal as to Respondents Craig Perry and Perry's Wilderness Ranch & Zoo, Inc." [hereinafter Appeal Petition]. On February 24, 2012, Mr. Perry and PWR filed "Response to Appeal Petition of Complainant" [hereinafter Response to Appeal Petition]. On March 2, 2012, 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 adopt the ALJ's conclusion that Mr. Perry and PWR violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126, except I conclude the violation was willful, and I assess Mr. Perry and PWR a civil penalty for their willful violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126.

**DECISION****Discussion**

The Administrator raises three issues on appeal. First, the Administrator contends, while the ALJ correctly concluded that Mr. Perry and PWR violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126 on December 15, 2009, the ALJ erroneously concluded the violation was not willful (Appeal Pet. at 6-9). Mr. Perry and PWR agree they violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126, but contend the ALJ correctly concluded their violation was not willful (Response to Appeal Pet. at 2-5, 11).

The Animal Welfare Act authorizes the Secretary of Agriculture to conduct inspections and investigations to determine whether any exhibitor has violated or is violating the Animal Welfare Act or the

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Regulations and requires exhibitors to allow access to their places of business, facilities, animals, and records, as follows:

**§ 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.

7 U.S.C. § 2146(a).

The Regulations require that each exhibitor allow Animal and Plant Health Inspection Service officials access to the exhibitor's place of business, records, facilities, property, and animals, 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:

- (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;

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- (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.

A willful act under the Administrative Procedure Act (5 U.S.C. § 558(c)) is an act in which the violator intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements.<sup>2</sup> It is undisputed that Mr. Perry intentionally left his and PWR's place of business during business hours on December 15, 2009, without designating a person to allow Animal and Plant Health Inspection Service officials to enter that place of business, and that, during Mr. Perry's absence, an Animal and Plant Health Inspection Service official attempted to enter the place of business to conduct the activities listed in 9 C.F.R. § 2.126. I conclude Mr. Perry's intentional conduct is by definition "willful" under the Administrative Procedure Act; thus, I conclude Mr. Perry and PWR willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126 on December 15, 2009.

Second, the Administrator contends the ALJ erroneously failed to assess Mr. Perry and PWR a civil penalty for their December 15, 2009,

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<sup>2</sup> *In re Kathy Jo Bauck*, 68 Agric. Dec. 853, 860-61 (2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); *In re D&H Pet Farms, Inc.*, 68 Agric. Dec. 798, 812-13 (2009); *In re Jewel Bond*, 65 Agric. Dec. 92, 107 (2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); *In re James E. Stephens*, 58 Agric. Dec. 149, 180 (1999); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 306 (1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978).

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violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126 (Appeal Pet. at 9-11).

The Animal Welfare Act authorizes the Secretary of Agriculture to assess any exhibitor a civil penalty of not more than \$10,000 for each violation of the Animal Welfare Act or the Regulations. With respect to the civil penalty, the Secretary of Agriculture is required to give due consideration 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).

Mr. Perry and PWR operate a large-sized business. An exhibitor's failure to provide Animal and Plant Health Inspection Service officials access to the exhibitor's place of business in violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126 is a serious violation because it thwarts the Secretary of Agriculture's ability to monitor the exhibitor's compliance with the Animal Welfare Act and the Regulations and severely undermines the Secretary of Agriculture's ability to enforce the Animal Welfare Act. However, Mr. Perry's December 15, 2009, absence from his and PWR's place of business was in response to a medical emergency suffered by Mr. Perry's long-time friend and volunteer, Michael Pacek, and, shortly after Mr. Perry returned to the place of business and determined an Animal and Plant Health Inspection Service official had attempted to enter the place of business to conduct an inspection, Mr. Perry contacted the Animal and Plant Health Inspection Service official and asked him to return to conduct the inspection or, in the alternative, to arrange another date for the inspection (Tr. 1776-82). Moreover, when Mr. Perry is absent from his and PWR's place of business during business hours, Mr. Perry designates a person to be available to provide Animal and Plant Health Inspection Service officials access to the place of business; however, due to the December 15, 2009, emergency, Mr. Perry did not have an opportunity to designate a person to be available to provide the Animal and Plant Health Inspection Service official access to the place of business (Tr. 1828-31). PWR has been an Animal Welfare Act licensee for approximately 20 years (Tr. 1699-1700), and the Administrator cites no previous violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126 either by Mr. Perry or by PWR.

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The United States Department of Agriculture's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991):

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. The Administrator recommends that I assess Mr. Perry and PWR, jointly and severally, a civil penalty of not less than \$1,000. However, I have repeatedly stated the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.<sup>3</sup>

After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of 7 U.S.C. § 2149(b), and the remedial purposes of the Animal Welfare Act, I conclude assessment of a \$500

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<sup>3</sup> *In re Sam Mazzola*, 68 Agric. Dec. 822, 849 (2009), *dismissed*, 2011 WL 2988902 (6th Cir. Oct. 27, 2010); *In re Lorenza Pearson*, 68 Agric. Dec. 685, 731 (2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); *In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. 77, 89 (2009); *In re Alliance Airlines*, 64 Agric. Dec. 1595, 1608 (2005); *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 787 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002).

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civil penalty is appropriate and necessary to ensure Mr. Perry and PWR's compliance with the Animal Welfare Act and the Regulations in the future, to deter others from violating the Animal Welfare Act and the Regulations, and to fulfill the remedial purposes of the Animal Welfare Act.

Third, the Administrator contends the ALJ erroneously failed to find that Mr. Perry and PWR committed the Iowa State Fair violations (Appeal Pet. at 11-21).

The alleged Iowa State Fair violations concern elephants exhibited by the Terranova Respondents. The ALJ concluded, although the Terranova Respondents exhibited elephants at the Iowa State Fair upon Mr. Perry's invitation, no principal-agency relationship existed between Mr. Perry and PWR and the Terranova Respondents as a result of the exhibition and, as to Mr. Perry and PWR, the ALJ dismissed the Iowa State Fair violations (ALJ's Perry Decision at 26 ¶¶ 5-6).

The Administrator correctly argues that a principal-agency relationship need not be established to hold Mr. Perry and PWR liable for the Iowa State Fair violations (Appeal Pet. at 14). I have long held, when two or more persons exhibit animals jointly, they all can be liable for violations of the Animal Welfare Act and the Regulations that arise out of that exhibition and there is no requirement that their relationship meet the requirements for a partnership or joint venture.<sup>4</sup> However, while the Administrator introduced some evidence that Mr. Perry and PWR jointly engaged in the exhibition of elephants with the Terranova

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<sup>4</sup> *In re Gus White III*, 49 Agric. Dec. 123, 154 (1990) (stating, when two persons act together in the exhibition of animals, it is not necessary that their relationship meet all of the technical requirements of a partnership or joint venture in order to hold that both are exhibitors and jointly and severally liable for the violations); *In re Hank Post*, 47 Agric. Dec. 542, 547 (1988) (stating whether or not the shared duties of three persons constituted a joint venture is not the critical issue; the controlling consideration is that each person exercised control and authority over the way the animal was handled when exhibited and any one of them could have prevented the mishandling). *Cf. In re Micheal McCall*, 52 Agric. Dec. 986, 998 (1993) (stating the distinction between two kennels was so blurred as to make them, in reality, a single operation for which both individual kennel owners were jointly responsible).

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Respondents at the Iowa State Fair, I do not find that the Administrator established joint exhibition by a preponderance of the evidence. Mr. Perry and PWR established that their employees and volunteers were prohibited from entering the elephant area and that Mr. Perry and PWR lacked control over the elephants (ALJ's Perry Decision at 20). Therefore, I agree with the ALJ's dismissal of the Iowa State Fair violations as to Mr. Perry and PWR.

**Findings of Fact**

1. Craig Perry is an individual whose business address is located in Center Point, Iowa 52213.
2. At all times material to this proceeding, Craig Perry was a corporate officer and director of Perry's Wilderness Ranch & Zoo, Inc.
3. Perry's Wilderness Ranch & Zoo, Inc., is an Iowa corporation.
4. At all times material to this proceeding, Perry's Wilderness Ranch & Zoo, Inc., was an Animal Welfare Act licensee and held Animal Welfare Act license number 42-C-0101.
5. On December 15, 2009, no one was at Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.'s place of business to allow an Animal and Plant Health Inspection Service official to enter the place of business to conduct an inspection of the facility, records, and animals.

**Conclusions of Law**

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Pursuant to 7 U.S.C. § 2139, Craig Perry's acts, omissions, or failures in his capacity as corporate officer and director of Perry's Wilderness Ranch & Zoo, Inc., are deemed to be his own as well as those of Perry's Wilderness Ranch & Zoo, Inc.
3. On December 15, 2009, Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., failed to allow an Animal and Plant Health Inspection Service official access to Craig Perry and Perry's Wilderness Ranch & Zoo,

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Inc.'s place of business to conduct an inspection, in willful violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126.

4. An order instructing Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., to cease and desist from failing to allow Animal and Plant Health Inspection Service officials access to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.'s place of business to conduct the activities listed in 9 C.F.R. § 2.126 is warranted in law and justified by the facts.

5. An order assessing Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., jointly and severally, a \$500 civil penalty is warranted in law and justified by the facts.

For the foregoing reasons, the following Order is issued.

**ORDER**

1. Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., 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 failing to allow Animal and Plant Health Inspection Service officials access to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.'s place of business to conduct the activities listed in 9 C.F.R. § 2.126.

Paragraph 1 of this Order shall become effective upon service of this Order on Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.

2. Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., jointly and severally, are assessed a \$500 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

**ANIMAL WELFARE ACT**

Colleen A. Carroll  
United States Department of Agriculture  
Office of the General Counsel  
Marketing, Regulatory, and Food Safety Division  
1400 Independence Avenue, SW  
Room 2343-South Building  
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Ms. Carroll within 60 days after service of this Order on Craig Perry and Perry's Wilderness Ranch & Zoo, Inc. Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., shall state on the certified check or money order that payment is in reference to AWA Docket No. 09-0155.

**RIGHT TO JUDICIAL REVIEW**

Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., have the right to seek judicial review of the Order in this Decision and Order as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., must seek judicial review within 60 days after entry of the Order in this Decision and Order as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.<sup>5</sup> The date of entry of the Order in this Decision and Order as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., is July 19, 2012.

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<sup>5</sup> 7 U.S.C. § 2149(c).

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**In re: FOR THE BIRDS, INC., AN IDAHO CORPORATION;  
JERRY LEROY KORN, AN INDIVIDUAL; MICHAEL SCOTT  
KORN, AN INDIVIDUAL; AND RAYMOND WILLIS, AN  
INDIVIDUAL.**

**Docket No. 09-0196.**

**Decision and Order.**

**Filed August 7, 2012.**

**AWA.**

Colleen A. Carroll, Esq. for Complainant.

Raymond Willis, pro se.

Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.

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

## **DECISION AND ORDER AS TO RAYMOND WILLIS**

### **PROCEDURAL HISTORY**

On September 14, 2009, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued pursuant to 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 of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges, from June 11, 2008, through the filing of the Complaint, Raymond Willis: (1) operated as an exhibitor without an Animal Welfare Act license, in willful violation of 9 C.F.R. §§ 2.1(a) and 2.100(a); (2) failed to have an attending veterinarian who provided veterinary care to respondents' animals, in willful violation of 9 C.F.R. § 2.40(a); (3) failed to employ an attending veterinarian under formal arrangements and with appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of

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animal care and use, in willful violation of 9 C.F.R. § 2.40(a)(1)-(2); (4) failed to establish and maintain programs of adequate veterinary care, in willful violation of 9 C.F.R. § 2.40(b); (5) failed to handle animals as expeditiously and carefully as possible in a manner that would not cause the animals trauma, unnecessary discomfort, behavioral stress, or physical harm, in willful violation of 9 C.F.R. § 2.131(b)(1); and (6) failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, in willful violation of 9 C.F.R. § 2.131(c)(1).<sup>1</sup> On October 6, 2009, Mr. Willis filed an answer denying the material allegations of the Complaint.

On March 13, 2012, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] conducted a hearing in Washington, DC. Mr. Willis, who represents himself in this proceeding, did not appear at the hearing. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. During the hearing, the Administrator moved for issuance of a decision based upon admissions deemed to have been made as a result of Mr. Willis's failure to appear at the hearing (Tr. 11-12).<sup>2</sup> In this regard, the Rules of Practice provide, as follows:

### § 1.141 Procedure for hearing.

. . . .

(e) *Failure to appear.* (1) A respondent who, after being duly notified, fails to appear at the hearing without good cause, shall be deemed to have waived the right to an oral hearing in the proceeding and to have admitted any facts which may be presented at the hearing. Such failure by the respondent shall also constitute an admission of all the material allegations of fact contained in the complaint. Complainant shall have an election whether to follow the procedure set forth in § 1.139 or whether to present evidence, in whole or in

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<sup>1</sup> Compl. at 5-10 ¶¶ 14, 21, 25, 29, 33, and 37.

<sup>2</sup> References to the transcript of the March 13, 2012, hearing are designated as "Tr."

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part, in the form of affidavits or by oral testimony before the Judge. Failure to appear at a hearing shall not be deemed to be a waiver of the right to be served with a copy of the Judge's decision and to appeal and request oral argument before the Judicial Officer with respect thereto in the manner provided in § 1.145.

7 C.F.R. § 1.141(e)(1). The ALJ granted the Administrator's motion (Tr. 12-13), and the Administrator introduced the testimony of 11 witnesses<sup>3</sup> and moved the admission of exhibits, all of which the ALJ admitted in evidence.

On March 16, 2012, pursuant to 7 C.F.R. § 1.141(e)(1), the ALJ issued "Decision and Order as to Only Raymond Willis" [hereinafter the ALJ's Decision] in which the ALJ: (1) concluded that Mr. Willis violated the Regulations as alleged in the Complaint; (2) ordered Mr. Willis to cease and desist from violating the Animal Welfare Act and the Regulations; (3) permanently disqualified Mr. Willis from obtaining an Animal Welfare Act license; and (4) assessed Mr. Willis a \$6,000 civil penalty (ALJ's Decision at 10-12).

On April 17, 2012, Mr. Willis filed "Appeal and Request for Oral Hearing Before the Judicial Officer" [hereinafter Appeal Petition]. On April 26, 2012, the Administrator filed a response to Mr. Willis's Appeal Petition. On May 2, 2012, 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, except for minor non-substantive changes, the ALJ's Decision as the final agency decision as to Mr. Willis.

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<sup>3</sup> Frank Lolli, Keith Schuller, Susan Dahnke, Craig Perry, Jeff Rosenthal, Joelene Janicek Gould, Kelly Kitchens, John Breidenbach, Dawn Talbott, and Toby Hauntz testified by telephone. Retired United States Department of Agriculture investigator Kirk B. Miller testified in person.

**ANIMAL WELFARE ACT****DECISION****Statement of the Case**

After being notified of the time, place, and manner of the hearing, Mr. Willis, without good cause, failed to appear at the March 13, 2012, hearing. Pursuant to 7 C.F.R. § 1.141(e)(1), a respondent who, after being duly notified, fails to appear at a hearing, without good cause, is deemed to have waived the right to an oral hearing in the proceeding, to have admitted any facts presented at the hearing, and to have admitted the material allegations of fact contained in the complaint. Accordingly, the facts presented at the March 13, 2012, hearing and the material allegations of fact contained in the Complaint are adopted as findings of fact.

**Findings of Fact**

1. Raymond Willis is an individual whose mailing address is in West Virginia. From at least June 11, 2008, through the filing of the Complaint on September 14, 2009, Raymond Willis was an officer and a director of For the Birds, Inc., and was (1) operating as an “exhibitor,” as that term is defined in the Animal Welfare Act and the Regulations, and/or (2) acting for, or employed by, an exhibitor (For the Birds, Inc., and/or Jerry LeRoy Korn), and Raymond Willis’s acts, omissions, or failures within the scope of his employment or office are, pursuant to 7 U.S.C. § 2139, deemed to be his own acts, omissions, or failures (Compl. at 3 ¶ 6).
2. Raymond Willis operated a moderate-sized business exhibiting farm, wild, and exotic animals. The gravity of Raymond Willis’s violations of the Animal Welfare Act and the Regulations is great and include repeated instances in which Raymond Willis knowingly exhibited animals without a valid Animal Welfare Act license, failed to provide animals with adequate veterinary care, and failed to handle animals humanely. (Compl. at 4 ¶ 8.)
3. Raymond Willis does not have a history of violations of the Animal Welfare Act or the Regulations; however, Raymond Willis has not

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shown good faith. Raymond Willis was made aware of the licensing, handling, and veterinary care requirements of the Animal Welfare Act and nevertheless repeatedly and knowingly demonstrated an unwillingness to comply with the prohibition against exhibiting animals without a valid Animal Welfare Act license and with the requirements for exhibiting animals safely (Compl. at 4 ¶ 9). The testimony and exhibits introduced at the March 13, 2012, hearing establish by more than a preponderance of the evidence that Raymond Willis, in his capacity as principal of For the Birds, Inc., operated as an exhibitor without being licensed to do so, as alleged in the Complaint. The evidence introduced at the March 13, 2012, hearing also establishes that Raymond Willis handled animals in a manner that exposed people and animals to harm and that Raymond Willis failed, on multiple occasions, to provide minimally adequate care to the animals and, specifically, failed to provide the animals with necessary veterinary care.

4. From June 11, 2008, through the filing of the Complaint, Raymond Willis operated as an exhibitor without having been licensed by the Secretary of Agriculture to do so, and specifically, operated a zoo (Compl. at 5-6 ¶ 14).

5. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to have an attending veterinarian who provided adequate veterinary care to respondents' animals (Compl. at 7 ¶ 21).

6. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to employ an attending veterinarian under formal arrangements and with appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use (Compl. at 8 ¶ 25).

7. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to establish and maintain programs of adequate veterinary care (Compl. at 8 ¶ 29).

8. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to handle animals as expeditiously and carefully as possible

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in a manner that would not cause the animals trauma, unnecessary discomfort, behavioral stress, or physical harm (Compl. at 9 ¶ 33).

9. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, allowed the public to handle tigers without any barrier or distance (Compl. at 10 ¶ 37).

**Conclusions of Law**

1. From June 11, 2008, through the filing of the Complaint, Raymond Willis operated as an exhibitor without having been licensed by the Secretary of Agriculture to do so, and specifically, operated a zoo, in willful violation of 9 C.F.R. § 2.1(a).<sup>4</sup>

2. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to have an attending veterinarian who provided adequate veterinary care to respondents' animals, in willful violation of 9 C.F.R. § 2.40(a).

3. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to employ an attending veterinarian under formal arrangements and with appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use, in willful violation of 9 C.F.R. § 2.40(a)(1)-(2).

4. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to establish and maintain programs of adequate veterinary care, in willful violation of 9 C.F.R. § 2.40(b).

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<sup>4</sup> The Administrator alleged and the ALJ concluded that Mr. Willis's failure to obtain an Animal Welfare Act license also is a violation of 9 C.F.R. § 2.100(a) (Compl. at 5-6 ¶ 14; ALJ's Decision at 10). I conclude only that Mr. Willis willfully violated 9 C.F.R. § 2.1(a); however, my failure to conclude that Mr. Willis also violated 9 C.F.R. § 2.100(a) does not affect the disposition of this proceeding.

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5. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to handle animals as expeditiously and carefully as possible in a manner that would not cause the animals trauma, unnecessary discomfort, behavioral stress, or physical harm, in willful violation of 9 C.F.R. § 2.131(b)(1).

6. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to 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, and specifically, allowed the public to handle tigers without any barrier or distance, in willful violation of 9 C.F.R. § 2.131(c)(1).

#### **Mr. Willis's Appeal Petition**

The Rules of Practice provide that a party may appeal an administrative law judge's decision to the Judicial Officer, as follows:

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

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

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relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

7 C.F.R. § 1.145(a). Mr. Willis's Appeal Petition contains numerous assertions that do not relate to: (1) the ALJ's Decision, (2) any ruling by the ALJ, or (3) the deprivation of Mr. Willis's rights. I do not address these assertions as they do not concern matters that may be raised in an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145(a). However, Mr. Willis's Appeal Petition does contain an allegation that the ALJ deprived him of due process.

First, Mr. Willis contends the ALJ deprived him of due process by changing the location of the hearing without providing him adequate notice of the change of the location of the hearing (Appeal Pet. at 8).

On July 28, 2011, the ALJ informed the parties that a hearing would be held in Boise, Idaho, commencing March 13, 2012, with an exact location in Boise, Idaho, to be determined 2 or 3 months before the commencement of the hearing (July 28, 2011, Hearing Notice at 1-2 ¶¶ 1, 4). The ALJ also informed the parties that she intended to change the location of the hearing from Boise, Idaho, to Washington, DC, if the respondents failed to comply with the ALJ's July 28, 2011, pre-hearing deadlines and instructions (July 28, 2011, Hearing Notice at 1 ¶ 2; July 28, 2011, Prehearing Deadlines and Instructions at 3 ¶ 11).

On March 2, 2012, the Administrator filed a motion requesting that the ALJ change the location of the hearing from Boise, Idaho, to Washington, DC, based upon the respondents' failure to comply with the ALJ's July 28, 2011, pre-hearing deadlines and instructions (Complainant's Motion to Change Hearing Location and to Take Testimony by Telephone at 1-3 ¶ I). On March 7, 2012, the ALJ granted the Administrator's motion (Order Granting Complainant's Motion to Change Hearing Location and to Take Testimony By Telephone), and Mr. Willis asserts he was informed of the ALJ's order changing the hearing location on March 9, 2012 (Appeal Pet. at 6).

The record before me establishes that the respondents failed to comply with the ALJ's July 28, 2011, pre-hearing deadlines and

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instructions. The ALJ informed Mr. Willis in both the Hearing Notice and the Prehearing Deadlines and Instructions, filed 7 months 13 days before the date of the hearing, that the respondents' failure to comply with the pre-hearing deadlines and instructions would result in a change of the location of the hearing from Boise, Idaho, to Washington, DC. Under these circumstances, I find the ALJ's March 7, 2012, Order Granting Complainant's Motion to Change Hearing Location and to Take Testimony By Telephone provided Mr. Willis adequate notice of the change of the hearing location, and I conclude the ALJ did not deprive Mr. Willis of due process when she changed the location of the hearing.<sup>5</sup>

Second, Mr. Willis contends the ALJ deprived him of due process by taking testimony by telephone because "[a] telephone hearing is not an acceptable alternative to facing one's accusers in person." (Appeal Pet. at 8.)

On March 2, 2012, the Administrator requested that the ALJ permit the taking of testimony by telephone (Complainant's Motion to Change Hearing Location and to Take Testimony by Telephone at 3-5 ¶ II). The Administrator cited a number of reasons for the request, including the cost of having witnesses attend an in-person hearing in either Boise, Idaho, or Washington, DC, the inconvenience to witnesses of having to travel to the place of the hearing, and the fact that the testimony of each witness who would give testimony by telephone would be corroborated by other evidence. The Administrator asserted that permitting witnesses to testify by telephone would provide a full and fair evidentiary hearing, would not prejudice any party, and would cost less than conducting the hearing by personal attendance of the witnesses in Boise, Idaho, or Washington, DC. (Complainant's Motion to Change Hearing Location and to Take Testimony by Telephone at 3-5 ¶ II.) On March 7, 2012, the ALJ granted the Administrator's request to take testimony of witnesses by telephone rather than in-person appearance (Order Granting Complainant's Motion to Change Hearing Location and to Take

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<sup>5</sup> Administrative law judges have the authority under the Rules of Practice to set the place of a hearing and change the place of a hearing with or without a motion requesting a particular hearing location (7 C.F.R. §§ 1.141(b), .144(c)(2)).

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Testimony by Telephone), and, at the hearing, 10 witnesses testified by telephone.<sup>6</sup>

Due process is flexible and calls for such procedural protections as the particular situation demands.<sup>7</sup> Courts have applied a balancing test that examines: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of the private interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>8</sup> Therefore, I reject Mr. Willis's apparent contention that taking witness testimony by telephone is per se a violation of the due process clause of the Constitution of the United States. Moreover, after examining Mr. Willis's interests affected by this proceeding, the risk that Mr. Willis is erroneously deprived of those interests by taking testimony by telephone, the probable value of taking the in-person testimony of the 10 witnesses who testified by telephone, and the government's fiscal and administrative burdens that the in-person testimony would have entailed, I find the ALJ did not deprive Mr. Willis of due process by taking testimony by telephone.<sup>9</sup>

**Mr. Willis's Petition to Reopen the Hearing**

Mr. Willis requests that I reopen the hearing to take further evidence, that an administrative law judge other than Jill S. Clifton conduct the reopened hearing in Boise, Idaho, and that an attorney other than

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<sup>6</sup> See note 3.

<sup>7</sup> *Gilbert v. Homar*, 520 U.S. 924, 930 (1997); *Sandin v. Conner*, 515 U.S. 472, 503 (1995); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

<sup>8</sup> *Wilkinson v. Austin*, 545 U.S. 209, 224-25 (2005); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>9</sup> The Rules of Practice provide that an administrative law judge may, in his or her sole discretion or in response to a motion by a party, conduct a proceeding by telephone if the administrative law judge finds a hearing conducted by telephone: (1) would provide a full and fair evidentiary hearing; (2) would not prejudice any party; and (3) would cost less than conducting the hearing by audio-visual telecommunication or by personal attendance of any individual who is expected to participate in the hearing (7 C.F.R. § 1.141(b)(4)).

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Colleen A. Carroll represent the Administrator (Appeal Pet. at 10). The Rules of Practice provide that a petition to reopen a hearing must state the nature and purpose of the evidence to be adduced and set forth a good reason why such evidence was not adduced at the hearing, as follows:

**§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**

(a) *Petition requisite. . . .*

(2) *Petition to reopen hearing.* A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2). Mr. Willis does not set forth a good reason for his failure to appear at the March 13, 2012, hearing and adduce evidence at the hearing. Therefore, I deny Mr. Willis's request that I reopen the hearing to take further evidence.

**Mr. Willis's Request for Oral Argument**

Mr. Willis's request for oral argument (Appeal Pet. at 10), which the Judicial Officer may grant, refuse, or limit,<sup>10</sup> is refused because the issues are not complex and oral argument would serve no useful purpose.

For the foregoing reasons, the following Order is issued.

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<sup>10</sup> 7 C.F.R. § 1.145(d).

**ANIMAL WELFARE ACT****ORDER**

1. Raymond Willis, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and, in particular, shall cease and desist from:

- a. operating as an exhibitor without an Animal Welfare Act license;
- b. failing to have an attending veterinarian to provide adequate veterinary care to animals;
- c. failing to employ an attending veterinarian under formal arrangements and with appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use;
- d. failing to establish and maintain programs of adequate veterinary care;
- e. failing to handle animals as expeditiously and carefully as possible in a manner that does not cause the animals trauma, unnecessary discomfort, behavioral stress, or physical harm; and
- f. failing to handle animals during public exhibition so there is minimal risk of harm to the animals and to 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.

Paragraph 1 of this Order shall become effective upon service of this Order on Raymond Willis.

2. Raymond Willis is permanently disqualified from obtaining an Animal Welfare Act license.

Paragraph 2 of this Order shall become effective upon service of this Order on Raymond Willis.

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3. Raymond Willis is assessed a \$6,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Colleen A. Carroll  
United States Department of Agriculture  
Office of the General Counsel  
Marketing, Regulatory, and Food Safety  
Division  
1400 Independence Avenue, SW  
Room 2343-South Building  
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Ms. Carroll within 60 days after service of this Order on Raymond Willis. Raymond Willis shall state on the certified check or money order that payment is in reference to AWA Docket No. 09-0196.

#### **RIGHT TO JUDICIAL REVIEW**

Raymond Willis has the right to seek judicial review of the Order in this Decision and Order as to Raymond Willis in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Raymond Willis must seek judicial review within 60 days after entry of the Order in this Decision and Order as to Raymond Willis.<sup>11</sup> The date of entry of the Order in this Decision and Order as to Raymond Willis is August 7, 2012.

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<sup>11</sup> 7 U.S.C. § 2149(c).

**ANIMAL WELFARE ACT**

**In re: JEFFREY W. ASH, AN INDIVIDUAL, D/B/A ASHVILLE  
GAME FARM.**

**Docket No. 11-0380.**

**Decision and Order.**

**Filed September 14, 2012.**

**AWA.**

Colleen A. Carroll, Esq. for Complainant.

Robert M. Winn, Esq. for Respondent.

Initial Decision by Janice K. Bullard, Administrative Law Judge.

*Decision and Order entered 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 proceeding on August 31, 2011, by filing an Order to Show Cause Why Animal Welfare Act License 21-C-0359 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: (1) at all times material to this proceeding, Jeffrey W. Ash was an “exhibitor” as that term is defined in the Animal Welfare Act and the Regulations; (2) at all times material to this proceeding, Mr. Ash held Animal Welfare Act license number 21-C-0359; and (3) on April 29, 2011, Mr. Ash was convicted of reckless endangerment in the second degree in violation of New York Penal Law § 120.20, in connection with his exhibition of animals at the Ashville

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Game Farm, in Greenwich, New York.<sup>1</sup> The Administrator seeks an order terminating Animal Welfare Act license number 21-C-0359<sup>2</sup> and disqualifying Mr. Ash from obtaining an Animal Welfare Act license for a period of not less than 2 years based upon Mr. Ash's violation of a state law pertaining to ownership and welfare of animals.<sup>3</sup>

On September 20, 2011, Mr. Ash filed a response to the Order to Show Cause: (1) admitting, at all times material to this proceeding, he was an "exhibitor" as that term is defined in the Animal Welfare Act and the Regulations; (2) admitting, at all times material to this proceeding, he held Animal Welfare Act license number 21-C-0359; (3) admitting that, on April 29, 2011, he was convicted of reckless endangerment in the second degree in violation of New York Penal Law § 120.20; (4) stating New York Penal Law § 120.20 does not contain any element pertaining to the welfare and treatment of animals; and (5) denying his conviction of reckless endangerment in the second degree resulted in any finding that he abused, mistreated, or neglected any animals or that he was not fit to exhibit animals.<sup>4</sup>

On March 6, 2012, the Administrator filed Complainant's Motion for Summary Judgment in which the Administrator contends there is no factual dispute requiring a hearing. On March 27, 2012, Mr. Ash filed Respondent's Opposition to Motion for Summary Judgment asserting Complainant's Motion for Summary Judgment should be denied and the matter scheduled for hearing. On April 2, 2012, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] filed a Decision and Order Granting Summary Judgment in which she: (1) found that, on or about April 29, 2011, Mr. Ash was convicted of reckless endangerment in the second degree in violation of New York Penal Law § 120.20, in

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<sup>1</sup> Order to Show Cause at 1 ¶ 1 and at 2 ¶¶ 3-4.

<sup>2</sup> The Administrator also states Animal Welfare Act license number 41-C-0122 should be terminated (Order to Show Cause at 1). I find the Administrator's reference to Animal Welfare Act license number 41-C-0122 puzzling as the record contains no evidence that Mr. Ash held Animal Welfare Act license number 41-C-0122, and I find no further reference to Animal Welfare Act license number 41-C-0122 in the record. Therefore, I decline to terminate Animal Welfare Act license number 41-C-0122.

<sup>3</sup> Order to Show Cause at 2 ¶ 5 and at 4.

<sup>4</sup> Answer and Request for Hearing ¶¶ 1-4.

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connection with his August 10, 2010, exhibition of animals at the Ashville Game Farm, in Greenwich, New York; (2) concluded Mr. Ash's conviction of reckless endangerment in the second degree in violation of New York Penal Law § 120.20 involved the possession and exhibition of animals; (3) concluded Mr. Ash's conviction of reckless endangerment in the second degree in violation of New York Penal Law § 120.20 establishes that Mr. Ash's conduct was willful; (4) concluded Mr. Ash's conviction of reckless endangerment in the second degree in violation of New York Penal Law § 120.20 demonstrates he is unfit to hold an Animal Welfare Act license; (5) concluded the revocation of Mr. Ash's Animal Welfare Act license promotes the remedial purposes of the Animal Welfare Act; and (6) revoked Animal Welfare Act license number 21-C-0359.<sup>5</sup>

On April 27, 2012, the Administrator filed Complainant's Petition for Appeal; on May 3, 2012, Mr. Ash filed a Request for Oral Argument and an Appeal Petition; on May 23, 2012, the Administrator filed Complainant's Response to Request for Oral Argument and Petition for Appeal; and on May 29, 2012, 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 ALJ's Decision and Order Granting Summary Judgment, except that I do not adopt the ALJ's Order revoking Animal Welfare Act license number 21-C-0359. Instead, I terminate Animal Welfare Act license number 21-C-0359.

**DECISION****Discussion**

The Animal Welfare Act provides that the Secretary of Agriculture shall issue licenses to dealers and exhibitors upon application for a license in such form and manner as the Secretary of Agriculture may prescribe (7 U.S.C. § 2133). The power to require and issue licenses under the Animal Welfare Act includes the power to terminate a license

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<sup>5</sup> Decision and Order Granting Summary Judgment at 11 Findings of Fact ¶¶ 3, 8; at 12 Conclusions of Law ¶¶ 4-6, 8; and at 13.

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and to disqualify a person whose license has been terminated from becoming licensed.<sup>6</sup> The Regulations specify certain bases for denying an initial application for an Animal Welfare Act license (9 C.F.R. § 2.11) and further provide that an Animal Welfare Act license, which has been issued, may be terminated for any reason that an initial license application may be denied (9 C.F.R. § 2.12). The Regulations provide that an initial application for an Animal Welfare Act license will be denied if the applicant has been found to have violated any state law pertaining to ownership or welfare of animals or is otherwise unfit to be licensed and the Administrator determines that issuance of an Animal Welfare Act license would be contrary to the purposes of the Animal Welfare Act, 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.

9 C.F.R. § 2.11(a)(6).

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

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<sup>6</sup> *In re Kathy Jo Bauck*, 68 Agric. Dec. 853, 856 (2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); *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); *In re Mary Bradshaw*, 50 Agric. Dec. 499, 507 (1991).

**ANIMAL WELFARE ACT****§ 2131. Congressional statement of policy**

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

- (1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
- (2) to assure the humane treatment of animals during transportation in commerce; and
- (3) to protect owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

7 U.S.C. § 2131.

The Animal and Plant Health Inspection Service [hereinafter APHIS] has determined that Mr. Ash is unfit to be licensed under the Animal Welfare Act and that allowing Mr. Ash to hold an Animal Welfare Act license is contrary to the purposes of the Animal Welfare Act. APHIS's determinations are based upon Mr. Ash's conviction of reckless endangerment in the second degree in violation of New York Penal Law § 120.20 in connection with Mr. Ash's exhibition of wild and exotic animals.<sup>7</sup> Mr. Ash admits being convicted of reckless endangerment in

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<sup>7</sup> Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 7.

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the second degree in violation of New York Penal Law § 120.20.<sup>8</sup> I conclude Mr. Ash has been found to have violated a state law pertaining to ownership and welfare of animals. I affirm the determinations that Mr. Ash is unfit to hold Animal Welfare Act license number 21-C-0359 and that allowing Mr. Ash to hold Animal Welfare Act license number 21-C-0359 is contrary to the purposes of the Animal Welfare Act. Therefore, I terminate Animal Welfare Act license number 21-C-0359.

### **Findings of Fact**

1. Mr. Ash is an individual who did business as Ashville Game Farm (Answer and Request for Hearing ¶ 1; Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 3).
2. Mr. Ash's mailing address is in Greenwich, New York (Answer and Request for Hearing ¶ 1; Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 3).
3. At all times material to this proceeding, Mr. Ash was an "exhibitor" as that term is defined in the Animal Welfare Act and the Regulations (Answer and Request for Hearing ¶ 1).
4. At all times material to this proceeding, Mr. Ash held Animal Welfare Act license number 21-C-0359 (Answer and Request for Hearing ¶ 1).
5. On or about December 18, 2010, APHIS Regional Director, Animal Care, Eastern Region, Elizabeth Goldentyer, D.V.M., was notified by a member of her staff that Mr. Ash had been indicted on 29 counts of alleged criminal conduct related to his exhibition of animals at the Ashville Game Farm in Greenwich, New York (Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 4).
6. Mr. Ash plead guilty to Count Twenty-Nine of the indictment referenced in Finding of Fact number 5, which Count reads as follows:

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<sup>8</sup> Answer and Request for Hearing ¶ 4.

**ANIMAL WELFARE ACT**COUNT TWENTY-NINE

The Grand Jury of the County of Washington, by this Indictment, accuses Defendant Jeffrey Ash, of the crime of Reckless Endangerment in the Second Degree, a class A misdemeanor, in violation of § 120.20 of the Penal Law of the State of New York, committed as follows:

Defendant Jeffrey Ash, on or about August 10, 2010, in the Town of Greenwich, Washington County, New York, did recklessly engage in conduct which created the risk of serious physical injury to another person by running Ashville Game Farm and by not properly caging animals including lemurs, monkeys, bears, turtles, alligators, pigs[,] goats, deer and other animals, and by encouraging visitors to the game farm including children to feed the animals, and did allow visitors to the Game Farm to have contact with the animals, and did not have the animals vaccinated for rabies and did allow children to have contact with turtles known to carry salmonella, and did have reptiles such as snakes and lizards in unsecured cages, and did have a tarantula in a cage with an unsecured lid with a figurine of the cartoon character Sponge Bob in the cage with the poisonous spider making it likely a child would reach into the cage, and did have alligators in a cage with fencing which visitors could reach over and which visitors could reach through and which was not properly secured. Jeff Ash did fail to protect the public from attack, and disease.

Complainant's Mot. for Summary Judgment CX 2 at 10.

7. On or about April 29, 2011, Mr. Ash was convicted of reckless endangerment in the second degree in violation of New York Penal Law § 120.20, as alleged in Count Twenty-Nine of the indictment quoted in

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Finding of Fact number 6 (Answer and Request for Hearing ¶ 4; Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 5 and CX 2 at 11-16).

8. APHIS determined Mr. Ash was unfit to hold a license under the Animal Welfare Act based upon Mr. Ash's April 29, 2011, conviction of reckless endangerment in the second degree in violation of New York Penal Law § 120.20 (Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 7).

9. APHIS determined that permitting Mr. Ash to continue to hold Animal Welfare Act license number 21-C-0359 would be contrary to the purposes of the Animal Welfare Act (Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 7).

10. On or about June 8, 2011, Dr. Goldentyer requested that APHIS institute an administrative proceeding to terminate Mr. Ash's Animal Welfare Act license based upon Mr. Ash's April 29, 2011, conviction of reckless endangerment in the second degree in connection with his exhibition of wild and exotic animals (Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 7).

11. In a letter dated June 29, 2011, the New York State Department of Environmental Conservation denied Mr. Ash's applications for renewal of his state licenses to possess and exhibit animals, in part, due to Mr. Ash's April 29, 2011, conviction of reckless endangerment in the second degree in violation of New York Penal Law § 120.20 (Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 6 and CX 3).

12. On July 27, 2011, the State of New York provided Dr. Goldentyer with a certificate of Mr. Ash's April 29, 2011, conviction of reckless endangerment in the second degree in violation of New York Penal Law § 120.20 (Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 5 and CX 2 at 11-16).

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13. On or about August 10, 2011, APHIS received a copy of a letter dated June 29, 2011, from the New York State Department of Environmental Conservation directed to Mr. Ash, in which the New York State Department of Environmental Conservation denied the renewal of Mr. Ash's state licenses to possess and exhibit animals (Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 6 and CX 3).

**Conclusions of Law**

1. The Secretary of Agriculture has jurisdiction in this matter.
2. The material facts involved in this matter are not in dispute and the ALJ's entry of summary judgment in favor of the Administrator was appropriate.
3. Mr. Ash's conviction of reckless endangerment in the second degree under New York Penal Law § 120.20 involved ownership and welfare of animals.
4. Mr. Ash's conviction of reckless endangerment in the second degree under New York Penal Law § 120.20 establishes that Mr. Ash's conduct was willful and implicated public health and safety; therefore, the Administrator was not required to provide Mr. Ash with written notice of the facts and conduct concerned with this proceeding and an opportunity to demonstrate or achieve compliance prior to instituting this proceeding, as provided in 5 U.S.C. § 558(c) and 7 C.F.R. § 1.133(b)(3).
5. Mr. Ash's conviction of reckless endangerment in the second degree under New York Penal Law § 120.20 demonstrates Mr. Ash is unfit to hold Animal Welfare Act license number 21-C-0359.
6. APHIS did not rely upon factors other than Mr. Ash's conviction of reckless endangerment in the second degree under New York Penal Law § 120.20 for its determination to seek termination of Mr. Ash's Animal Welfare Act license.

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7. The termination of Mr. Ash's Animal Welfare Act license pursuant to 9 C.F.R. §§ 2.11(a)(6), .12, promotes the remedial purposes of the Animal Welfare Act.

### **Mr. Ash's Request for Oral Argument**

Mr. Ash's request for oral argument, which the Judicial Officer may grant, refuse, or limit,<sup>9</sup> is refused because the issues have been fully briefed by the parties and oral argument would serve no useful purpose.

### **Mr. Ash's Appeal Petition**

Mr. Ash raises four issues in his Appeal Petition. First, Mr. Ash contends the ALJ erroneously held New York Penal Law § 120.20 is a state law pertaining to the transportation, ownership, neglect, or welfare of animals (Appeal Pet. Issue and Argument No. 1 at unnumbered pages 3-5).

New York Penal Law § 120.20 sets forth the elements of reckless endangerment in the second degree and defines the crime as a misdemeanor as follows:

#### **§ 120.20 Reckless endangerment in the second degree**

A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

Reckless endangerment in the second degree is a class A misdemeanor.

While transportation, ownership, neglect, and welfare of animals are not elements of the crime of reckless endangerment in the second degree, Mr. Ash's exhibition of animals was extrinsically related to Mr. Ash's

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<sup>9</sup> 7 C.F.R. § 1.145(d).

**ANIMAL WELFARE ACT**

execution of the crime so as to be an instrumentality of the crime as is evident in Count Twenty-Nine of the indictment charging Mr. Ash with a violation of New York Penal Law § 120.20.<sup>10</sup> Mr. Ash pled guilty to, and was convicted of, Count Twenty-Nine of the indictment.<sup>11</sup> Mr. Ash's indictment and conviction were based upon the manner in which Mr. Ash conducted the operation of Ashville Game Farm and specifically on his exhibition of animals regulated under the Animal Welfare Act.<sup>12</sup> Thus, I conclude New York Penal Law § 120.20 can pertain to ownership and welfare of animals and, under the circumstances in *People v. Ash*, Case No. I-192-2010 (Crim Ct, Washington County Apr. 29, 2011), New York Penal Law § 120.20 did pertain to ownership and welfare of animals.

Second, Mr. Ash asserts there are triable issues of fact relating to Mr. Ash's fitness to hold Animal Welfare Act license number 21-C-0359; therefore, the ALJ erroneously granted Complainant's Motion for Summary Judgment (Appeal Pet. Issue and Argument No. 2 at unnumbered pages 5-9).

The conclusion that Mr. Ash is unfit to hold Animal Welfare Act license number 21-C-0359 is based upon Mr. Ash's April 29, 2011, conviction of reckless endangerment in the second degree in violation of New York Penal Law § 120.20.<sup>13</sup> The determination that a respondent is unfit to hold an Animal Welfare Act license may be based upon a conviction of any federal, state, or local law or regulation pertaining to transportation, ownership, neglect, or welfare of animals.<sup>14</sup> As discussed

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<sup>10</sup> Complainant's Mot. for Summary Judgment CX 2 at 10.

<sup>11</sup> Answer and Request for Hearing ¶ 4; Complainant's Mot. for Summary Judgment Decl. of Elizabeth Goldentyer ¶ 5 and CX 2 at 11-16.

<sup>12</sup> The term "animal" is defined in 7 U.S.C. § 2132(g); 9 C.F.R. § 1.1.

<sup>13</sup> Decision and Order Granting Summary Judgment at 9-10 and at 12 Conclusion of Law ¶ 6.

<sup>14</sup> 9 C.F.R. §§ 2.11(a)(6), .12. See also *In re Kathy Jo Bauck*, 68 Agric. Dec. 853, 866-67 (2009) (concluding the respondent was unfit to be licensed under the Animal Welfare Act based upon her conviction of animal torture in violation of Minnesota Stat. § 343.21 subdiv. 1), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); *In re Animals of Montana, Inc.*, 68 Agric. Dec. 92, 96-102 (2009) (concluding the respondent was unfit to be licensed under the Animal Welfare Act based, in part, upon violations of the Lacey Act and the Endangered Species Act); *In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. 77, 83-85 (2009) (concluding the respondent was unfit to be licensed under the Animal Welfare Act based upon violations of the Endangered Species Act); *In re Loreon Vigne*,

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in this Decision and Order, *supra*, under the circumstances in *People v. Ash*, Case No. I-192-2010 (Crim Ct, Washington County Apr. 29, 2011), New York Penal Law § 120.20 did pertain to ownership and welfare of animals. Mr. Ash admits he was convicted of violating New York Penal Law § 120.20;<sup>15</sup> therefore, there is no genuine issue of material fact regarding Mr. Ash's fitness to hold Animal Welfare Act license number 21-C-0359 to be heard, and I reject Mr. Ash's assertion that the ALJ erroneously granted Complainant's Motion for Summary Judgment.

Third, Mr. Ash contends the ALJ erroneously gave preclusive effect to Mr. Ash's conviction of violating New York Penal Law § 120.20. Mr. Ash asserts the ALJ should not have given preclusive effect to his conviction because Count Twenty-Nine of the indictment charging him with violations of New York Penal Law § 120.20 is bombastic and contains misstatements of science. Further, Mr. Ash asserts he only plead guilty to violating New York Penal Law § 120.20 because a guilty plea was financially more prudent than incurring the expense of defending against the indictment. (Appeal Pet. Issue and Argument No. 3 at unnumbered pages 9-11.)

Mr. Ash's conviction of violating New York Penal Law § 120.20 is a material fact in this proceeding; the reason Mr. Ash plead guilty to violating New York Penal Law § 120.20 and the purported defects in the indictment filed in *People v. Ash*, Case No. I-192-2010 (Crim Ct, Washington County Apr. 29, 2011), are not material facts in this proceeding. Mr. Ash cannot relitigate his past criminal conviction in this Animal Welfare Act license termination proceeding. If Mr. Ash wishes to contest his conviction in *People v. Ash*, Case No. I-192-2010 (Crim Ct, Washington County Apr. 29, 2011), he must turn to the State Courts

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67 Agric. Dec. 1060, 1067 (2008) (concluding the respondent was unfit to be licensed under the Animal Welfare Act based upon her conviction of violations of the Endangered Species Act); *In re Mark Levinson*, 65 Agric. Dec. 1026, 1038-39 (2005) (concluding the respondent was unfit to be licensed under the Animal Welfare Act based upon his conviction of violations of New York state laws pertaining to the transportation and ownership of animals).

<sup>15</sup> Answer and Request for Hearing ¶ 4.

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of New York, as that is the proper forum in which to direct his arguments.

Fourth, Mr. Ash contends the ALJ erroneously determined that Mr. Ash's willfulness had been established as a matter of law (Appeal Pet. Issue and Argument No. 4 at unnumbered pages 11-13).

As an initial matter, an Animal Welfare Act license may be terminated under 9 C.F.R. § 2.12 based upon a violation of any state law described in 9 C.F.R. § 2.11(a)(6) and there is no requirement under 9 C.F.R. § 2.11(a)(6) that the violation of state law must be willful. However, under the Rules of Practice, except in a case of willfulness or in a case in which public health, interest, or safety otherwise requires, the Administrator must provide an Animal Welfare Act licensee with written notice of the facts or conduct concerned and an opportunity to demonstrate or achieve compliance, prior to instituting a proceeding that may affect the Animal Welfare Act license, as follows:

#### § 1.133 Institution of proceedings.

.....  
 (b) *Filing of complaint or petition for review.*

.....  
 (3) As provided in 5 U.S.C. 558, in any case, *except one of willfulness or one in which public health, interest, or safety otherwise requires*, prior to the institution of a formal proceeding which may result in the withdrawal, suspension, or revocation of a "license" as that term is defined in 5 U.S.C. 551(8), the Administrator, in an effort to effect an amicable or informal settlement of the matter, shall give written notice to the person involved of the facts or conduct concerned and shall afford such person an opportunity, within a reasonable time fixed by the Administrator, to demonstrate or achieve compliance with the applicable requirements of the statute, or the regulation, standard, instruction or order promulgated thereunder.

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7 C.F.R. § 1.133(b)(3) (emphasis added). A willful act is an act in which the violator intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements.<sup>16</sup> Generally, a criminal act involves at least a careless disregard of statutory requirements. In the instant proceeding, the Administrator seeks termination of Mr. Ash's Animal Welfare Act license as a result of Mr. Ash's conviction of reckless endangerment in the second degree in violation of New York Penal Law § 120.20. Mr. Ash's conviction of recklessly engaging in conduct which creates a substantial risk of serious physical injury to another person establishes willfulness and implicates public health and safety; thus, the Administrator was not required to give Mr. Ash written notice of the facts or conduct concerned and an opportunity to demonstrate or achieve compliance prior to instituting this proceeding.

### **The Administrator's Appeal Petition**

The Administrator raises one issue in Complainant's Petition for Appeal. The Administrator asserts the ALJ erroneously revoked Mr. Ash's Animal Welfare Act license (Complainant's Pet. for Appeal at 3-4).

Throughout this proceeding, the Administrator has consistently sought termination of Mr. Ash's Animal Welfare Act license pursuant to 7 U.S.C. § 2133 and 9 C.F.R. § 2.12 rather than revocation of Mr. Ash's Animal Welfare Act license pursuant to 7 U.S.C. § 2149. Nonetheless, the ALJ revoked rather than terminated Mr. Ash's Animal Welfare Act license.<sup>17</sup> Revocation of Animal Welfare Act license number 21-C-0359 would prohibit Mr. Ash from obtaining an Animal Welfare Act license in the future,<sup>18</sup> whereas termination of Mr. Ash's Animal Welfare Act

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<sup>16</sup> *In re Kathy Jo Bauck*, 68 Agric. Dec. 853, 860-61 (2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); *In re D&H Pet Farms, Inc.*, 68 Agric. Dec. 798, 812-13 (2009); *In re Jewel Bond*, 65 Agric. Dec. 92, 107 (2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); *In re James E. Stephens*, 58 Agric. Dec. 149, 180 (1999); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 306 (1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978).

<sup>17</sup> Decision and Order Granting Summary Judgment at 13.

<sup>18</sup> See 9 C.F.R. §§ 2.10(b), .11(a)(3).

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license would not prohibit Mr. Ash from obtaining an Animal Welfare Act license in the future. As this proceeding was instituted under the authority of the Secretary of Agriculture to terminate an Animal Welfare Act license and the Administrator consistently sought termination of Mr. Ash's Animal Welfare Act license, I do not adopt the ALJ's Order revoking Animal Welfare Act license number 21-C-0359. Instead, I terminate Animal Welfare Act license number 21-C-0359.<sup>19</sup>

For the foregoing reasons, the following Order is issued.

**ORDER**

Animal Welfare Act license number 21-C-0359 is terminated. This Order shall become effective on the 60th day after service of this Order on Jeffrey W. Ash.

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<sup>19</sup> In addition to termination of Animal Welfare Act license number 21-C-0359, the Administrator originally sought Mr. Ash's disqualification from obtaining an Animal Welfare Act license for a period of not less than 2 years (Order to Show Cause at 4). The Administrator appears to have abandoned the request for a period of disqualification and now seeks only termination of Animal Welfare Act license number 21-C-0359 (Complainant's Mot. for Summary Judgment at 7; Complainant's Pet. for Appeal at 7; Complainant's Response to Request for Oral Argument and Pet. for Appeal at 9); therefore, I do not include a period of disqualification from obtaining an Animal Welfare Act license in the Order in this Decision and Order.

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**In re: TRI-STATE ZOOLOGICAL PARK OF WESTERN  
MARYLAND, INC., A MARYLAND CORPORATION; AND  
ROBERT L. CANDY, AN INDIVIDUAL.  
Docket No. 11-0222.  
Decision and Order.  
Filed August 1, 2012.**

AWA.

Buren W. Kidd, Esq., and Colleen A. Carroll, Esq., for Complainant.  
Respondents, pro se.  
*Decision and Order entered by Janice K. Bullard, Administrative Law Judge.*

**DECISION AND ORDER**

**I. Introduction**

The above captioned matter involves administrative disciplinary proceedings initiated by the Administrator of the Animal and Plant Health Inspection Service (“APHIS”), an agency of the United States Department of Agriculture (“USDA”; “Complainant”), against Tri-State Zoological Park of Western Maryland and Robert Candy (“Respondents”; “the Zoo”; “Tri-State”). 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”).

In a complaint filed on May 11, 2011, (“the Complaint”) Complainant alleged that Respondents willfully violated the Act and the Regulations on multiple occasions between 2006 and 2010. Generally, the Complaint alleged that Respondents failed to properly handle and care for a variety of animals; failed to maintain proper records; failed to maintain an adequate plan of veterinary care, or employ an attending veterinarian; failed to adequately maintain facilities in a variety of circumstances, including one leading to the death of a macaque.

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Respondents timely filed an Answer on June 2, 2011, and thereafter filed supplementary narrative discussions. By Order issued August 17, 2011, a hearing was scheduled to commence on February 8, 2012 in Hagerstown, Maryland. At the hearing, Complainant was represented by Colleen A. Carroll, Esq. and Buren Kidd, Esq. of the Office of the General Counsel, Washington D.C. Respondents were represented by the Zoo's owner, Robert Candy, who appeared without assistance of counsel on his own behalf and on behalf of the corporate entity.

At the hearing, I admitted to the record Complainant's exhibits identified as CX-1 through CX-16, with the exception of CX-3 page 4 and CX-10, pages 9-12, which Complainant withdrew. Tr. at 21; 23. I also excluded portions of CX-16. Tr. at 434-435. I admitted to the record Respondents' exhibits RX-1 through RX-23, with the exception of RX-12 and RX-14, which Respondents withdrew, and RX-13, which I excluded. Tr. at 743-746. In addition, the parties entered into stipulations regarding the admissibility and authenticity of much of the documentary evidence, which I admitted to the record as ALJX-1. Tr. at 9.

I directed the parties to file written closing argument by not later than May 18, 2012<sup>1</sup>. By telephone on May 17, 2012, Respondents requested permission to file his argument by facsimile. I instructed my staff to advise Respondents that I would not accept filing by facsimile, but would allow a brief extension of time for mailed submissions. Respondents filed closing argument on May 21, 2012. Complainant filed partial written closing arguments on May 18, 2012, and requested a brief extension of time to file additions to its brief. Complainant filed its supplemental closing argument on May 22, 2012. Accordingly, the record is hereby closed.

The instant decision<sup>2</sup> is based upon consideration of the record evidence; the pleadings, arguments, and explanations of the parties; and controlling law.

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<sup>1</sup> May 18, 2012 fell on a Friday.

<sup>2</sup> In this Decision & Order, the transcript of the hearing shall be referred to as "Tr. at [page number]". Complainant's evidence shall be denoted as "CX-[exhibit #]" and

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**II. Issues**

Did Respondents violate the Animal Welfare Act, and if so, what sanctions, if any, should be imposed because of the violations?  
Is Mr. Candy personally liable for acts of the corporate entity?

**III. Findings of Fact and Conclusions of Law**

**A. Admissions**

Respondents admit that Tri-State Zoological park of Western Maryland, Inc. (“Tri-State”; “the zoo”) is a Maryland corporation whose registered agent for service of process is Respondent Robert L. Candy, whose mailing address is in Cumberland, Maryland.

Robert L. Candy is the Chief Executive Officer, principal and registered agent for Tri-State at all times pertinent to this proceeding.

Respondents further admit that Tri-State operates as an exhibitor within the meaning of the Act and prevailing regulations, and held Animal Welfare Act license Number 51-C-0064 at all times relevant to the instant adjudication.

**B. Summary of Factual History**

During the period encompassed by the instant cause of action, Respondents were in the business of exhibiting animals. Robert Candy started Tri-State in 2002 as a way to provide his children and other members of the community in Cumberland, Maryland with an entertaining and educational activity. Tr. at 694-697. Before starting the zoo, Mr. Candy spent thirty years as a management operations consultant, specializing in the fields of sanitation, housekeeping, building management, and environmental services. Tr. at 693. Mr. Candy wrote

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Respondents’ evidence shall be denoted as “RX-[exhibit number]”. Exhibits admitted to the record sua sponte shall be denoted as “ALJX-[exhibit number]”.

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housekeeping and maintenance manuals and provided training in those disciplines, and is experienced in construction. Tr. at 694-695. He also has experience in operating businesses, and he managed a large horse farm in Pennsylvania at one time. Tr. at 761-762.

During his years working for corporations and as a consultant, Mr. Candy traveled extensively and visited zoos wherever he went. Tr. at 695. He started gathering information on owning and operating a zoo in the 1980s. *Id.* The Zoo is located on a defunct campsite, which Mr. Candy modified to house and exhibit Tri-State's animals. Tr. at 695-696. The site included a large building that was lost in a fire in March, 2006. Tr. at 763. Most of the Zoo's post-fire structures were constructed by volunteers from recycled materials. Tr. at 697. Tri-State has no employees, but approximately 20 volunteers perform specific duties at the Zoo commensurate with their experience and abilities. Tr. at 696.

The Zoo is still being developed, and approximately five acres of the sixteen acre site are used for zoo related purposes. Tr. at 698. Mr. Candy estimated that when construction is completed, the Zoo will occupy eight acres of the property. *Id.* Mr. Candy explained that the Zoo operates as an animal rescue facility as much as it does a zoo. Tr. at 699. He estimated that 3,000 visitors come to the Zoo each year to visit approximately 50 animals. Tr. at 721. Although Tri-State rescues animals, all of its big cats are hand-raised from infancy, and three were born at the facility. Tr. at 699-700. Tri-State does not solicit for animals, but is contacted by both large and small zoos when those facilities cannot accommodate a particular animal. Tr. at 700.

Dr. Gloria McFadden has been employed by the Animal Care Division of APHIS as a Veterinary Medical Officer for approximately eight (8) years. Tr. at 31. Her primary duties are to enforce the AWA and prevailing regulations at facilities that she is assigned to inspect. Tr. at 33. Among her assigned facilities is Respondents', with which Dr. McFadden first became familiar in 2004. Tr. at 34. During the period from May 17, 2006 through September 29, 2010, Dr. McFadden conducted eleven (11) inspections of Tri-State's facility and cited Respondents with violations of the Act and regulations. CX-3 through CX-14.

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Mr. Candy testified that he does his best to comply with prevailing rules and regulations regarding the operation of his facility, but has been told by AWA personnel that they cannot give him specific guidance when he has asked for assistance. Tr. at 701. This has posed problems for him, as he has been found non-compliant with some of his fences and cages, despite his requests to consult with an AWA expert about standards for those structures. Tr. at 701-702. Although Tri-State solicits Dr. McFadden's advice before undertaking any project, Mr. Candy has been told that APHIS cannot give specific advice on how to achieve compliance. Tr. at 702.

Mr. Candy was frustrated to be cited for violations of the AWA on occasions when weather or other unusual circumstances caused a temporary non-compliance. Tr. at 702. As an example, he was cited for muddy conditions after five consecutive days of rain. *Id.* Tri-State has been responsive to criticism from APHIS and has immediately corrected any problems pointed out by APHIS. Tr. at 702-703. Mr. Candy asserted that the Inspector General for the United States Department of Agriculture concluded that APHIS had no clear regulatory guidelines for many of the issues under its jurisdiction. Tr. at 748; RX-3. According to Dr. McFadden, inspectors were expected to be enforcement officers who had little authority to assist exhibitors on reaching compliance with the AWA and its regulations. Tr. at 749. Mr. Candy was not familiar with APHIS' website, which has reference materials on the Act and regulations. Tr. at 850.

Mr. Candy speculated that the biggest problem with his facility is "aesthetics". Tr. at 703-704. The Zoo doesn't always look "pretty", especially in winter. Tr. at 704. Mr. Candy opens at 10:00 a.m. in the morning and closes in the winter at dusk. Tr. at 705. Volunteers follow a written schedule of tasks throughout the day. Tr. at 704. He alone feeds and handles the large cats. Tr. at 705.

Mr. Candy admitted that he does not keep paperwork related to the zoo's operations on site, stating that he has no permanent structure to store records, save a small gift shop. Tr. at 706. He does not believe it is appropriate to keep records at the gift shop or in the kitchen area of the

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reptile house, where he keeps staff daily check lists. Mr. Candy argued that he always provides the requested records and documents on the second day of inspection. Tr. at 836-837; 706-707. His records include an enrichment plan for primates, acquisition and disposition records, and information regarding the Zoo's attending veterinarian, as well as dietary instructions. Tr. at 707-713; 728-729.

Volunteers are required to complete a daily log on which they check off tasks and make observations about conditions of animals and facilities. Tr. at 724-725. The kitchen area where he stores these logs is small, and Mr. Candy did not believe it would be a good place to store official records, which he keeps at home. Tr. at 730-731.

Mr. Candy also keeps information regarding training sessions he or his volunteers attended, and the Zoo's rules and regulations. Tr. at 714-718. His rules include instructions on cleaning areas occupied by the animals and rules for feeding the animals. Tr. at 718-720. He provides ongoing instruction to his volunteers during their tours of duty. Tr. at 719. Some volunteers live on the premise, which provides added security. Tr. at 727. Other than a "Big Cat Symposium" that he and volunteers attended in 2004 (Tr. at 714-715; RX-5), Mr. Candy and the Zoo volunteers have had no formal training in the care and keeping of exotic animals. Tr. at 710-712.

Mr. Candy doubted that the facility would appear "perfect" at any time, but he asserted that he was conscientious about correcting problems that he and his volunteers find, or that are pointed out by APHIS. Tr. at 720. He believed that he made every effort to correct violations. Tr. at 834-835. He considered himself compliant with recordkeeping requirements because he always provided all requested records to APHIS inspectors before they concluded the inspection. Tr. at 835-845.

The Zoo gives educational tours to school and other groups, which Mr. Candy conducts on a daily basis. Tr. at 722. Mr. Candy encourages interaction with the animals, but does not allow direct contact with them. Tr. at 854-855. He explained that he conducts tours of the Zoo because the facility does not have a lot of signs, and he is aware that it looks "different" from traditional zoos. Tr. at 790. Many of the Zoo's animals

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are rescued, and Mr. Candy wants visitors to understand the Zoo's mission and layout. *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 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.

Implementing regulations provide requirements for licensing, recordkeeping and attending veterinary care, as well as specifications and

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standards 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 of and environmental requirements 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. Cited Violations**

APHIS cited Respondents with violations of the Act and regulations that generally pertain to the state of the zoo's physical facilities; the existence of proper veterinary care; the proper retention and storage of records; and handling of animals, as follows:

**1. Handling of Animals 9 C.F.R. § 2.131 (c)(1)**

Respondents were cited with several violations of this regulation, which provides:

During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and or barriers between the animal and the general viewing public so as to assure the safety of animals and the public.

9 C.F.R. § 2.131(c)(1).

**a. Cougar**

During an inspection conducted on May 17, 2005, Dr. McFadden determined that the barrier fence separating the public from the cougar's enclosure was approximately 3 feet from the enclosure and too low, and would permit potential contact between the public and the animal in violation of 9 C.F.R. § 2.131 (c)(1). Tr. at 36; CX-3. Dr. McFadden acknowledged that the AWA regulations do not specify how high a

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barrier fence must be to be considered “adequate”. Tr. at 165; 163. However, since there were areas where she could reach over the fence and touch the enclosure containing the cougar, she concluded that the barrier fence was inadequate to prevent people from leaning over and reaching in to touch the cougar. Tr. at 166-168. Upon cross examination by Mr. Candy, Dr. McFadden acknowledged that the cougar is declawed. Tr. at 168.

Mr. Francis Keyser is an investigator for APHIS who investigated Respondents’ facility in May, 2006. Tr. at 414-416. Mr. Keyser noted Dr. McFadden’s concern that the cougar cage did not have an adequate perimeter fence, and he took photographs of the cougar cage area. Tr. at 418; CX-3. He also followed up on Dr. McFadden’s concerns about the structural strength of the lion enclosure and took pictures of it. Tr. at 421-422;CX-3. Mr. Keyser met with Mr. Candy and prepared an affidavit which he asked Mr. Candy to sign. Tr. at 428-431; CX-16.

Respondents maintained that the fence around the cougar’s enclosure was of sufficient distance within the regulations. Tr. at 752. The cougar is no longer housed in this enclosure. Tr. at 815. Although Respondents were cited for other violations involving the cougar’s housing in subsequent investigations, this violation was not cited as a repeated violation. Dr. McFadden testified that repeated violations should be cited. Tr. at 225-226. She typically did not cite violations that had been corrected. Tr. at 62-63.

There is no evidence that the fence around the cougar enclosure was changed. Mr. Candy contended that the fence was adequate within the regulations, which suggests that it remained unchanged. Since the cougar no longer occupies that space, whether the fence was moved or height added is moot. Nevertheless, I accord substantial weight to Dr. McFadden’s testimony and opinion and find that the barrier between the public and the cougar was not sufficient. It is not material that the cougar was declawed; the regulations are meant to protect the animal from the public, as well as the public from animals.

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However, I am not persuaded that this lapse represents a violation of handling animals. Nothing of record demonstrates that the public had breached the perimeter barrier or that the cougar was near the public. Any non-compliance with the regulations involving the cougar enclosure would more aptly constitute a facilities violation. The height and distance of the perimeter fence from the cougar alone does not constitute a violation of 9 C.F.R. § 2.131 (c)(1), where there is no evidence that the public was seen near the cougar. This charge is dismissed.

**b. Lion and Tigers**

During an inspection conducted on June 2, 2008, Dr. McFadden was accompanied by another inspector, Robert Markham. Tr. at 75; CX-8. Volunteers for the Zoo were observed leading a group of people to see lions and tigers in a “behind the scenes tour”. CX-8. Dr. McFadden noticed that the barrier between the public and the animals would have allowed people to reach in close to the animals, though she did not observe anyone doing so. Tr. at 76-77. She took pictures of two areas that showed people very close to the cats’ enclosures. CX-8; Tr. at 79-80. No pictures show anyone touching the animals. CX-8; Tr. at 249. The lion was situated at a distance from the viewing public, with a wall-like structure between the animal and the tour participants. Tr. at 250.

Robert Markmann has been employed by APHIS since 1986, and has been an animal care inspector since 1988. Tr. at 359. He accompanied Dr. McFadden during her inspection of Tri-State’s facility on June 2, 2008. Tr. at 361. He observed members of the public viewing tigers and saw children touching the tigers through their cage. Tr. at 362. Mr. Markmann advised a Zoo volunteer who appeared to be in charge that APHIS did not allow the sort of exhibition that was underway, and asked to speak to the owner. Tr. at 363. Dr. McFadden left to find Mr. Candy and bring him to the exhibition site; when Mr. Markmann told him that he could not allow the public to touch the tigers, Mr. Candy told him that he encouraged contact by the public with the tigers to keep them friendly. Tr. at 365.

Mr. Markmann related several incidents where tigers hurt APHIS inspectors and injured or killed exhibitors. Tr. at 365-369. He explained that APHIS has no pictures of the children touching the tigers because

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people at the exhibit complained about the inspectors taking pictures of children. Tr. at 370. Mr. Markmann said that some people expressed their unhappiness about being stopped from touching and photographing the tigers while they waited for Mr. Candy to come to the scene. Tr. at 376.

Mark Deatelhauser works as a corrections officer, but has volunteered at the Zoo since 2004. Tr. at 509. He does a little of everything at the Zoo, helping with exhibitions and tours, and feeding and cleaning up after the animals. *Id.* Mr. Deatelhauser described how he and volunteers would bring groups to see the large cats in their housing behind the cages that are open to general public viewing. Tr. at 516-517. Usually at least two people from the Zoo are with the public during these special exhibitions. Tr. at 518. People are allowed to get close to the animals to take pictures, but they are instructed not to touch the animals. Tr. at 519.

Mr. Deatelhauser was taking a group on a tour of the back of the tiger area on June 2, 2008, when USDA inspectors were present. Tr. at 510. He did not allow anyone on the tour to touch the tigers or to put their hands in their cages. Tr. at 511. He was not involved with showing the lions to the group that day. *Id.* Mr. Deatelhauser was the only barrier between the public and the cats in their cages. Tr. at 517. He estimated that between fifteen and twenty people were in the group on June 2, 2008, but he could not recall the exact number. Tr. at 515.

Mr. Deatelhauser had worked at the Zoo for four years on the date the inspectors observed him. Tr. at 514. At that time, he worked at his regular job from 4:00 p.m. to 12:00 a.m., so he helped at the Zoo every morning from Monday through Friday. *Id.* Mr. Deatelhauser's training for his work at the Zoo was acquired "on the job" from Mr. Candy. Tr. at 514; 520. Mr. Candy taught him how to handle young animals, and he has worked with the tigers since they were born at the zoo. Tr. at 520-521; 524. Mr. Deatelhauser no longer handles the cats, but he does direct them to a "catch area" for feeding or cleaning their cages. Tr. at 521. Mr. Deatelhauser was instructed that if an animal escapes, he should do "whatever you can to keep the animal from getting away". Tr. at 522.

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He no longer conducts many tours because he now works at his regular job during the day. Tr. at 523.

Kimberly Nicole Cramer has volunteered at the Zoo for ten years. Tr. at 527. Her primary duties include helping to keep internet records, helping with tours, and working in the gift shop and ticket office. Tr. at 528. She leads school groups on tours, including areas of the Zoo that are otherwise restricted to the public. Tr. at 429-530. She often works with another volunteer to lead the tours, depending on the size of the group. Tr. at 530. The school tours generally include chaperones or parents of the children. *Id.* Ms. Cramer received all her training about the Zoo's animals while working as a volunteer. Tr. at 538-539.

Ms. Cramer instructs all visitors to keep their hands away from the animals, but she believes that the area where she usually stands with groups is too far from the fence containing the lion to allow people to put their hands near the animal. Tr. at 532. She believes she is a sufficient barrier between the animals and the tour group. *Id.* She instructs people to keep their backs against the wall opposite to the lion's enclosure and their arms at their sides. Tr. at 544-545. She is particularly vigilant when children are present, having four of her own. Tr. at 542-543. When Ms. Cramer thinks that the lion would not be receptive to a crowd, she won't bring them to the area behind the lion enclosure. Tr. at 533. Ms. Cramer was one of the volunteers leading a tour group on June 2, 2008 when USDA inspectors were at the Zoo. Tr. at 534. She testified that no one touched the lion or put their hands near the fence, which she estimated was twelve feet in distance from the lion. Tr. at 535-537.

Mr. Candy denied inviting the public to touch the tigers. Tr. at 854. He explained that Mr. Markmann misunderstood his concept of contact with the animals, by which Mr. Candy meant closer interaction with them. *Id.* Mr. Candy did not say a lot to Markmann that day<sup>3</sup>. Tr. at 855. He compared his "behind the scenes tour" to films he had seen of children smacking tigers at a preserve, and observed that "[t]here is actually no regulation that says you can't do that". Tr. at 787. He explained that the area where people entered to observe the tigers close

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<sup>3</sup> I infer from discussions about the admission of evidence and Mr. Candy's concerns about Mr. Markmann's behavior that there was some unpleasant interaction between the individuals on June 2, 2008.

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up was about twenty feet long, and that the number of people who could enter was controlled by the volunteer at the door, while another volunteer was inside the corridor with the tour. Tr. at 786-789. Mr. Candy likes to compensate for what he believed to be the aesthetic drawbacks of his facility by offering tours and personal tutoring to visitors. Tr. at 790.

Mr. Candy observed that at the time of the inspection at issue, the tigers were young teenagers and had occupied their space for about four months. Tr. at 790. They were housed in that area while their permanent enclosure was being prepared. Tr. at 790-791. Mr. Candy believed that his staff was familiar with the temperaments of his hand-reared tigers. Tr. at 788. No one at the Zoo moves a cat unless he is there, and he has trained his staff to handle an animal escape by using fire extinguishers that are scattered throughout the facility. Tr. at 791-792.

I accord substantial weight to the testimony of Ms. Cramer and Mr. Deatelhauser that they instructed the public not to touch from the animals. Bonnie Kellerhouse also conducted tours at times and her description of instruction to the public was very similar to Ms. Cramer's. See, Tr. at 585. I accord particular weight to this testimony, as it was elicited solely on my colloquy with the witness. I similarly credit Mr. Candy's explanation that he wanted to provide tour groups with some special closer viewing of the animals but did not invite them to touch the tigers.

I accord weight to the testimony of the volunteers, who both described giving strict instructions to visitors to keep their hands down. Mr. Markmann testified that he saw children reach into the spaces in the fencing to touch the tigers, but Dr. McFadden did not observe children touching the animals before she left the area to find Mr. Candy. Tr. at 84. The evidence regarding whether people touched the tigers is in equipoise.

Regardless, I find that Complainant has met its burden of proving that Respondents failed to provide a sufficient barrier between the tigers and the public, thereby mishandling animals. The photographs depict close quarters, with Mr. Deatelhauser in front of the group in a narrow corridor

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and Ms. Cramer outside of the entrance to the corridor. CX-8. It is unlikely that Ms. Cramer could have seen what people did while they observed the tigers, and she was tasked with crowd control in the area next to the lion enclosure.

The volunteers assigned to conduct tours did not have sufficient control over the participants to prevent them from reaching into the tigers' cage. The quarters were too cramped and the volunteers too far apart to provide an adequate barrier between the crowd and the animals. Neither volunteer had a good view of everyone on the tour once the tour entered the area behind the tiger cages. People were too far from Ms. Cramer once they were behind the tiger cage, and Mr. Deatelhauser did not stand between all of the tour participants and the cage. Mr. Deatelhauser could scarcely have seen, never mind have stopped, an impulsive child from reaching between the fencing and touching the tigers. Mr. Markmann's credible testimony about injuries from tigers illustrates their unpredictability, and emphasizes the need for extra caution.

Further, although I fully credit the volunteers' testimony that their years at the Zoo have made them familiar with the tigers, the record does not establish that they were instructed on specific plans for capture or restraint of tigers, or were prepared to respond to an animal attack. Ms. Cramer has significant experience in educating and handling crowds, but there is little evidence that she would know how to restrain the lion if it decided to jump the wall that separated it from the viewing public on these special tours. Her reliance on her familiarity with the animals and their moods appears misplaced in these circumstances, given the inherently dangerous nature of lions and tigers.

The evidence demonstrates that the public was extremely close to animals that were controlled solely by two volunteers who are familiar with the animals but have no special training in containing them, preventing their escape, or controlling them in the event of an attack. The regulations anticipate that individuals trained to handle and control animals would be involved in their exhibition to the public, but the presence of a handler does not eliminate the need for distance or a barrier between the animal and the public. *In re: ZooCats, Inc.*, 68 Agric. Dec. 737 (U.S.D.A. 2009).

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Given the limited handling training for the volunteers, the number of people in attendance, the close proximity of dangerous animals, the lack of a formal plan to control animals in the event of escape, combined with the potential for people to physically come into contact with the animals, risking harm to them, I find that the Zoo's private, behind-the-scenes exhibitions, such as was observed on June 2, 2008, represent failure to adequately handle animals in violation of 9 C.F.R. § 2.131(c)(1).

c. Porcupine

On June 2, 2008, Dr. McFadden observed that the enclosure containing a porcupine did not have a barrier, although she had seen one in the past. Tr. at 90; CX-8. Dr. McFadden maintained that the lack of any barrier represented a violation even though no people were seen in the area. Tr. at 257. Dr. McFadden agreed that Respondents had corrected the problem by erecting a concrete wall. Tr. at 100; 278; CX-9.

Mr. Candy credibly testified that on the day of Dr. McFadden's inspection, he had removed a portion of a chain link fence that served as the exterior barrier so that he could exhibit the porcupine more closely to a school tour that was present. Tr. At 793-794. Nevertheless, Respondents built a stone wall as an additional barrier together with the chain link fence. Tr. at 783.

The record establishes that there was an inadequate barrier fence around the porcupine enclosure area, but there is nothing to suggest that a porcupine was being exhibited at the time of the inspection in such a way as to risk contact between it and the public. When Mr. Candy removed the barrier to exhibit the porcupine to the school group, he acted as a barrier within the meaning of the Act and regulations. The evidence fails to demonstrate a violation of a regulation concerning the handling of an animal pursuant to 9 § 2.131(c)(1).

d. Binturong

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At the inspection conducted on August 3, 2009, Dr. McFadden observed a child stepping over a missing rung of the perimeter fence around the binturong enclosure<sup>4</sup>. Tr. at 102-103; CX-8. A post had fallen from the fencing and Mr. Candy fixed it as soon as Dr. McFadden pointed it out. Tr. at 806. That problem has not occurred again. Tr. at 807.

The evidence does not establish that this violation involved inadequate handling of an animal. Complainant admitted that the child did not enter the binturong enclosure, and the record fails to establish the location of the binturong when the child stepped over the perimeter fence. There is no evidence in previous or subsequent inspection reports that demonstrates that the fallen fence post was a persistent problem. Although the defective condition could represent a deficiency in facilities, I find the evidence insufficient to establish a violation of 9 C.F.R. § 2.131(c)(1).

e. Squirrel Monkey

Dr. McFadden conducted an inspection of Tri-State's facility on September 29, 2010, and found openings in the wire mesh entry door of a squirrel monkey's enclosure that permitted contact between the animal and public. Tr. at 132; 134; CX-14. The inspector was concerned that the gauge of the wire mesh was wide enough to allow people to put their fingers through it. Tr. at 136. On cross-examination, the doctor agreed that the squirrel monkey had occupied that enclosure for some time and she had never before issued a citation for the condition of the enclosure. Tr. at 311. Once she pointed it out to Mr. Candy, the door was replaced with a solid door. Tr. at 311-312. Mr. Candy observed that the monkey had been in the same location with the same conditions for five years, and the Zoo was not cited for a problem with the construction before this inspection. Tr. at 820.

I credit Dr. McFadden's testimony that the public could have reached through the door to touch the squirrel monkey. I find that the inspector's failure to cite this particular condition on previous inspections suggests

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<sup>4</sup> USDA moved to correct the complaint to conform with the evidence that the child stepped over the perimeter fence, and did not enter the binturong enclosure, and I granted the motion. Tr. at 447-448.

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that the violation was not significant. I note that the condition was corrected. Nevertheless, I find that the violation is supported by the record.

## 2. Facilities and Operating Standards

The majority of the cited violations involved in the instant adjudication fall within the general penumbra of “facilities”, and shall be addressed categorically.

### a. Structural Strength

The pertinent regulation states that

[t]he facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

9 C.F.R. § 3.125(a).

### i. *Lion Enclosure*

Respondents were repeatedly cited for failure to provide a structurally sound lion enclosure. CX-3; CX-7; CX-10; CX-11; CX-12; CX-13; CX-14. Dr. McFadden testified that at her inspection on May 17, 2006, she observed that “. . . the lion cage, the home panels at the bottom of the enclosure, they were not attached to the bottom in any way, and side posts weren’t securely attached at that time and there were some gaps as well that the animal could reach under or dig under”. Tr. at 40. Dr. McFadden pointed to photographs that she took, which depicted hog panels and different kinds of fencing held together by clips. In her opinion, the failure of one kind of fencing could cause a break in a section of fencing and the potential escape of the Zoo’s lion. Tr. at 49. Dr. McFadden testified that the gauge of the fence would not have

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prevented the lion from escaping if it attempted to get out. Tr. at 69.<sup>5</sup> She also believed that the use of railroad ties at the bottom of the hog panel fence created “the potential for it to detach over time or [be] bothered or tampered with, I guess”. Tr. at 104; CX-11.

On September 26, 2007, the inspector found that the entrance door of the lion enclosure, constructed of treated wood and small gauge wire, would not contain the lion. CX-7; Tr. at 67. Dr. McFadden believed that the lion was kept in the enclosure depicted in her photograph at the time of the inspection, but she noted that the lions and tigers were moved around. Tr. at 67-68. The older lion has occupied the same enclosure for some time. Tr. at 68.

Dr. McFadden took pictures of the various kinds of fencing used to build the lion enclosure, and included them with her inspection report from September 30, 2009. CX-11. She shared with Mr. Candy her concerns that the fencing was not “traditional” and did not “necessarily meet the industry standards that [she] generally would see. So it was making an assessment of whether it was appropriate difficult”. Tr. at 110.

Dr. McFadden referred to photographs showing corner metal poles connected to corner wooden poles with clamps, and other sections of fencing connected with wire clips. CX-11. She found the construction methods and materials “questionable”, as she doubted their durability and strength. Tr. at 111-113. Dr. McFadden’s inspection report of her September 30, 2009 inspection detailed her concerns about the use of multiple kinds of materials fixed together with clamps and plastic ties. CX-11; Tr. at 111-112.

At her inspections on November 20, 2009 and May 19, 2010, Dr. McFadden again cited Tri-State with violations related to the soundness of the lion’s enclosure because nothing had changed and the materials were the same. Tr. at 121; 127; CX-12; CX-13. At her inspection on September 29, 2010, Dr. McFadden observed that an overhang made of

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<sup>5</sup> The testimony is confusing at this juncture, because it has been acknowledged that the Zoo had only one lion, but the inspector refers to young lions. I believe she meant to discuss the young tigers’ enclosure. See, Tr. at 233.

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wood planks and high tensile wire had been added to the lion enclosure, but she still had concerns about the structure. Tr. at 138-141 ; CX-14.

In response to questioning by Mr. Candy, Dr. McFadden admitted that she could not specifically state the exact nature of the defects in the lion enclosure, other than that she believed it potentially would be unable to contain the lion. Tr. at 171-172. Dr. McFadden testified that industry standards are considered when determining whether an exhibitor is in compliance with the Animal Welfare Act. Tr. at 172. In addition, APHIS' big cat expert was unfamiliar with the hog wire panels used by Respondents. Tr. at 173. She acknowledged that the Zoo's lion has occupied the enclosure space for six years without an escape. 172.

Dr. McFadden testified that the lion enclosure was "not the most pleasing exhibit" and one of her reasons for citing non-compliance was to "minimize complaints", presumably from the public<sup>6</sup>. Tr. at 175. She admitted that she had offered no alternative solution to Respondents, and further admitted that over the years, Respondents have added to the enclosure to increase its strength. Tr. at 172; 176. She had not observed breaks in the high tensile fence erected by Respondents. Tr. at 177. The fence is built with metal poles buried in the ground, and is attached to horizontal metal poles as well as vertical poles 11 feet high. Tr. at 178. The hog panels were added by Respondents after discussions with Dr. McFadden regarding how to improve the fence. *Id.*

Dr. McFadden reiterated her opinion that when a fence is constructed of different materials, the potential for a break in one kind of material could decrease the overall strength of the fence. Tr. at 179. She recalled being able to move one of the panels, which she concluded showed that the fence was not structurally sound. Tr. at 180. The inspector referred to pictures that showed that the fence was not consistently constructed. CX-11. Sometimes poles were erected between fencing; sometimes poles were inside the fence; and sometimes poles were outside the fence. The support posts appeared rusty and there were gaps in the fencing, as well as between the fencing and the ground. Tr. at 180.

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<sup>6</sup> Mr. Candy made references to complaints about his facility made to various groups.

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In Dr. McFadden's opinion, it was generally better to have poles outside the fence, because if an animal would push on the fence, the pole would stop the fence from moving further. Tr. at 185. She conceded that the strength of a fence and placement of poles depended on the type of materials and manner of construction. Tr. at 186. In some places, she agreed that changes made by Respondents increased the strength of the lion enclosure, but overall had doubts about the structural integrity of the fence. Tr. at 186-187.

Dr. McFadden acknowledged that Mr. Candy had requested an opinion about the fence from APHIS' big cat expert, who did not offer one. Tr. at 188. Dr. McFadden would have appreciated a second opinion from the specialist regarding whether the lion enclosure was in compliance with the AWA and regulations. Tr. 307. She had discussed with Mr. Candy that she wanted a resolution on the issue from another source. *Id.* Dr. McFadden further agreed that the basis for Respondents' non-compliance with respect to the lion's enclosure was that the fence may not be structurally sound rather than an affirmative opinion that is not structurally sound. Tr. at 190-191.

Dr. Ellen Magid has been a supervisory animal care specialist with APHIS since 1994. Tr. at 389-390. In September, 2009, Dr. Magid accompanied Dr. McFadden on an inspection of Tri-State's facilities. Tr. at 391-392. She recalled inspecting the lion enclosure and finding an area of fencing that she could move back and forth. Tr. at 392. Dr. Magid talked about the "wobbly" fence with Mr. Candy, who advised her that he wanted the loose fence as he believed it would be harder for the lion to get out. *Id.* She could not recall any specific reason for Mr. Candy's opinion, though she remembered discussing his rationale with him, as well as discussing the merits of different kinds of fencing. Tr. at 394.

Dr. Magid favors chain link fence over a hog panel fence because in her opinion, with hog panel fencing, "the animals can reach out with paws, sometimes up to their shoulders". Tr. at 395. Dr. Magid admitted that hog panel fencing met the regulatory minimum standards. Tr. at 408. She agreed that theories about fence construction varied and that the integrity of a fence sometimes depended on the animal. Tr. at 396.

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Dr. Magid had observed a gap in the bottom of the lion enclosure of about two and one half feet in one section. *Id.* She also did not like the fence “waving”, as the movement could cause metal fatigue. Tr. at 399-400. The doctor did not agree with Mr. Candy’s theories about the flexibility of a fence adding to its safety, and found that the lion’s enclosure was not structurally sound, which violated the Act and regulations. Tr. at 401. Although Dr. Magid was aware that the lion had lived for a long time in that enclosure without escape, she remembered an incident where he almost got out. Tr. at 403-404.

Dr. Magid did not recall a complaint from the public about the lion’s enclosure, and she had no concerns about the health of the Zoo’s animals. Tr. at 406. Her overall concern with the lion’s enclosure was that it was constructed of many different materials that were joined together in different fashions in a manner that made it difficult to assess its structural integrity. Tr. at 409. The various kinds of materials required maintenance to prevent rusting, fatigue and breakage. Tr. at 410. Although APHIS’ big cat specialist was not available to personally inspect Respondents’ facility, she looked at pictures of the fencing and reached similar conclusions to Dr. Magid’s. Tr. at 411. The big cat specialist did not give her opinion in written form. *Id.*; RX-11.

Timothy Squires is a police officer who regularly volunteers at the Zoo. Tr. at 590-593. Mr. Squires has also worked as a county code enforcement officer. Tr. at 592. He acquired construction experience by building his own home and other buildings. Tr. at 646. Mr. Squires does a little of everything at the Zoo, but is primarily involved in building and maintaining enclosures. Tr. at 593. When he first started volunteering at the Zoo, the two tigers were a few months old, and he has watched them grow. Tr. at 594-595. He has worked with the Zoo’s large cats, and was particularly involved with the Zoo’s cougar. Tr. at 596.

Mr. Squires took pictures of the facility and referred to them during his testimony. RX-15 through RX-22. He did not build the lion enclosure but was familiar with its construction, and described it from a photograph (RX-17) as consisting of eight foot by twenty foot panels

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made of four inch square six gauge fencing on the outside of metal posts, with high tensile wire above the post and chain link fence below the post. Tr. at 663. The wires are attached with hog-rings and clamped to the horizontal poles, but Mr. Squires could not say from the picture how they are attached at corners. Tr. at 664-665. Railroad ties are at the base of the fencing and are attached to the fence. Tr. at 665. Another picture showed that at the corners, fencing is held to the posts by clamps. Tr. at 666. Tension straps further stabilize the fence. Tr. at 666.

Respondents have changed all perimeter or barrier fences and replaced three foot fences with eight foot fences. Tr. at 638-639. Mr. Squires confirmed that Respondents planned to confine all large cats to one area of the Zoo, located near the center of the premises and contained within a barrier fence. Tr. at 640. Mr. Squires described the lion enclosure that was then under construction at the Zoo, using photographs that he took to illustrate his explanations. Tr. at 634; RX-21. He testified that metal poles that hold the fencing are sunk into the ground several inches, and stand about twelve feet high. Tr. at 634-635. Mr. Squires stated that Mr. Candy was debating the relative merits of using chain link fence, compared to wire gauge fence, which he prefers. Tr. at 640-642. Mr. Squires thinks that chain link is flimsier and does not repair as well as panel fencing. Tr. at 641.

Mr. Squires described how he and Mr. Candy placed wire fencing over a wooden perimeter fence with a wooden platform when Dr. McFadden directed them to do so. Tr. at 643-644. Respondent has attempted to address every concern that Dr. McFadden shared by adding fencing and strengthening existing fencing even in areas that the public didn't generally go. Tr. at 647-651; RX-18; RX-22. Mr. Squires believes that the fences at the Zoo are structurally sound. Tr. at 647. Mr. Squires explained the integrity of the materials and the construction of the fencing by showing samples of the materials used. Tr. at 671-676.

Mr. Squires testified that the presence of rust does not present a threat to the strength of metal unless the rust corrodes the metal. Tr. at 675. He typically sands and paints rusted parts, and replaces parts that have deteriorated. Tr. at 676-677. Mr. Candy believed that rust would not harm an animal that licked it because it contains no lead. Tr. at 754. He

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pointed out that the fencing was secured to the railroad ties, which were secured to poles. Tr. at 753.

Both Dr. McFadden and Dr. Magid did not like certain aspects of the lion enclosure fencing, and I credit their testimony, particularly regarding gaps in the fence and where the fence joined, and places where the fence appeared slack, which photographs corroborate. Although she did not provide a written opinion, APHIS' big cat specialist, Dr. Laurie Gage, agreed with the inspectors that the lion enclosure. Mr. Candy recalled discussing the fencing with both Dr. McFadden and Dr. Magid and he testified that he did not get an opinion about the fence's integrity from Dr. Gage. Tr. at 741. It appears as though Respondents expected a written opinion from Dr. Gage, but I do not find such corroboration necessary.

Although Dr. Magid conceded that hog wire panels met the regulatory standards, her major concerns were with the construction methods used in the fencing and not the materials. The photographs depict a structure that looks cobbled together. I accord substantial weight to Mr. Squires' testimony regarding the strength of the fencing, the security of the panels and the railroad ties, and the difference between a layer of rust and a corroded fitting. Although Mr. Squires is not a construction expert, he has experience in building and his testimony credibly explained why the structure had integrity. However, I equally credit the testimony of APHIS inspectors, who regularly assess the strength and utility of animal enclosures. The inspectors were concerned about gaps in area where fencing was joined, and at the bottom of the fence. They were concerned about the variety of materials used to join the fencing in corners. The fence was pliable at places, which represented an additional concern. There appeared to be no uniform plan in the construction, which cast suspicion on its fitness for purpose.

Dr. McFadden admitted that she cited Respondents with this violation out of her concerns that the fence "may" not be structurally sound. Although Dr. McFadden provided no specific instructions to Respondents on how to satisfy her concerns about the fence, she did repeatedly point out its flaws, and Dr. Magid shared her opinion. Dr.

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McFadden testified that the fence did not meet industry standards. The record does not describe those standards, nor is reference made to a professional organization that issues such standards. Despite her allusion to “industry standards”, Dr. McFadden’s citations addressed specific conditions that Respondent could have remedied to meet her expectation of compliance.

Respondents argue that Dr. McFadden was uncertain about whether this enclosure met regulatory standards, and the record supports that conclusion to a point. Despite the somewhat speculative nature of Dr. McFadden’s concerns about the fence, I find that the preponderance of the evidence establishes that the fence violated standards for structural integrity. Repeated inspections revealed different problems with the fencing that impinged upon its reliability. Although Respondents remedied problems identified by the inspectors, such ad hoc attention to the lion’s fence falls short of coming into compliance. As I stated in my colloquy with Mr. Candy at the hearing, Dr. McFadden’s uncertainty about the soundness of the fence is rooted in her inability to satisfy herself that it would withstand an escape attempt. Tr. at 867. It is clear that particular elements of the lion’s fencing needed repair or bolstering, which supports Complainant’s contention that the fencing was not adequate.

I further find that Mr. Candy’s response to citations regarding the lion’s fence demonstrate his unwillingness to accept APHIS’ assessment about the fence. Although he questioned what more he could do to come into compliance and asserted that APHIS failed to give him guidance, I find that the inspection reports specifically identify deficits that should have been corrected. Since Mr. Candy fully believed his fence system was adequate, he ignored Dr. McFadden’s repeated citations on this issue, resting upon his firm belief that she was uncertain about the integrity of the fence. I find that Dr. McFadden fully believed that the fence was unsound, but had no real and specific idea on how Respondents could come into compliance with the structure as it existed. I mark Dr. Goldentyer’s suggestion that Respondents would know how to come into compliance by comparing the lion’s enclosure to structures that were not cited for violations of this standard.

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Considering the record as a whole, I find that Complainant has established that the lion's enclosure was not structurally sound within the meaning of the regulations. I note that this matter should soon be moot, since at the time of the hearing, Respondents were in the process of building new enclosures for all of the Zoo's large cats. Mr. Squires described a sound plan for building a solid enclosure that should address APHIS' concerns about gaps at the bottom of the fence, and the materials used to join fence posts at corners.

ii. *Tiger Enclosures*

Dr. McFadden had concerns about the enclosure that houses the Zoo's tigers. CX-14; Tr. at 140-145. She stood on the viewing platform looking into the white tiger area and took pictures that she used to illustrate her testimony. Tr. at 143-144; CX-14 at 8 and 12. She was concerned about the fencing dividing the white tiger area from an adjacent area housing other tigers:

because, again, it was not traditional materials or industry standard, and they're using different types of materials to put this enclosure together. There was concern about the divider fence, particularly because up in this photo, he has added the wire hog panel fencing to that divider. Originally, it was just the board fencing and animals could potentially jump over. So the wire in this picture it has been added and I believe there's also electric wire you can see at the top of that. Additionally, there was some concern about the height of the enclosure at different points, because this was sort of an old swimming pool. So there was a sloping. So at the lowest end at one point didn't meet our 14 feet requirement. It was probably like 13 or something. So they did add some wire paneling, hog paneling. There has been high tensile wire added as well.

Tr. at 144-145.

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Dr. McFadden had concerns that tigers could escape over a 12 foot high fence based upon experience at other facilities. Tr. at 146. However, she conceded that there was no height requirement for fences within enclosures that did not lead to public space. Tr. at 325. She described a wide ledge that she believed was less than 14 feet below the highest part of the fencing. Tr. at 147. She did not know the height of the concrete wall before it ended in a ledge to which Respondents had attached additional fencing, with electric fencing and a kick-in at the top. Tr. at 319. She admitted that height of the fence and the kick-in together was twelve feet. Tr. at 321.

Dr. McFadden pointed out that Respondents had added fencing, and the inspection report citing violations of this condition addressed general concerns about the security of the enclosure. Tr. at 326. She conceded that the regulations do not require a particular height of fence, but policy required a fence of at least twelve feet in height. She had not measured the exact height of the fences, and could not estimate the thickness of the concrete wall that formed part of enclosure. Tr. at 318.

Dr. McFadden did not like the concrete construction of the tiger enclosure because of the potential for crumbling. Tr. at 320. She cited Respondents with a violation of sanitary standards for that condition. CX-14. She did not know the thickness of the concrete, which Mr. Candy estimated at eight inches to two feet thick. Tr. at 323. She thought the animals could gain footing on the ledge, but could not say how high the fence above the ledge was. Tr. at 322. Dr. McFadden acknowledged that the board fencing that Respondents had erected to separate animals from each other was not in an area open to the public. Tr. at 148-149.

Lisa Ferguson is a Doctor of Zoology whose studies focused on the behavior of large cats. Tr. at 556-558. She has experience raising tigers and has worked at zoos and animal rescues for many years. Tr. at 556-559; 566-567. She has addressed animal rights conferences and has acted as a consultant on a variety of issues dealing with large cats. Tr. at 559. Dr. Ferguson is also a qualified veterinary technician and has worked with veterinarians. Tr. at 559; 567. She has worked at Tri-State as a volunteer since October 2011. Tr. at 560. In her opinion, the Zoo's cats are well-cared for and content. Tr. at 560-561. She has not observed

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the signs and symptoms of anxiety or illness that are typical in large cats. Tr. at 561-563.

Dr. Ferguson was surprised at how well the tiger's containment area was adapted from a drained swimming pool. Tr. at 564. She observed, "[f]or a private owned zoo, out of the ones I've been to, I think that is like an amazing tiger cage, actually, to hold them, to see them, view them, they have plenty of room." Tr. at 564. She believed that the enclosure was secure and structurally sound. Id. Dr. Ferguson considered Respondent's enclosures to be superior to many she had seen at other facilities. Tr. at 574-575.

Mr. Squires helped build the tiger enclosure, and he described the construction methods and materials he used, illustrated by photographs that he took. Tr. at 595-600; RX-19; RX-20. Mr. Squires explained how the height of the enclosure varied because it was built around an emptied swimming pool, but the height of the fence was generally fourteen feet to sixteen feet from the lowest points of the enclosure, with kick-ins affixed to the top of the fencing. Tr. at 599-601. Additional fencing was added to concrete walls to heighten the fence. Tr. at 619. In addition, electric wiring runs along the top of the concrete, wood, and wire that comprised the enclosure. Tr. at 601-602. He explained that there was twelve feet of fencing above the ledge that concerned Dr. McFadden. Tr. at 622.

Mr. Squires testified that every structure or wall that abutted the tiger enclosure was at least twelve feet high. Tr. at 628. All cages were designed with catch areas, and no enclosure opens directly onto public areas. Tr. at 629-632. The doors to the tiger enclosure are reinforced with rebar and Mr. Squires believed them to be particularly impervious. Tr. at 630-633. High fences with electric wiring separate the Siberian and white tiger enclosures. Tr. at 635.

Mr. Squires explained that when the tiger enclosure is being cleaned, the tigers are moved to their inside area, and are kept in that area by two "guillotine" drop doors. Tr. at 652-653. The tigers are kept separate from the people who clean their areas. Tr. at 653.

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Dr. McFadden's opinion regarding the fencing is speculative and conclusory. She believed that the fencing did not meet recent guidelines for height, but admitted that she was not good with dimensions, and conceded that the fence was at least twelve feet high. I accord substantial weight to Respondent's evidence regarding the height of the fencing that encloses the tiger display. With the help of Mr. Squires, Mr. Candy took extensive measurements of the fencing, documented by photographs. In addition, Dr. McFadden was unable to explain how Respondents could meet her expectations regarding the materials used to build the enclosure. Dr. McFadden and Dr. Magid were concerned that the re-purposed pool area created an unconventional enclosure, and their objections appear to be based primarily on the look of the containment area, since the preponderance of the evidence demonstrates that the enclosure was at least 12 feet high at all points, and constructed in a manner to discourage animals from escaping.

Dr. McFadden also did not provide a basis for concerns about the fencing that separated the tigers from each other. I credit the testimony that the fence that divided the enclosure did not open to the public in any way. Any animal that escaped its half of the enclosure would end up in another animal's enclosure. The enclosure was surrounded by fencing that was at least twelve feet high at every point, with tensile and electric wires and kick-ins at the top. Nothing of record demonstrates that an escape by tigers into each other's enclosures would pose a risk to the animals. The evidence fails to establish why the fence separating the different kinds of tigers violated the Act or regulations.

In contrast, Dr. Ferguson believed that the enclosure presented opportunity for environmental enrichment and variety for the tigers. Although Dr. Ferguson is not a veterinarian, she has a doctorate in zoology and has worked with big cats at many facilities. I accord weight to her opinion, and also credit Mr. Squires' testimony regarding the construction methods and materials, as his explanations are more concrete than the conclusory and speculative opinions of inspectors McFadden and Magid.

Complainant was unable to affirmatively explain how the tiger enclosure was fundamentally defective within the regulatory scheme. Although it is clear that inspectors found the enclosure unconventional,

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the regulations measure the structural soundness of an enclosure and not its beauty. Complainant could not explain how Respondents could correct the fence to meet its standards. Dr. McFadden was unable or unwilling to advise Respondents on how to reach compliance regarding the tiger fence. In her opinion, Respondents are responsible for familiarizing themselves with regulatory requirements, presumably even those that could not be specifically explained.

I find that Complainant has failed to establish with any specificity how the Zoo's tiger enclosure fails to meet regulatory standards. I accord substantial weight to the photographic evidence that depicts the height of the fence and the methods and materials used for its construction, including an electrical fence and overhang at the top. I find that even considering the policy change regarding fence height, the evidence establishes that the tiger enclosure fences met that standard. These charges are dismissed.

iii. *Young Cat Enclosure*

On an inspection on or about September 26, 2007, Dr. McFadden cited the Zoo with failing to construct an enclosure for a large cat, referred to as a lion, in a manner sufficient to contain the animal. CX-7. On cross-examination, Dr. McFadden corrected the citation, acknowledging that the enclosure actually held Respondent's young tiger. Tr. at 233. Dr. McFadden explained that there were "two doors, sort of a space between a keeper area or a lock-out area." Tr. at 235. She believed that the small gauge of the wire door "would not withstand the strength of the animal." Id. She acknowledged that Respondents added hog-wire fence to the area. Tr. at 236. Dr. McFadden again found a problem with the young tiger enclosure upon inspection conducted on May 19, 2010. CX-13. At that time, she observed that a tree had grown inside the enclosure, which the tiger could potentially climb and escape. Tr. at 128.

Mr. Candy described how he had reinforced the door to this enclosure with another panel of six gauge wire. Tr. at 783. He further explained how trees had been growing out of an old pool back in 2008, two years

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before he rebuilt the enclosure for the tiger. Tr. at 818-819. He stated that the tree that the inspectors had observed was small and was immediately removed. Tr. at 819; CX-13.

Complainant has established this violation, but Respondents have established that it was corrected.

*iv. Cougar Enclosure*

Complainant charged Respondents with a violation pertaining to damage and loose boards in the cougar's enclosure on September 26, 2007. CX-7. Mr. Candy explained that the loose boards were decorative trim that did not affect the structure. Tr. at 784. Upon reviewing photographs of the cougar area, Dr. McFadden acknowledged that the loose boards did not affect the structural integrity of the cage, and were decorative. Tr. at 240; CX-7, 7-9. The doctor admitted that the entire platform could be removed without impacting the integrity of the enclosure and agreed that the damaged platform did not give the cougar access to areas beyond its enclosure. Tr. at 9. She explained, "However, this is a citation for housekeeping and things have to be in good repair. If it's there, it needs to be in good repair." Tr. at 240.

On September 30, 2009, Dr. McFadden again cited Respondents with a violation of structural integrity standards with respect to the cougar enclosure. CX-11; Tr. at 114. She testified that the platform remained damaged. *Id.*

Despite Dr. McFadden's explanation that the condition of the cougar platform represented a housekeeping violation, Respondents were cited for structural failure. The record fails to establish that the loose boards on a decorative cover on the outside of a platform under the cougar enclosure violated the cited regulation pertaining to structural strength of a facility. See, 9 C.F.R. § 3.125(a). This charge is dismissed.

*v. Llama and Goat Enclosure*

On inspections conducted on November 29, 2006 and May 23, 2007, Dr. McFadden observed that wire fencing around the llama and goat enclosure was detached from the ground, causing sharp wire to protrude

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into the enclosure. CX-5. Dr. McFadden was concerned that the protruding wire could injure an animal, or that an animal could escape. Tr. at 56. The inspector was aware that a miniature horse regularly damaged the fence, and she thought a citation could motivate a permanent solution to a recurring problem. Tr. at 57. Dr. McFadden had seen the horse damaging the fence, and Mr. Candy had told her that the horse damaged the fence on a regular basis. Tr. at 59; 222.

The inspector agreed that Respondents fixed the problem whenever she pointed it out, but she was not sure that the problem was ever permanently corrected. Tr. at 218; 222. She had no pictures of the damage because she typically does not retain pictures of inspections for more than three years. Tr. at 217-218. Mr. Candy testified that “that horse is no longer with us”. Tr. at 765.

The evidence establishes this continuing violation. Respondents are credited with making repairs, but the record clearly demonstrates that the problem remained so long as the horse was housed in that location.

vi. *Reptile House*

A large crack in the back of the reptile house posed a potential structural problem, according to Dr. McFadden, who cited Respondents with this defect on her inspection report from May, 2006. Tr. at 40. Dr. McFadden agreed that the problem was repaired, and it was not the topic of any other citation mentioned in later inspections. Tr. at 192. Complainant has established this violation.

vii. *Bobcat Enclosure*

At her inspection on September 30, 2009, Dr. McFadden noticed that the bobcat’s resting platform and ramp, which were made of wood, were damaged and need to be replaced. CX-11; Tr. at 114. She was concerned that the platform and ramp would not bear the weight of the bobcat. Id. Mr. Candy replaced the ramp that day with new wood, but he believed that the wood presented no structural problems that risked harm to the animal. Tr. at 815-816.

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The evidence is in equipoise. Dr. McFadden observed an obvious defect in a ramp, but did not explain how the ramp would fail to bear the weight of the bobcat. Mr. Candy's explanation was reasonable and credible, and his willingness to make changes to accommodate Dr. McFadden's concerns merits consideration. This count is dismissed.

viii. *Arctic fox*

At her inspection on November 29, 2006, Dr. McFadden observed a hole in the roof of the structure housing an arctic fox. CX-5; Tr. at 57. Respondents corrected the defect on the date of the inspection. Tr. at 219. On September 29, 2010, the inspector saw detached planks on a wooden spool that the arctic fox used as a resting place. Tr. at 151; CX-14. Mr. Candy removed the resting platform that day. Tr. at 340. These charges are supported by the evidence.

b. Storage of Food and Bedding

"Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against deterioration, molding, or contamination by vermin. Refrigeration shall be provided for supplies of perishable food". 9 C.F.R. § 3.125(c).

Dr. McFadden's inspection conducted on September 3, 2008, disclosed chemicals stored with feed hay storage building, and she concluded that this could potentially contaminate the hay. Tr. at 97. Respondents were cited with failing to store food supplies in facilities that would protect them from deterioration and contamination. CX-9.

Mr. Squires described a red building as the binturong house, which the Zoo had used for storage; at the time of the hearing, the building contained a separate enclosure that housed an alligator. Tr. at 655-656; RX-15. The items depicted at CX-8 had not been stored at this location for about two years. Tr. at 657. The barn is used to store hay, dog food, and feed for the field animals; a separate room inside the barn is used to store equipment and tools. Tr. at 658-660; RX-16. Within the barn is a platform where the Zoo stores garden tools and shovels. Tr. at 661.

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Dr. McFadden's explanation for this citation is based upon conjecture. There is no evidence that chemicals were in open containers mixed among food stores. Her concerns about the potential of storing foodstuffs and other items in the same area represent a general apprehension about this practice, but not a clear indication of what risk the condition posed. It is clear that the inspector's advice about maintaining order was well placed and. Respondents have made significant strides to separate feed from supplies and tools. However, overall, the record fails to establish anything beyond the fact that Respondents' storage procedures were slovenly. This charge is dismissed.

c. Waste Disposal

Respondents were cited with a variety of violations of regulations pertaining to this obligation. The regulations require that:

Provision shall be made for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris. Disposal facilities shall be so provided and operated as to minimize vermin infestation, odors, and disease hazards. The disposal facilities and any disposal of animal and food wastes, bedding, dead animals, trash, and debris shall comply with applicable Federal, State and local laws and regulations relating to pollution control and the protection of the environment.

9 C.F.R. § 3.125(d).

i. *Accumulation of bedding and rodent feces in fennec fox and agouti enclosures*

On May 17, 2006, Dr. McFadden observed an excessive amount of waste and bedding in an enclosure housing an agouti and a fennec fox. CX-3; Tr. at 41. The doctor described a two-tiered enclosure occupied by the fox on the top and the agouti on the bottom. Tr. at 41-43. Mr. Candy testified that the agouti was not housed directly beneath the fox,

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but rather that the area described by Dr. McFadden allows for air ventilation, heat distribution and drainage. Tr. at 756. He agreed that excess bedding could have been cleaned out, but disagreed that feces had accumulated in the area that actually was next to the agouti enclosure. Id.

This charge is sustained. Mr. Candy admitted that there was an excess of feces in areas near animal habitats. It is immaterial that the agouti was not directly in contact with the waste.

ii. *Excessive waste and excreta in pools*

On June 2, 2008, Dr. McFadden's inspection disclosed an excessive amount of excreta in a small pool where two adult tigers defecated and urinated. CX-8; Tr. at 91. The water was murky, and Dr. McFadden believed that the pool needed to be cleaned more often. Tr. at 90-91. Dr. McFadden cited Respondents with a repeated violation of this standard on August 3, 2009 (CX-10; Tr. at 105) and again on September 30, 2009 (CX-11; Tr. at 114-115); and November 20, 2009 (CX-12; Tr. at 122).

Mr. Candy explained that the pool referenced in the inspection reports served solely as the "tiger toilet". Tr. at 794. Dr. McFadden generally conducts inspections on Wednesdays, and is present when the enclosures are being cleaned. Tr. at 726. The pool was cleaned on Wednesdays and on Sundays. Tr. at 794-795. Mr. Candy speculated that Dr. McFadden observed what she considered excess waste in the "tiger toilet" because the pool had not yet been cleaned that day. Tr. at 794. Respondents' schedule was interrupted when Dr. McFadden arrived, and the area was cleaned after she concluded her inspection. Tr. at 795. The tigers no longer occupy that space, but are in a new exhibit. Tr. at 830. Mr. Candy believed that it was somewhat arbitrary to be cited for conditions that were temporary and were scheduled to be corrected. Tr. at 771.

Dr. McFadden criticized the condition of several pools, including the swimming pool in the area housing the large Siberian tiger and the area where the tiger cubs were housed. Tr. at 810. That pool is made of dark green concrete and Mr. Candy believed that it looked murkier to Dr. McFadden than it really was, because of the color of the paint on the pool. Tr. at 811. He observed that Dr. McFadden was 100 feet away from

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the pool, and the distance was far enough to make the water appear dark. Tr. at 831. Respondents have resolved the problem with mulch in the tiger pool by removing it; the pool is now surrounded only by concrete. Tr. at 831-832.

Complainant cited Respondents for violations of how the pools that animals used for waste elimination and recreation were cleaned, but did not explain in other than vague terms how the condition of these pools represented a risk to the animals. There is no evidence that describes what constitutes an excess of excreta in the pools in violation of the regulatory standards. Dr. McFadden's proximity to the pools was not close. If she measured or tested the pool water to determine the amount of excreta within, the results of such measurements are not of record.

I fully credit Mr. Candy's testimony that the areas in question were cleaned twice a week, on Wednesdays and Sundays. However, the fact that Dr. McFadden repeatedly cited Respondents with violations of this standard establishes is supported by Mr. Candy's cleaning schedule. Although Mr. Candy testified that he was aware of the aesthetic challenges that his facility presented to the public, my colloquy with him regarding his failure to adjust his practices to mollify Dr. McFadden's perceptions suggests that Mr. Candy did not consider Dr. McFadden's concerns as seriously as he may have. Despite the relative paucity of evidence demonstrating exactly how much excreta is too much<sup>7</sup>, I conclude that Mr. Candy is mistakenly convinced that his methods are sound. He could have avoided Dr. McFadden's scrutiny by a simple adjustment in the cleaning schedule to accommodate her usual arrival for inspection on Wednesday. Respondents' adherence to the existing cleaning schedule, combined with the fact that Respondents have no paid employees to help lighten Mr. Candy's workload, supports a finding of this violation.

However, the evidence regarding the murky pool that is impinged by mulch and painted a color that enhances the murk is vague. I credit the

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<sup>7</sup> I find it appropriate in this instance to apply to excessive excreta the observation made by Justice Potter regarding obscenity: "I know it when I see it". *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

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testimony that the Zoo changed its sanitation methods regarding this water source in an effort to avoid future citations, but I also find that nothing of record establishes that this pool was excessively unclean or posed a risk to the health and welfare of the animals. I credit the testimony that the distance between the pool and observer would make it difficult to determine how clean the water was. I further credit the testimony that the water is filtered and sump pumped routinely. This violation is dismissed.

iii. *Failure to remove uneaten food and food waste*

On June 2, 2008, Dr. McFadden observed a carcass in the lion enclosure, and Mr. Candy told her it had been there for two days. CX-8; Tr. at 92-93. Dr. McFadden concluded that the carcass should have been taken away sooner to prevent potential contamination. Tr. at 92.

Mr. Candy denied that the carcass represented food, but maintained that it was for the enrichment of the lion, which would play with it. Tr. at 797-798. He did not believe it posed the risk of contamination, as it was dried skin. Tr. at 797. He found nothing in the regulations that addressed giving a large cat a deer carcass. Tr. at 796. Nevertheless, the carcass was removed before the inspectors left the Zoo that day. Tr. at 797.

Complainant did not fully establish how the lion was at risk because of the presence of a carcass. I find that the evidence on this issue is in equipoise and dismiss this allegation.

d. Outdoor Facilities

i. *Shelter from sunlight and inclement weather*

“When sunlight is likely to cause overheating or discomfort of the animals, sufficient shade by natural or artificial means shall be provided to allow all animals. . . to protect themselves from direct sunlight.” 9 C.F.R. § 3.127(a). In addition, exhibitors are required to provide “for all animals kept outdoors [appropriate shelter] to afford them protection and to prevent discomfort to such animals. . .” 9 C.F.R. § 3.127(b).

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On June 2, 2008, Respondents were charged with failing to provide adequate shelter to ferrets. CX-8. Dr. McFadden observed ferrets in an outdoor enclosure in direct sunlight, with no shade available. CX-8; Tr. at 92. Mr. Candy explained that the ferrets were outside for a short time, while their enclosures were being cleaned. Tr. at 795. He denied that they were in direct sunlight, noting shade from a structure and a tree in the area. Tr. at 795-796. The ferrets are not exhibit animals, and usually are kept in an area in the back of the reptile house. Tr. at 796. They were not in the exhibition area of the zoo when the inspector saw them. Tr. at 797.

Dr. McFadden could not recall the weather or temperature on the day of her inspection but pictures confirm that the sun was shining. CX-8; Tr. at 262. She acknowledged that there was a pavilion nearby and a tree that provided shade. Tr. at 263. Dr. McFadden was concerned that the ferrets were left in direct sunlight. Tr. at 264.

The evidence fails to establish how long the ferrets were outside. I credit Dr. McFadden's observations, but she did not observe the animals for an extended length of time. I credit Mr. Candy's representations that the animals were left outside temporarily while their enclosure was being cleaned. In addition, if the animals were uncomfortable, the pavilion and tree were close enough for them to obtain shelter from the elements. The record fails to show that they were restrained or otherwise confined to the exact area where they were observed by the inspector.

Complainant has failed to establish that Respondents' conduct involving the ferrets constitute a violation of the Act or regulations. This allegation is dismissed.

ii. *Drainage*

On an inspection conducted on May 17, 2006, Dr. McFadden observed a mixture of feces and mud in the pot-bellied pig enclosure, and she cited Respondents with failing to provide adequate drainage. CX-3. Respondents are required to provide "a suitable method. . . to rapidly eliminate excess water. 9 C.F.R. § 3.127(c). The doctor testified that the

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Zoo had previous problems with drainage, and she therefore issued a citation at this inspection. Tr. at 43.

Respondents acknowledged that drainage was a problem at the facility, but maintained that the Zoo has worked regularly to improve drainage. Tr. at 756-757. Mr. Candy observed that despite five consecutive days of rain prior to the day he was cited with this violation, there was only one puddle. Tr. at 757.

I accord substantial weight to Respondents' efforts to find a permanent solution to this problem, as there is no evidence of repeated violations for this purported defect after 2006. I also credit Mr. Candy's explanation about the effects of continuous days of rain. The record is devoid of an explanation of how muddy conditions posed a sanitation or other health problem for the pigs in the area affected by the excess water. This violation is dismissed.

*iii. Perimeter fence*

The regulations mandate that "all outdoor facilities must be enclosed by a perimeter fence that is of sufficient height to keep animals and unauthorized persons out." 9 C.F.R. § 3.127(d). The fence must be at least 8 feet high for potentially dangerous animals as identified by the regulations and must be constructed so as to protect the animals and "function as a secondary containment system." *Id.* The perimeter fence must be sufficiently distance from the primary enclosure "to prevent physical contact between animals inside the enclosure and those outside the perimeter fence" and fences less than 3 feet from the primary enclosure must be approved by APHIS. 9 C.F.R. § 3.127(d). The regulations do not mandate the height of such fencing. Tr. at 165.

On September 7, 2006, Dr. McFadden found that Respondents had failed to enclose facilities for servals with a perimeter fence. CX-4. The servals were in a temporary enclosure that did not have a perimeter fence three feet from the enclosure fence in the back. Tr. at 54. Dr. McFadden explained that although there was a perimeter fence generally around the facility, there was a break in the wall in this particular area, which represents a failure to create a secondary containment system that would keep an animal from escaping the premises. Tr. at 54-56; 216.

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At her inspection on September 26, 2007, the serval was no longer in that enclosure, but the problem persisted. No complete perimeter fence had been erected, and a tiger and coatimundi were housed in the area. CX-7-A; Tr. at 68-69. Dr. McFadden cited Respondents because the back wall of the tiger enclosure was not within a perimeter fence. CX 7A; Tr. at 72-74.

Mr. Candy believed that a solid wall around the coatimundi and young tiger enclosure was sufficient to serve as a perimeter fence but nevertheless put up another fence when Dr. McFadden expressed reservations about the existing wall.. Tr. at 786. Dr. McFadden acknowledged that a solid wall could serve as a perimeter, since the regulations did not demand a particular material of fencing. Tr. at 217. However, there was a break in one area of the wall between two enclosures. Tr. at 216. Dr. McFadden conceded that there was a wall present in the area, but it did not meet the regulatory standard of being three feet from the enclosure. Tr. at 237.

Dr. McFadden acknowledged that the three foot requirement was a policy and not a specific regulatory requirement. Tr. at 238. She was not the original inspector assigned to Respondents' facility, and did not know whether her predecessor provided information to the Zoo. Tr. at 239-240. This violation has been substantiated.

On September 26, 2007 and on August 3, 2009, Dr. McFadden noted that the perimeter fence near the lion's enclosure was leaning inward, and therefore was not structurally providing an adequate barrier. CX-7; CX-10; Tr. at 105. The fence was "slightly, but noticeably" leaning inward. Tr. at 289. The fence was leaning at the top of its eight foot height, and Dr. McFadden could not recall whether it was braced on either side. Tr. at 289. Pictures that she took at both inspections show the fence leaning, and it appeared to be leaning more in 2009. CX-7; CX-10; Tr. at 292. She and Mr. Candy discussed the issue, and Mr. Candy understood that the fence needed to be made sturdier, and he straightened it out. Tr. at 812.

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Complainant's concern about the structural integrity of the leaning perimeter fence is supported by the fact that later inspection revealed further leaning. This violation is established.

**3. Animal Health and Husbandry Standards**

The regulations require that animals be provided wholesome, palatable food, free from contamination, and appropriate in quantity and nutritive value for the age, species and condition of animals. 9 C.F.R. § 3.129(a). Potable water must be provided as often as necessary if not accessible at all times.

**a. Feed**

Respondents were cited with violations of this standard, with respect to a carcass that was observed in the lion enclosure on June 2, 2008. CX-8. At an inspection on September 3, 2008, Dr. McFadden was concerned about how meat and a carcass were stored in a refrigerator. Tr. at 97-99. She found that blood had pooled in the refrigerator, which she believed presented a risk of contaminating the other food. CX-9; Tr. at 99-100.

Respondents have adopted new policies regarding the storage of feed for animals. Tr. at 801. The Zoo no longer keeps large amounts of food on store. Mr. Candy buys meat on a daily basis and keeps enough of other foodstuffs for about a week. Tr. at 802. The Zoo freezes or refrigerates only donated meat, and donated foods are inspected closely before being fed to animals. Tr. at 802-803. Meat is no longer kept in the kitchen area inspected by Dr. McFadden, but fruits and vegetables are stored in the refrigerator. Tr. at 804.

The evidence demonstrates that Respondents' past practices were not the most tidy, but the record fails to establish how the conditions posed sanitation or health risks to animals. There is no record showing that animals were sickened by foodstuffs, and nothing to suggest that the conditions were not corrected. These violations are based upon appearances and not proof of actual and potential risk to animals or visitors. Complainant has failed to substantiate these violations by a preponderance of the evidence.

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b. Watering

The Complaint charged Respondents failing to keep a water receptacle clean for a lion as a result of Dr. McFadden's inspection of November 20, 2009. CX-12. The testimony regarding the lion's water did not explain how the inspector reached her conclusions. She discussed the presence of a heating element in either a tub or a pool, and pointed to a photograph. Tr. at 124; 126. Dr. McFadden thought the water looked green. Tr. at 126.

Mr. Candy believed that this violation was prompted by a complaint made to PETA about his facility, because the inspection occurred shortly after he received a letter from that organization, and Dr. McFadden had completed an inspection thirty days or so previously. Tr. at 817. He believed that the water was clear.

No testing of the water was conducted, and although the water looked green in color to Dr. McFadden, the record fails to establish her distance from the container, or the color of the container that held the water. There is no evidence that the water contained algae. *Cf. In re: Hootor*, 56 Agric. Dec. 416 (U.S.D.A. 1977). The preponderance of the reliable evidence fails to establish that Respondents' animals were not provided adequate and potable water. This charge is dismissed.

c. Sanitation

i. *Cleaning and Housekeeping*

"Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors. . ." 9 C.F.R. § 3.131(a)(1). On November 29, 2006, Dr. McFadden observed an excessive amount of feces in several enclosures. CX-5; Tr. at 59. Mr. Candy advised that enclosures were cleaned once a week, which the inspector considered to be inadequate to prevent contamination and health hazards. Tr. at 59-60. On her inspection conducted on May 23,

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2007, Dr. McFadden observed accumulated excreta, dirt and hair in the tiger enclosure. CX-6; Tr. at 60-61. She cited with a repeated violation for not cleaning enclosures frequently enough, Tr. at 61-62. These charges are upheld.

At her inspection on August 3, 2009, Dr. McFadden found an excessive amount of excreta in the enclosures for cougars, servals, bobcats, pigs and goats. CX-10; Tr. at 106. She believed the problem would be resolved with more frequent cleaning. Id.; CX-10. Mr. Candy had worked in the field of environmental services and has written policies regarding proper cleaning and building maintenance for companies such as Sodexo and Marriott. Tr. at 693-694. He is certified in cleaning and sanitation and feels qualified to determine how to maintain facilities so that they are properly cleaned and sanitized. Tr. at 694. He and his volunteers follow a schedule for cleaning the facility. Tr. at 705. He has developed checklists that volunteers must use to record that they accomplished assigned tasks. Tr. at 714-716. He trains volunteers in the best way to clean the facility, and uses industry-recognized cleaning agents. Tr. at 717. Vinegar is used inside, near the animals, and outside facilities are cleaned with a water and bleach mixture. Id.

Animals' areas are cleaned daily, and power-washed every two weeks. Tr. at 718. Mr. Candy asserted that Dr. McFadden is aware of the schedule and approved of his power-washing schedule. According to Mr. Candy, Dr. McFadden had never suggested a different schedule for removing feces, or doing other routine maintenance. Tr. at 719; 725. Since the Zoo operates on a 16 to 20 hour day, the fact that conditions appear unsanitary in the morning does not mean that they have been neglected, as the facility will be cleaned later in the day. Tr. at 771. He cleans large cat cages, and he cannot be cleaning on inspection days when he is required to tour the premises with the inspector. Id. The areas of fencing that tigers used to rub against and that accumulated hair have been changed, and are no longer attractive to the cats for that purpose. Tr. at 772.

As I have stated herein, *supra*, Mr. Candy's insistence on adhering to his pre-established cleaning schedule demonstrates that he fails to comprehend Complainant's concerns. He has been repeatedly and

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frequently cited for deficiencies of cleanliness standards, yet maintains that Dr. McFadden has not suggested adjusting his cleaning practices. I find that Respondents have made little effort to accommodate Dr. McFadden's concerns. Although Mr. Candy deems himself an expert in sanitation, the businesses that he had worked in prior to his current enterprise hardly replicate conditions at a zoo. This violation is substantiated.

Dr. McFadden cited Respondents with violating basic housekeeping standards set forth at 9 C.F.R. § 3.131(c) on June 2, 2008. CX-8. She explained that half of the building that housed the binturong was used to store unused equipment, which was haphazardly placed and presented a potential place to harbor pests. Tr. at 93. The inspector estimated that equipment and material, including propane tanks and possibly chemicals, had accumulated in three-quarters of the space, but did not impinge upon the binturong's living space. Tr. at 94-95.

Inspection of the premises on August 3, 2009 revealed an accumulation of trash and unused equipment in the bird area that could attract pests. Tr. at 107. Dr. McFadden cited Respondents with violating housekeeping standards. CX-10. She found a similar problem on her inspection of September 30, 2009. CX-11; Tr. at 117-118. The bird room is connected to the reptile house, which serves as part of the Zoo's perimeter fence. Tr. at 813. The area that Dr. McFadden described is outside of the Zoo's exhibition space, and part of the area used by another business that Mr. Candy owns. Tr. at 813-814. The area contains bathrooms and a miniature golf course. Tr. at 814.

The description of how housekeeping standards within this area of the Zoo violated the Act is too vague and subjective to fully credit. It does not appear from the record that any harm came to animals, or that the condition posed a risk other than potential increase in pests in an area not devoted to exhibiting animals covered by the Act. These problems have been resolved with permanent solutions, as described by Mr. Squires and Mr. Candy. The preponderance of the evidence fails to establish a violation of the Act and regulations with respect to this condition.

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Respondents were cited for having cracks in concrete in the big cat enclosures that would have made it difficult to clean the area. Mr. Candy disagreed that the cracked concrete presented a sanitation problem. Tr. at 822. Mr. Candy uses Borateem or Borax, which is a powder that can sink into crevices that a power washer doesn't reach. Tr. at 822. He believed that although the cracks were not attractive, the effect was no different from having rocks or other irregularly shaped articles in an enclosure. *Id.* Mr. Candy pointed out that Dr. Gage believed that rough ground was better for cats. Tr. at 823; RX-10; RX-11.

I credit both opinions equally. The record is in equipoise on this issue and Complainant has failed to establish by a preponderance of the evidence that this condition is a violation of the Act.

*ii. Pest Control*

During the inspection on May 17, 2006, a mouse was seen in the binturong enclosure. CX-3. It was obvious to Dr. McFadden that the mouse was staying in the enclosure, and she opined that the presence of one rodent generally signified additional mice and an inadequate pest control system. Tr. at 46. Exhibitors are required to establish "a safe and effective program for the control of insects, ectoparasites, and avian and mammalian pests. . ." 9 C.F.R. § 3.131(d).

On May 23, 2007, Dr. McFadden noted numerous flies in the reptile house, and concluded that Respondents had not taken effective measures to reduce their numbers. CX-6. Tr. at 62-63. She observed a number of fly strips, and knew of no other pest control measure used by Respondents. Tr. at 63. Dr. McFadden admitted that APHIS had not established standards for pest control. Tr. at 227. She further testified that she was not supposed to give guidance on how to come into compliance. *Id.*

On June 2, 2008, a dead mouse was seen in a trap near the young tiger's enclosure. CX-8; Tr. at 95. Although she could not say whether the picture she viewed depicted the mouse trap inside the enclosure, she nevertheless concluded that Respondents did not have effective pest

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control measures that included frequent checking of traps to remove dead rodents. Tr. at 95- 96.

Mr. Candy has a written pest control program, but acknowledged that sometimes conditions require adjustments, such as in May, 2007, when an excessive number of flies were on site. Tr. at 773. An individual who used to have an animal exhibition now runs a pest control company and the Zoo uses his services. *Id.*

I find that the evidence supports that better pest control was necessary at the Zoo. These allegations are supported. However, Respondents have established a written program and instituted more effect pest control methods.

d. Employees

Exhibitors are required to use “a sufficient number of adequately trained employees. . . to maintain the professionally acceptable level of husbandry practices” required by the regulations. 9 C.F.R. § 3.132. “Such practices shall be under a supervisor who has a background in animal care.” *Id.*

At her inspection on May 17, 2006, the inspector cited Respondents for failure to have adequate numbers of sufficiently trained employees on site. CX-3. It was evident to Dr. McFadden that Respondents did not have enough properly trained staff, due to the number of problems she had observed. Tr. at 46-47. She believed that the Zoo’s volunteers needed guidance from someone with expertise in animal husbandry. Tr. at 47.

In 2004, Mr. Candy and two other Zoo volunteers attended a “Big Cat Symposium”. Tr. at 714-715. He has not provided any other formal training to his volunteers, but he stated that he has established strict rules about maintenance and care of the animals, and closely supervises his volunteers. Tr. at 715. The Zoo’s rules include health and safety policies, and volunteers are required to note and sign a list of tasks that they completed during their tours of duty. Tr. at 716. The checklist

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requires observations about the condition of the animals and facility, and volunteers are expected to make entries when they arrive for their shifts, and again when they leave. Tr. at 717. Mr. Candy is always available to answer questions. *Id.* He expects volunteers to record weather conditions, any changes they notice in the animals, maintenance issues and anything else that they consider important. Tr. at 724-725.

Volunteers are trained on an on-going basis, and the Zoo uses the specific talents and expertise of its volunteers. Tr. at 719. The Zoo does not provide manuals to volunteers, other than the check list and rules. Tr. at 722. Mr. Candy is in charge of whatever goes on at the Zoo and he expects the volunteers to heed his instructions. *Id.* The checklists are kept in the reptile house. Tr. at 723-725; RX-23. One volunteer is designated as the “main volunteer” daily. Tr. at 726. The main volunteer works the same day each week and is generally responsible for feeding the animals. Tr. at 726-727. In addition, people live on the premises, and provide security on a consistent basis. Tr. at 727.

Mr. Candy testified that Dr. McFadden has told him that four people should be on duty at a time. Tr. at 759. Since the Zoo is not open long hours, and volunteers perform different jobs throughout the day and evening, Mr. Candy believed that he had sufficient workers. Tr. at 759-760. Mr. Candy asserted that he had adequate experience in animal care and expertise in facility maintenance and consequently has knowledge of animal husbandry. Tr. at 761. Mr. Candy had managed a large horse farm in Pennsylvania, and was responsible for cleaning and sanitizing universities, hospitals and veterinarian clinics. Tr. at 761-762. He developed procedures with the consultation of an individual with zoo experience. Tr. at 762. That individual is now working for another zoo, and another individual that Respondents hired as an animal consultant is no longer with Tri-State. Tr. at 762-763.

I credit Mr. Candy’s years of experience working with animals and conferring with veterinarians and other animal experts, and conclude that he has adequate experience to operate the Zoo. However, the preponderance of the evidence demonstrates that the Zoo is not adequately staffed. Respondents have been repeatedly cited for violations that could have been avoided if people were tasked to make routine maintenance inspections to correct such problems as breaches in fencing,

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pest control, and unsanitary conditions. Although Respondents' use of a check list for volunteers is laudatory, it is inadequate to prevent those types of infractions that were routinely observed by Dr. McFadden on her inspections. The Zoo fails to provide much formal training to volunteers. Despite Mr. Candy's contention that he demands certain skill sets from volunteers, he assumes sole responsibility for many tasks, without a trained individual to replace him in the event of an emergency.

I disagree with Mr. Candy's insinuation that four on-site people, reporting to an individual with experience in animal husbandry, is an arbitrary number. The size of the Zoo, both in area and animals, and the repeated problems observed by inspectors, support Complainant's contention that at least four people should be on site while the Zoo is open for operation. This is most clearly demonstrated by the fact that Mr. Candy must interrupt his scheduled work whenever an inspection takes place. Since he has sole responsibility for cleaning big cat cages, it is axiomatic that tasks are left undone or postponed when his attention is diverted.

Complainant has established this violation by the preponderance of the evidence.

#### **4. Handling, Care and Treatment of Nonhuman Primates**

On September 7, 2006, Dr. McFadden noticed that the roof of a dog house that was used as shelter for a Japanese macaque was cracked. CX-5; Tr. at 57. She believed this posed a problem as the crack could potentially injure the animal, and may not provide sufficient shelter from the elements. Respondents were cited with violating regulations pertaining to Structural soundness of housing and Shelter from elements. Housing facilities must be structurally sound and kept in good repair (9 C.F.R. § 3.75 (a)) and must provide protection from weather conditions (9 C.F.R. § 3.77 (d)).

Mr. Candy testified that the macaque in question was a rhesus macaque and not a Japanese macaque. Tr. at 770. He disagreed with this citation, because the dog house was meant as an environmental

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enhancement for the animal; it was not where the macaque was sheltered, but was meant for the macaque to play in. Tr. at 770. Dr. McFadden admitted that the macaque was housed in a different enclosure. Tr. at 220. In any event, the roof was removed. Id.

Complainant has failed to establish that a cracked toy violated a housing standard for primates.

On her inspection conducted on September 29, 2010, Dr. McFadden noticed rodent holes in the lemur house charged Respondents with violating the standards set forth at 9 C.F.R. § 3.84 (d), Failure to maintain effective pest control program. CX-14; Tr. at 153.

Complainant has established that the Zoo's pest control plan is not consistently effective. This violation is supported.

On May 17, 2006, Dr. McFadden observed a young lemur housed by itself. CX-3; Tr. at 38-39. She charged Respondents with failure to provide enrichment for the psychological well-being of a primate, and with failure to provide environmental enhancement needs in violation of 9 C.F.R. § 3.81(b); (c)(4). Tr. at 39. Dr. McFadden issued a notice of non-compliance with this standard on August 3, 2009 with respect to a capuchin monkey, a squirrel monkey, and the lemur, who were each individually housed without companionship and without any program to enrich their psychological well-being. CX-10; Tr. at 103.

Dr. McFadden testified that the problem regarding the enrichment plan remained in effect at her inspection on September 30, 2009. CX-11; Tr. at 108-109. However, the inspector was uncertain where the primates were housed at this time, speculating that some may have been at a clinic or in foster homes. Tr. at 109.

Respondents denied that the Zoo failed to have an enrichment plan. Tr. at 707. Mr. Candy included every primate at the Zoo in the plan that was originally devised by an individual with experience with primates, and which was approved by the Zoo's veterinarian. Tr. at 708. The enrichment plans from the years 2006 to 2011 were admitted to the record as RX-6. The Zoo's original veterinarian was Dr. Ryan, who practices under the name of "Feathers, Tails and Scales". Tr. at 709.

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Mr. Candy believed that Dr. Ryan was the only exotic pet expert in his part of the state, and the doctor's veterinarian technicians get some training at the Zoo. Tr. at 709-710.

The plans were again approved by Dr. Adams, who has been the Zoo's primary veterinarian from approximately 2007 or 2008, as he was located closer to the Zoo. Tr. at 710. When Dr. Adams decided to concentrate his practice on large hoofed animals, the Zoo engaged Dr. Fox from Cumberland County. Tr. at 710-711.

Mr. Candy acknowledged that the lemur was alone, but the environmental plan called for an increase in the variety of toys and other ways to stimulate solitary primates. Tr. at 807-808. The lemur is still alone, but his enclosure is near other primates so that they can interact. Tr. at 808. Respondents cannot buy a lemur legally, and must wait for a donation, so the Zoo's lemur is by necessity alone. Id.

The preponderance of the evidence establishes that Respondents had in place a plan for environmental enhancement, and practiced it. I dismiss this charge.

**5. Attending veterinarian and adequate veterinary care**

Exhibitors are required to employ "an attending veterinarian under formal arrangements. . . which include a written program of veterinarian care and regularly scheduled visits to the premises". 9 C.F.R. § 2.40(a). The program of care must demonstrate "the availability of appropriate facilities, personnel, equipment, and services. . .; the use of appropriate methods to prevent, control, diagnose and treat diseases and injuries and the availability of emergency, weekend, and holiday care; daily observation of all animals to assess their health and well-being . . .with a mechanism of direct and frequent communication [with] the attending veterinarian; adequate guidance to personnel involved in the care and use of animals regarding handling; and adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures". 9 C.F.R. § 2.40(b)(1)-(5).

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Dr. Fox remains the Zoo's primary veterinarian. Tr. at 711. Mr. Candy volunteers at the doctor's office to learn as much as he can about animal care. Tr. at 712. Dr. Fox is very responsive to the needs at the Zoo, and his close physical proximity allows him to attend to emergencies. Tr. at 713. In addition to the plans for the care of the primates at the Zoo, the veterinarians that the Zoo has used over the years approved plans for the care of other animals, including the large cats. Tr. at 729; RX-7; RX-8; RX-14 and RX-15. The doctor's signatures are visible on the records. Tr. at 733. Veterinarians have visited the Zoo and signed a letter acknowledging their service. Tr. at 734; RX-9.

The record fully establishes that Respondents have a plan of veterinary care. This charge is dismissed.

a. Care of Goats

On September 7, 2006, Dr. McFadden noticed that one of Respondents' goats needed to have its hooves trimmed. Tr. at 53-54. The goat has a genetic deformity on its hooves, but they also were overgrown. CX-4; Tr. at 54. On August 3, 2009, Dr. McFadden noticed two limping goats, and documented their gait problem to make sure that they received veterinary attention. CX-10; Tr. at 102. On November 20, 2009, Dr. McFadden again cited Respondents with this violation. CX-12. She explained that Respondents had failed to provide a record from a veterinarian acknowledging the condition of the goats' hooves and establishing a schedule for trimming them. Tr. at 121. Respondents had no documentation from a veterinarian diagnosing the chronic condition. *Id.*

Mr. Candy explained that some of the goats at the Zoo had a genetic defect that creates a consistent problem with their hooves, which was known to their veterinarian. Tr. at 757. Mr. Candy does not consider the genetic malformation a medical condition that requires a schedule of care, but he is aware that the condition affects the goats and he tries to tend to their needs. Tr. at 757-758. Some of his goats have since been donated to other facilities. Tr. at 758; 804. Respondents have only six goats, none of which are related, because he was concerned that the goats

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that limped due to the genetic hoof problem caused visitors to question their care and condition. Tr. at 804-805.

The evidence regarding veterinary care for goats with a genetic condition is substantiated. I accept that the existence of a genetic condition may not warrant a schedule of medical treatment for the condition. However, goats were observed limping due to overgrown hooves that needed medical attention. Respondents did not have a plan for routine hoof treating, and Mr. Candy admitted that the condition needed attention, as he called the Zoo's veterinarian, who treated the goats. Tr. at 281. This constitutes a failure to follow a plan of veterinary care, and a violation of the Act.

b. Pigtail Macaque

During her inspection of September 26, 2007, Dr. McFadden noted that Respondents' pigtail macaque was not in its usual enclosure. Tr. at 65. She had inquired into its whereabouts, having learned that Respondents did not always document the transfer, acquisition, death, or sale of their animals. Tr. at 64. Mr. Candy told her that the pigtail macaque had been found dead in its enclosure, and he speculated that it may have chewed on the cord of a heat lamp that was adjacent to its enclosure. Tr. at 65. Dr. McFadden concluded that the Zoo's personnel were not properly trained to care for animals, as a potential hazard had been left near the macaque in violation of 9 C.F.R. § 2.40(b)(1). Tr. at 66. In addition, it was alleged that appropriate methods to prevent, control, diagnose, and treat an injury were not used, in violation of 9 C.F.R. § 2.40(b)(2). Dr. McFadden concluded that these failures led to the macaque's electrocution. CX-7.

Mr. Candy found the animal dead, and discussed alternate theories of the cause of its death with Dr. McFadden, including the possibility that the animal had bitten through an electric cord. Tr. at 778. Mr. Candy rejected electrocution by the lamp as the cause of death because the extension cord was far from the enclosure, and the lamp remained in its place, suggesting that its cord had not been pulled. Tr. at 781. Although the plug on the cord was marked, the cord and plug were old and there

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was no way to say that the marks were recent. *Id.* The cord and lamp were arranged so that they would be unplugged if pulled. Tr. at 781. There was no sign of damage to the cord, or signs of burns on the animal. Tr. at 779; 781. He and Dr. McFadden discussed many different causes of death, including old age and heart disease. Tr. at 781. No necropsy was performed, and the animal had been buried. Tr. at 780. Dr. McFadden did not examine the animal because her inspection was conducted the September following the animal's death in December. Tr. at 780-781.

There is insufficient evidence to determine that the animal died of electrocution. Even if Mr. Candy's speculations about the cause of the animal's death were limited to electrocution, Complainant has no corroborative evidence to charge Respondents with such a serious allegation. The violation is based on conjecture and is not supported by evidence of any sort. This allegation is dismissed.

**6. Failure to retain records**

Dr. McFadden charged Respondents with failure to maintain records relating to the acquisition and disposal of animals in violation of 9 C.F.R. § 2.75(b) during her September 26, 2007 inspection. CX-7; Tr. at 64. Mr. Candy testified that people often leave animals at their facility that they may not keep, and the Zoo did not at first record animals that were not covered by the AWA. Tr. at 775. He believed that he now kept records of animals, though were reconstructed after originals were destroyed in a fire. *Id.*

I find no evidence of record credibly disputes Complainant's contention that the Zoo fails to keep complete records relating to the acquisition and disposal of animals. This charge is sustained.

On June 2, 2008, Respondents failed to provide a copy of a written veterinarian plan. CX-8; Tr. at 75-76. As a result, Dr. McFadden was unable to determine whether Respondents had a veterinarian on call, or had developed a plan for care. Tr. at 75. Mr. Candy testified that he has no place to keep his records on site since the Zoo lost a building in a fire. Tr. at 706. He is reluctant to keep records in the gift shop or any other building that gives access to the public. Tr. at 707. However, he is aware

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that Dr. McFadden generally spends two days inspecting his facility and he consistently provides her with all the records, including plans of veterinary care and enrichment for non-human primates, on the morning of the second day of her inspection. Tr. at 707.

When pressed to explain why he could not maintain the records in the place where he keeps check lists, Mr. Candy testified that he did not think it was appropriate to keep the records in that location, which is a kitchen that stores animal feed. Tr. 730. He distinguished those records from the daily logs, which are used daily. Tr. at 731. Despite being cited for repeated violations, he had never failed to provide the records. Tr. at 731-732. He maintains that so long as he “cures” defects, he should be considered compliant with the Act and regulations.

Mr. Candy’s attitude with respect to keeping records on-site for inspection demonstrates that he does not understand the need to meet the inspector’s expectations of compliance with the Act and regulations. I accept that the records are always made available to Dr. McFadden, but I reject the notion that duplicates cannot be maintained somewhere on the premises. Moreover, APHIS has the right to see records at an unannounced inspection to assure itself that the records have not been changed to conform with regulatory standards. *See In re: S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 489 (U.S.D.A. 1991).

Mr. Candy’s recalcitrant resistance to keeping the records on-site despite repeated violations for this failure demonstrates a lack of cooperation and commitment to full compliance with the Act and regulations. This violation is supported by the evidence.

### **E. Summary**

The record establishes that Respondents are clearly in violation of regulatory operating standards regarding sanitation and record keeping. Although Respondents cooperate with USDA when Mr. Candy agrees with Dr. McFadden, where Mr. Candy is comfortable with how he does things, he disregards Dr. McFadden’s concerns. For example, he is satisfied with being repeatedly cited for recordkeeping violations rather

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than finding a place to keep records on site. He would rather be charged with repeated violations of unsanitary conditions than modify his cleaning routine. Although Respondents have resolved some of the government's concerns about food and equipment storage, I cannot conclude that Mr. Candy made those changes entirely to please APHIS. Mr. Candy has shown himself indisposed to alter his conduct when he disagrees with Dr. McFadden.

In addition, there is no doubt that Respondents lack adequately trained employees. Despite USDA's expressed concerns about manpower, and the obvious defects that inadequate staffing has caused, Mr. Candy has made no attempt to mollify the inspectors on this point. It is clear that more frequent patrols of the facility would eliminate problems with food storage, pest control, fence maintenance issues, and animal care. There is no trained back-up personnel, should Mr. Candy become unable to clean large cat enclosures or carry out other tasks. He failed to maintain and put into place a schedule for routine care of goats' hooves.

Although I have found certain allegations do not demonstrate failure to handle animals properly, Respondents' policy of taking groups within close proximity to large cats is a serious offense. The volunteers comprise the sole barrier between the cats in their cages and the public, who are within reaching distance to the cats. The volunteers are not positioned directly between the cats and the public, and their training is limited to using fire extinguishers in the event of an emergency. Even without direct evidence that spectators touched the cats, this practice represents a clear danger to both animals and spectators, and must be discontinued.

Respondents have corrected the concerns of APHIS about barrier and perimeter fences. I agree with Mr. Candy that certain of the allegations address concerns about appearances. Complainant has not been able to articulate exactly why the tiger enclosure fails to meet the regulatory standards. Respondents' facility appears to have been judged against "industry standards", which are not in evidence. The record establishes that the fencing meets height requirements and the use of kick ins, tensile wire and electric fencing demonstrates Respondents' concerns about containing the tigers.

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In contrast, Complainant's concerns about the integrity of the lion enclosure have merit. Inspectors specifically pointed to questionable materials used to join fencing at corners. Specific deficits were observed in the fencing on different inspections, such as a gap at the bottom of fencing, and a leaning portion of the fence. In instances where inspectors found fault with aspects of the lion enclosure, Respondents addressed the concerns. However, Complainant clearly found the construction of the enclosure inadequate and a risk factor for an escape. I put little weight on an escape attempt in the past, since Respondents have done much to shore up the fencing since that time. However, I credit the inspectors' explanations that the use of several fencing types and different joining materials made the stability of the fence questionable. Since Respondents are in the process of building a new enclosure for the lion, the concerns that gave rise to these allegations shall soon be moot.

#### **F. Personal Liability of Robert Candy**

As sole corporate officer, and Director of the zoo, Mr. Candy is personally responsible for the acts of Tri-State. All acts of the corporate entity in these circumstances arose out of decisions made by Mr. Candy. 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*, 67 Agric. Dec. 154 (U.S.D.A. 2008). A corporation and the individual who exercised sole control over corporate activities may be jointly assessed penalties under 7 U.S.C. § 2149 pursuant to the operation of 7 U.S.C. § 2139. *Irvin Wilson & Pet Paradise Inc. v. U.S.D.A.*, 54 Agric. Dec. 111 (U.S.D.A. 1995). I find that Mr. Candy may be held personally liable for acts he performed on behalf of Tri-State.

#### **G. Remedies**

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 (U.S.D.A. 1997). In assessing penalties, the Secretary must give due consideration to the size of the business, the gravity of the violation, the

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person's good faith and history of previous violations. *In re Lee Roach and Pool Laboratories*, 51 Agric. Dec. 252 (U.S.D.A. 1992). The recommendations of administrative officials responsible for enforcing a statute are entitled to great weight, but are not controlling, and the sanction imposed may be considerably less or different from that recommended. *In re: Marilyn Shepherd*, 57 Agric. Dec. 242 (U.S.D.A. 1998).

As Eastern Regional Director of the Animal Care Program for APHIS, Dr. Goldentyer is familiar with the licensees within her jurisdiction. Tr. at 858-860. When considering whether sanctions are appropriate, she considers factors such as the size of the business of the licensee, the history of compliance, and the good faith of the enterprise with adhering to the Act and regulations. Tr. at 860-862. Respondents' operation is relatively small in size, and Respondents have consensually paid a previous fine to APHIS. Tr. at 860-861. Dr. Goldentyer could not say that Respondents acted entirely in good faith, because repeated and multiple violations were disclosed at each inspection. Tr. at 862.

Dr. Goldentyer agreed that some of the violations were not "egregious", but she pointed to the accumulation of violations, which she inferentially attributed to poor management. Tr. at 863. She believed that a period of suspension was appropriate to allow the facility to come into compliance. Tr. at 863-864. She also believed that a civil money penalty would send an appropriate deterrent message, though she was cognizant of Respondents' limited resources. Tr. at 870-871.

With respect to the soundness of the tiger and lion structures, Dr. Goldentyer suggested that the best model to judge structural soundness would be those enclosures that were not considered a violation of the regulations. Tr. at 865-866. Inspectors are expected to give guidance to licensees on how to achieve compliance, but are not tasked to dictate standards of construction. Tr. at 883. Inspectors generally rely upon their experience with facilities that have successfully built structures that are reliable when they measure the integrity of fencing. Tr. at 882. Dr. Goldentyer testified that she believed it would be possible for APHIS to work with Respondents during a period of suspension and confirm whether its newly constructed enclosures met regulatory standards. Tr. at

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885. She observed that this would only work if both parties were in complete agreement about the outcome. Tr. at 886.

According to APHIS policy, if a deficient condition is corrected, it will not be cited on the following inspection. Tr. at 875-876. However, if a pattern of non-compliance establishes itself with repeated violations that reflect upon overall management of a facility, then inspectors will include all cited violations to show the pattern. Tr. at 877.

Respondents handled animals in a manner that posed risk to them and the public. Respondents do not employ an adequate number of trained personnel to ensure compliance with the Act and regulations, leading to repeated violations pertaining to the maintenance of the facility. Respondents failed to develop and follow a plan for veterinary care of its goats' hooves. Respondents' lion enclosure did not meet standards for structural soundness and at times had no full perimeter fence and no barriers. Respondents repeatedly violated regulations regarding recordkeeping requirements. Although Respondents have put forth good faith efforts to improve the appearance of the facility, and have implemented changes that corrected many of the conditions for which they were cited, conditions remained unaltered when Respondents disagreed with APHIS' findings. The Zoo's response to repeatedly being cited for certain conditions suggests lack of good faith and demonstrates willful violation of the Act and its implementing regulations.

APHIS has recommended that Respondents' license be suspended for a period of six months. I find that recommendation overly harsh, considering that many of the conditions on which violations were based occurred as long as six years ago, and many have been corrected by Respondents. As Dr. Goldentyer observed, the Zoo constitutes a small business; a suspension will pose a significant financial burden. Considering the remedial nature of the Act, and the fact that there were no violations involving harm to animals or the public, I find that a short suspension represents a sufficient deterrent from violating the Act, and see no need to impose an additional monetary penalty on Respondents as the result of their violations. In particular, I find that the deterrent purpose of sanctions would not be furthered by imposing a civil money

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penalty for violations that were transitory and have been remedied, regardless of their historical accuracy.

I find it appropriate to suspend Respondents' license for a period of forty-five (45) days. I have found that Respondents' repeated violations are willful, thereby permitting the imposition of a suspension of the Zoo's license. See, In re: Big Bear Farm, Inc., et al., 55 Agric. Dec. 107 (1996).

**H. Findings of Fact**

1. The Secretary has jurisdiction in this matter.
2. Tri-State Zoological Park of Western Maryland, Inc. is a Maryland corporation whose registered agent for service of process is Robert L. Candy.
3. At all times relevant to this adjudication, Respondents operated a Zoo, and exhibited approximately 65 wild and exotic animals at a facility in Cumberland, Maryland under AWA license 51-C-0064.
4. APHIS conducted inspections of Respondents' facility, records and animals on May 17, September 7, and November 29, 2006; on May 23 and September 26, 2007; on June 2 and September 3, 2008; on August 3, September 30, and November 20, 2009; and on September 29, 2010.
5. At each of the inspections, APHIS inspectors cited Respondents with violations of the Act and regulations, including violations pertaining to handling animals; recordkeeping; housekeeping; animal husbandry; environmental enhancement for primates; inadequate drainage; structural inadequacy of enclosures; insufficient number of and inadequately trained employees; inadequate plan for pest control; poorly maintained fencing and shelter; inadequate shelter from inclement weather for primates and other animals; excessive feces and waste matter; failure to erect perimeter fencing; failure to provide wholesome and palatable food; failure to provide potable water; failure to store foodstuffs properly; and failure to follow plan of veterinary plan for trimming goat hooves.

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6. Groups of people, including children, were led on tours to view the rear of lion and tiger enclosures with no additional barrier outside of the cages other than the presence of volunteers, and were allowed close proximity to the animals.
7. Records were not consistently maintained to record acquisition and disposition of animals, and no records regarding a plan for veterinary care, or other required records, were available on the days of inspections.
8. An accumulation of bedding and feces was observed in and near animals' housing on several occasions.
9. Deficits in construction and disrepair was noted in the enclosures of a porcupine, a binturong and a macaque.
10. Primates were housed singly and a plan for their environmental enhancement was not kept on the premises.
11. A veterinarian developed plans for environmental enhancement of primates.
12. Tri-State has an attending veterinarian who treats the Zoo's animals.
13. Puddles were observed after several days of rainfall, indicating problems with drainage.
14. The lion enclosure showed gaps between the ground and the fence, and the fencing was joined with a variety of materials.
15. Volunteers undertook tasks assigned by Mr. Candy, but had no special training in animal husbandry or animal escape and capture.
16. Rodent carcasses and an excess of flies were observed upon inspection.

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17. Wire fencing at the llama and goat enclosures was detached and sharp wires protruded; a crack in a permanent shelter was observed; and the door of the lion enclosure needed reinforcement.

18. A cougar was displayed in an enclosure that was not surrounded by a barrier of sufficient height and distance to prevent contact between the animal and the public.

19. Ferrets were left in the sun; a structure used by a macaque was cracked; a spool in the enclosure for an arctic fox was cracked; and a ramp used by a bobcat appeared unstable.

20. Feces was observed repeatedly in the tiger pools and other areas of the facility.

21. Perimeter fencing was not evident in certain areas of the facility.

22. Foodstuffs were stored in locations where chemicals, tools and equipment were also stored.

23. A carcass was kept in a lion's enclosure for two days.

24. Water for a lion appeared greenish in color.

25. A macaque was found dead without obvious cause of death.

26. The hooves of goats needed to be trimmed, and there was no plan of veterinary care for maintenance of the condition.

**I. Conclusions of Law**

1. In his capacity as corporate officer and director of the Tri-State Zoological Park of Western Maryland, Robert Candy operated as an exhibitor as that term is defined by the Act and regulations.

2. Pursuant to 7 U.S.C. § 2139, Robert Candy'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.

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3. The following violations brought against Respondents are dismissed for lack of proof by a preponderance of the evidence:

- a. Allegations of violations of 9 C.F.R. § 2.131(c)<sup>8</sup>, alleging failure to properly handle a cougar on May 17, 2005; a porcupine on June 2, 2008; and a binturong on August 3, 2009.
- b. Allegations of violations of 9 C.F.R. § 3.125 (a), alleging insufficient structural strength of the tigers' enclosure, including the fencing that separates the different of tigers.
- c. Allegations of violations of 9 C.F.R. § 3.125(a) alleging structural defects in the decorative board surrounding the platform in the cougar enclosure.
- d. Allegations of violations of 9 C.F.R. § 3.125(a) alleging structural defects in the bobcat ramp.
- e. Allegations of violation of 9 C.F.R. § 3.125(c) alleging improper storage of food on September 3, 2008.
- f. Allegations of violations of 9 C.F.R. § 3.125(d) alleging sanitation violations with respect to the tiger pool occasionally compromised by mulch.
- g. Allegations of violation of 9 C.F.R. § 3.125(d) alleging sanitation violations because of the failure to remove a carcass from the lion enclosure.
- h. Allegations of violation of 9 C.F.R. § 3.127(a), alleging failure to provide shade to ferrets on June 2, 2008.
- i. Allegations of violation of 9 C.F.R. § 3.127(c), alleging failure to provide adequate drainage on May 17, 2006.

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<sup>8</sup> It is clear that Respondents failed to provide proper barrier fences in these instances, but Complainant did not charge them with that offense.

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- j. Allegations of violations of animal husbandry standards set forth at 9 C.F.R. § 3.129(a) regarding the refrigeration and storage of food on September 3, 2007 and the failure to remove a carcass from the lion enclosure on June 2, 2008.
- k. Allegations of violations of animal husbandry standards set forth at 9 C.F.R. § 3.129(a) regarding potable water for a lion in November 20, 2009.
- l. Allegations of violations of sanitation and housekeeping standards set forth at 9 C.F.R. § 3.131(c) pertaining to the storage of food stuffs mingled with equipment and non-food stuffs in a building on June 2, 2007; the failure to dispose of trash in a non-exhibition area of the facility on August 3, 2009; and the presence of cracked concrete in the tiger enclosure.
- m. Allegations of violations of sanitation and housekeeping standards set forth at 9 C.F.R. § 3.131(c) with respect to trash found outside of the official Zoo on August 3, 2009 and September 30, 2009.
- n. Allegations of violations of standards for structural integrity of housing for primates set forth at 9 C.F.R. § 3.75(a) for a macaque, cited on September 7, 2006.
- o. Allegations of violations of standards for shelter from the elements for primates set forth at 9 C.F.R. § 3.77(d) for a macaque.
- p. Allegations of violations of requirements to develop and provide environmental enhancement to primates set forth at 9 C.F.R. § 3.81(b) and (c)(4), pertaining to a macaque, lemur and capuchin monkey.
- q. Allegations of violations of requirements to provide an attending veterinarian pursuant to 9 C.F.R. § 2.40 for a pigtail macaque that was discovered dead one morning.
- r. Allegations of violations of requirements to engage an attending veterinarian pursuant to 9 C.F.R. § 2.40.

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4. The following violations are established by a preponderance of the evidence:
- a. On June 2, 2008, Respondents failed to handle animals (lion and tigers) in a manner to prevent risk of harm in violation of 9 C.F.R. § 2.131(c).
  - b. On September 29, 2010, Respondents failed to handle a squirrel monkey in a manner to prevent risk of harm in violation of 9 C.F.R. § 2.131(c).
  - c. Respondents failed to provide structural integrity for their lion enclosure in violation of 9 C.F.R. § 3.125(a).
  - d. On September 26, 2007 and again on May 19, 2008, Respondents failed to provide structural integrity of the enclosure housing their young cat in violation of 9 C.F.R. § 3.125(a) due to the gauge of the wire on the door to the enclosure.
  - e. On September 29, 2006 and May 23, 2007, the llama and goat enclosure was in disrepair in violation of 9 C.F.R. § 3.125(a).
  - f. A crack in the reptile house presented a structural defect that violated 9 C.F.R. § 3.125(a).
  - g. Structural problems with a spool in the arctic fox enclosure represented a defect that posed the risk of harm to the animal in violation of 9 C.F.R. § 3.125(a).
  - h. Respondents failed to dispose of waste in the agouti and fennec fox enclosure and in the tigers' pools in violation of 9 C.F.R. § 3.125(d).
  - i. Respondents failed to maintain a perimeter fence that was not disrupted by gaps, which affected the serval enclosure on

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September 7, 2006 and the tiger and coatimundi enclosures on September 26, 2007, in violation of 9 C.F.R. § 3.127(d).

- j. Respondents' perimeter fence was defective, in that its integrity was compromised, upon inspections conducted on September 26, 2007 and August 3, 2009, in violation of 9 C.F.R. § 3.127(d).
  - k. Respondents failed to remove excreta on numerous occasions in violation of 9 C.F.R. § 3.131(a)(1).
  - l. Respondents failed to establish an adequate plan for pest control, which impacted all of its animals, including primates, in violation of 9 C.F.R. § 3.131(d) and 9 C.F.R. § 3.84(d).
  - m. Respondents failed to provide for attending veterinary care for their goats in violation of 9 C.F.R. § 2.40(b).
  - n. Respondents failed to keep and provide records as required by 9 C.F.R. § 2.75(b).
  - o. Respondents failed to maintain an adequate number of sufficiently trained staff in violation of 9 C.F.R. § 3.132.
5. Respondents have repeatedly and willfully violated the Act and regulations.
6. A sanction of the suspension of Respondents' license for a period of forty-five (45) days is appropriate.
7. Further, an Order instructing Respondents to cease and desist conduct that violates the Act and regulations is appropriate.

**ORDER**

1. The Tri-State Zoological Park of Western Maryland, Inc., and its agents, employees, successors and assigns, directly or indirectly through any corporate or other device, including, but not limited to Robert L. Candy are hereby ORDERED to cease and desist from further violations of the Act and controlling regulations. In order to achieve compliance

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with the Act and regulations, Respondents should develop alternate plans for tour groups that will not expose them or animals to the risk of contact; recruit and train volunteers or employees regarding basic sanitation and maintenance of the facility, with an emphasis on identifying conditions that could violate a regulation; consult with a specialist with animal husbandry experience to improve cleaning schedules and water sources; implement a plan for maintenance of goats' hooves; to identify a suitable location to store records on-site; and consult with APHIS specialists regarding the structural integrity of new enclosures and make suggested alterations.

2. AWA license number 51-C-0064 is hereby suspended for a period of forty-five (45) days.
3. 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.

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**In re: LEE MARVIN GREENLY, AN INDIVIDUAL; AND  
MINNESOTA WILDLIFE CONNECTION, INC., A MINNESOTA  
CORPORATION.  
Docket No. 11-0072.  
Decision and Order.  
Filed August 22, 2012.**

AWA.

Colleen A. Carroll, Esq., for Complainant.

Larry D. Perry, Esq., for Respondents.

*Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.*

**DECISION AND ORDER**

**ANIMAL WELFARE ACT****Preliminary Statement**

This Decision and Order involves the first of two actions filed the same day by Kevin Shea, the Acting Administrator of the Animal and Plant Health Inspection Service (APHIS) alleging that the named Respondents violated the Animal Welfare Act (the Act or AWA). 7 U.S.C. § 2131, *et seq.*

In this action, the Complaint filed on November 29, 2010 originally named as Respondents Lee Marvin Greenly, Sandy Greenly, Crystal Greenly, and Minnesota Wildlife Connection, Inc., a Minnesota corporation. As the proceedings against two of individual Respondents have since been resolved by Consent Decisions, the action now involves only the two remaining Respondents named in the caption.<sup>1</sup>

On January 19, 2011, an Order was entered consolidating the two cases for the purpose of hearing, denying the Motions filed by the Respondents to dismiss three Respondents and to compel production of documents, establishing deadlines requiring the exchange of exhibits and lists of exhibits and witnesses, and setting both cases for hearing in Duluth, Minnesota on May 10, 2011.

On February 8, 2011, Complainant filed a Motion for Summary Judgment in Docket No. 11-0073 and on March 1, 2011 sought and was granted an Extension of Time in which to comply with the Order of January 19, 2011 concerning the exchange deadlines. By Order entered on March 8, 2011, the ruling on the Motion for Summary Judgment was deferred pending the hearing of the consolidated actions. On April 14, 2011, the Complainant amended its Complaint and on May 5, 2011, moved to continue the oral hearing.

By Notice of Hearing entered on April 25, 2012, the actions were rescheduled to be heard on May 1, 2012 in Minneapolis, Minnesota.<sup>2</sup> At the hearing conducted May 1 and 2, 2012, eleven witnesses testified for

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<sup>1</sup> Consent Decisions were entered as to Sandy Greenly on April 9, 2012 and as to Crystal Greenly on May 4, 2012.

<sup>2</sup> The actions had previously been set for hearing on May 1, 2012 in Duluth, Minnesota; however, court space was not available and the location of the hearing was moved to Minneapolis.

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the Complainant, seven witnesses testified for the Respondents, fifty-one exhibits were admitted for the Complainant and forty-eight exhibits admitted for the Respondents.<sup>3</sup>

Post hearing briefs were received from both parties and the matter is now ripe for disposition.

### 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.<sup>4</sup> Since that time Congress periodically has acted to strengthen enforcement, expand coverage to more animals and activities, or conversely, curtail practices that are viewed as cruel or dangerous.<sup>5</sup>

The Secretary of Agriculture is specifically authorized to promulgate regulations to govern the humane handling and transportation of animals

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<sup>3</sup> Includes sub exhibits introduced by Complainant (2-2c less 2a, 16-16a, and 24-24a).

<sup>4</sup> 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.

<sup>5</sup> 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 100<sup>th</sup> 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.

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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 can result in the assessment of civil penalties, and the suspension or revocation of licensees. 7 U.S.C. § 2149. Over time, the maximum civil penalty that may be assessed for each violation has been increased 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. The Act originally specified a \$2,500 maximum; however, between April 14, 2004 and June 17, 2008 the maximum for each violation was \$3,750. More recently 7 U.S.C. § 2149(b) was again amended and effective June 18, 2008 the maximum civil penalty for each violation increased to \$10,000.

The Respondent Lee Marvin Greenly is an individual who operates what he describes as a photographic educational game farm along the scenic Kettle River near Sandstone, Minnesota. CX-23, Tr. 382. He is a licensed exhibitor, holding Animal Welfare Act License Number 41-C-0122 and has worked in training animals for “close to over 28 years” with experience at a zoo in Hinckley prior to opening his own facility.<sup>6</sup> Tr. 416. The license renewal forms introduced during the hearing have listed as many as 190 animals that are maintained at his facility. CX-2.

The Respondent Minnesota Wildlife Connection, Inc. is a corporation organized and existing under the laws of Minnesota formed on February 19, 2008 and lists its address as the same as Respondent’s Greenly’s. CX-24. Although Greenly suggests that the corporation is a “marketing company,” the record contains ample evidence that its activities and those of Mr. Greenly are essentially identical and the corporation checks

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<sup>6</sup> During questioning concerning his experience with raccoons, Greenly testified that he had worked with raccoons for 31 or 32 years. Tr. 427.

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have been used to renew Greenly's AWA license. CX-2, 5, 11, 23, 39, 40, 45, 46, 52, and 75.

The Complaint, as amended,<sup>7</sup> alleges that between March 14, 2006 and October 19, 2010 the Respondents committed some thirty-seven separate violations of the Act and its Regulations.<sup>8</sup> The alleged violations cover a wide range of provisions in the Regulations, including (a) failing to provide adequate veterinary care to their animals; (b) failing to establish a mechanism for communicating with the veterinarian; (c) failing to construct structurally sound housing facilities; (d) failing to timely remove and dispose of food waste; (e) failing to appropriately store food; (f) failing to adequately enclose outdoor facilities; (g) failing to make, keep and maintain adequate and appropriate records; (h) failing to provide environmental enrichment for the animals; (i) failing to allow access for unannounced inspections of the facility, the animals and records; (j) failing to handle animals so as to avoid trauma or physical harm; and (k) failing to handle animals so that there was minimal risk to the public and the animals by permitting direct contact between dangerous animals and members of the public, resulting in injuries to the public on three occasions, death to a neighbor's pet, and mandatory euthanization of one of the animals following one incident. The prayer for relief seeks findings that the violations alleged were committed, a cease and desist order, a civil penalty, and the suspension or revocation of the Respondents' Animal Welfare Act license.<sup>9</sup>

The Answer and Amended Answer filed by the Respondents dispute or deny the majority of the allegations, minimize the seriousness of the events underlying certain other alleged violations, and as to others indicate that any problem was corrected once it was brought to their attention. Limited staffing, the fact that the facility is open only by

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<sup>7</sup> The Complaint was amended on April 14, 2011 to add allegations of two additional violations. Docket Entry No. 16.

<sup>8</sup> One alleged violation (Paragraph 17 of the Amended Complaint) was withdrawn by the Government during the hearing. Tr. 408-409. The post hearing brief indicated that "the complainant calculates that the amended complaint alleges no fewer than 29 violations." Complainant's Post hearing Brief at p. 33.

<sup>9</sup> In her testimony, Dr. Goldentyer suggested that a cease and desist order, revocation of Respondent's license, and a \$50,000.00 fine would be appropriate. Tr. 570-577.

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appointment and conflicting business appointments were offered to explain the failure to provide inspection access. Still other violations were denied on the basis that the conditions observed were temporary and caused in part by being taken away from the performance of ongoing tasks to deal with USDA personnel who had interrupted normal routines.

Of the matters alleged in the Complaint, the allegations concerning Respondent's actions on the instances in which there was risk of injury to the animals or the public, if proven, by themselves would be sufficiently serious to warrant revocation of Respondent Greenly's Animal Welfare Act license.<sup>10</sup> While no useful purpose is served by speculation concerning the need for two separate actions and the large number of alleged violations, one of which was withdrawn during the hearing and a number of others which I will find to be unfounded, it will be observed that the decision to include allegations of numerous less serious and sometimes questionable violations significantly increased the Respondents' burden and expense of defending the actions brought against them.<sup>11</sup> While I will discuss all of the allegations, discussion of the less serious allegations will be given limited treatment in view of the remedial nature of the Act and the severity of the sanction which is being imposed. As noted in Complainant's post hearing brief and in the Departmental sanction policy, the Act is a remedial statute. *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (U.S.D.A. 1991); *See also In re Sam Mazzola*, 68 Agric. Dec. 822, 850 (U.S.D.A. 2009).

The handling violations:

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<sup>10</sup> As will be discussed, only four of the five instances will be found to be supported.

<sup>11</sup> The pattern of including large numbers of alleged violations, many of which have since been corrected and/or are several years old has been observed in a number of recent cases. *See, In re Craig Perry, et al.*, Docket No. 05-0026, Initial Decision by Judge Bullard, *aff'd in part by the Judicial Officer, (Date)*; *In re Terranova Enterprises, Inc., et al.* Docket Nos. 09-0155 and 10-0418, 70 Agric. Dec. \_\_\_\_ (December 20, 2011); and *In re Bodie Knapp*, Docket No. 09-0175, 70 Agric. Dec. \_\_\_\_ (September 27, 2011); *See also, In re Lorenza Pearson, et al.*, 68 Agric. Dec. 685 (2009). Including allegations of numerous violations, but failing to establish them has the potential to expose the Department to the award of attorney fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. §504. *See, Fox v. Vice*, 131 S. Ct. 2205 (2011).

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The Amended Complaint alleged that Respondents not only failed to handle animals so as to avoid trauma or physical harm on five occasions in violation of 9 C.F.R. §2.131(b)(1), and on the same occasions also failed to handle animals so that there was minimal risk to the public and the animals by permitting direct contact between dangerous animals and members of the public in violation of 9 C.F.R. §2.131(c)(1).

The evidence establishes that on February 12, 2009, Respondents allowed two wolves to run free during a photo shoot on acreage owned by Leo Gardner following which the wolves went onto residential property belonging to Linda and Carlyle Zeigler and attacked and killed the Zeigler's dachshund that had been let out "to go to the bathroom." Tr. 52, 439-440. As Mrs. Zeigler watched, one wolf scooped the dog up and the two wolves then proceeded to play tug of war with the pet, lancing the animal in half. Tr. 55-56. Although Respondent Greenly indicated that he was moving his truck at the time of the incident, he accepted responsibility for the incident and attempted to make amends with the Zeiglers by purchasing a replacement animal which the Zeigler ultimately accepted. Tr. 439, 441-444.

On either August 6 or 9 of 2009,<sup>12</sup> the Amended Complainant alleged that Respondents permitted the public to have direct contact with adult bears during "Quarry Days" without having any distance or barriers between the animals and the public. No USDA employee was present on either of the dates alleged<sup>13</sup> and the evidence advanced in support of the allegation consisted only of a photocopy of a newspaper article photograph for which no foundation was provided other than it was obtained as part of the investigation. Tr. 189-190, CX-39. I find this evidence insufficient to establish a violation was committed on either August 6 or 9, 2009.

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<sup>12</sup> Paragraph 26 of the Amended Complaint lists the August of 2009 violation as occurring on August 9, 2009; however, Paragraph 27 has the date as August 6, 2009. The newspaper article predates August 9, 2009 but does not indicate when the photograph was taken. CX-39.

<sup>13</sup> Neither IES Investigator Vissage nor VMO Sime were present. Tr. 195, 258.

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On April 22, 2010, during a work study outing for students from East Range Academy of Technology and Science at Respondents' facility, Respondents exhibited Blue, a 19 or 20 year old bear. Tr. 488-491. During the exhibition, as apparently is Greenly's ill advised but frequent practice,<sup>14</sup> the students and faculty were allowed to feed the bear "Gummi Worms," with the students putting the candy in their mouth and letting the bear then take the candy from their mouths. Tr. 490. During the feeding session, Blue bit Denise Jenson, (Lee Greenly's cousin and then a school employee) who had accompanied the students.<sup>15</sup> Ms. Jenson attempted to minimize the incident during her testimony, indicating that the bite to her arm did not draw blood until later. Tr. 118. A couple of days after the bite, she began to experience pain. After being initially seen in the emergency room, she was admitted to the hospital the following day for a five day stay. Tr. 120-121. As she declined to have the bear euthanized and tested for rabies, she later underwent the prophylactic series of inoculations for rabies. Tr. 122.

On August 14, 2010, at the request of VMO Sime, Kimberly Miller, an Animal Care Inspector, was present at the Quarry Days celebration in Sandstone, Minnesota. Tr. 272, 274. While at the event, she attended Respondents' show and observed the public having direct contact with and handling raccoons, a possum, and some foxes during photography sessions without any distance or barriers between the animals and the public. Tr. 275-276, CX-41. Although the show was performed from an elevated stage, there was only a short distance between the public seating area and no barrier separated the two areas. Tr. 276, CX-41. Inspector Miller also observed Greenly standing in front of the area between the stage and the chairs with a mountain lion or cougar in his arms. Tr. 276-279, CX-41. An adult wolf was exhibited on the stage by two young adolescent girls and two or three baby wolves were brought through the audience allowing the public to take photographs and pet the animals. Tr. 277-278. The Inspection Report was prepared the following month. CX-20.

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<sup>14</sup> Greenly testified that the stunt had been performed "hundreds of times" without incident. Tr. 490.

<sup>15</sup> Ms. Jenson's employment with East Range Academy of Technology and Science ceased at the end of the 2010 school year.

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On October 19, 2010, the evidence amply established that Respondents were at or near Banning State Park for a photo shoot with a couple of photographers when an unleashed adult wolf came into contact with and injured five year old Johnna “Johnny” Mae Kenowski. Tr. 10-16, 478, 522, CX-45, 46. Although Respondent disputes that the wolf actually bit the child, the child’s aunt, Maja Dockal testified that the wolf attacked her niece and the record contains photographs of bloodied areas on Johnny’s face, scalp, and arm and what appeared to be puncture wounds on the child’s face and scalp. Tr. 12, 14, 19, 24-25, 478-480, CX-45. As a result of the incident, it was necessary to euthanize the wolf to verify that it did not have rabies. Tr. 47.

Providing adequate veterinary care and communicating information to the attending veterinarian violations:

The Amended Complaint alleges that on two occasions, Respondents failed to provide adequate veterinary care and to establish a mechanism to communicate with the attending veterinarian. The first alleged violation was reported to be observed by VMO Sime during her inspection of Respondents’ facility on March 14, 2006. VMO Sime testified that because the incident was so long ago, she could not recall exactly but thought that the cougar appeared thin and surmised that the Respondents could not demonstrate to her that they had transmitted any information concerning the animal to the attending veterinarian. Tr. 203-204. In his testimony, Mr. Greenly disputed her account and testified that he had discussed the cougar with Dr. Zimpel and that worming had been suggested. Tr. 384-386. Given the equivocal nature of VMO Sime’s testimony and lack of any other supporting evidence refuting Mr. Greenly’s testimony, I will give credence to his testimony and decline to find violations of sections 2.40(a) or 2.40(b)(3) of the Regulations on March 14, 2006.

On July 24, 2007, Respondent was again visited by VMO Sime who observed a raccoon with a thick mucous discharge. CX-30. Mr. Greenly testified that he had worked with raccoons for 31 or 32 years and that he had periodically observed similar conditions and that the condition usually cleared up in a day or two. Tr. 427. He also indicated that he had

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consulted with Dr. Jill Armstrong about the animal and that she was in agreement with waiting a couple of days before determining the need for examination by her and medical intervention. Tr. 426-427. As the evidence is in conflict, I will again decline to find violations of sections 2.40(a) or 2.40(b)(3) of the Regulations on July 24, 2006.

Failing to construct structurally sound housing facilities:

The Amended Complaint lists six instances in which Respondent's failed to construct and maintain structurally sound housing facilities, to wit: March 14, 2006, August 23, 2006 (2 violations), July 24, 2007, November 10, 2008, and June 29, 2009.

On the first date, VMO Sime also testified that she observed a piece of wood in the fisher<sup>16</sup> enclosure "...where there was some exposed nails that must have fallen into that..."Tr. 205. Mr. Greenly testified that he remembered the situation well. He indicated that the enclosure had corner platforms designed so that the animals could climb into them for animal enrichment and to encourage exercise. By Mr. Greenly's account there were several boards on the platform which were screwed into another platform and one of the boards had split and exposed two or three screws allowing the heads to protrude maybe a half inch to an inch. When it was brought to his attention, he either screwed them back in or broke them off while VMO Sime was still there. Tr. 387-388. As the deficiency was corrected during the inspection, it would appear that any violation was abated and no further action is needed.

On August 24, 2006, VMO Sime reported two structural problems, faulting the enclosure housing five woodchucks and the bear enclosure. CX-43. Mr. Greenly testified that the boards were not broken, but rather were intentionally left in the woodchuck enclosure to provide something for the animals to gnaw on. Tr. 399. Although a photograph of the structure was admitted, it does not contain sufficient detail to dispute Mr. Greenly's account. CX-44. As to the second alleged violation involving

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<sup>16</sup> When asked what a fisher was, VMO Sime responded "You know that's a good question. It's an animal native to Minnesota." Tr. 205. The Amended Complaint identifies a fisher or fisher cat as *Martes pennanti*, a medium sized mammal native to North America and a member of the *Mustelid* family, commonly referred to as the weasel family. Footnote 1, paragraph 8, Amended Complaint, Docket Entry No. 16.

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the bear enclosure, Mr. Greenly testified that the bear had not escaped as the gate was still latched. He had taken the bear out of its cage on a leash prior to the inspector's arrival and was cleaning the cage. Tr. 402-404. Examination of the photograph reflects an apparently sound chain link structure with chain securing the gate. CX-44.

Greenly acknowledged that the two juvenile woodchucks had been able to escape their enclosures on July 24, 2007, but indicated that they had not breached the perimeter fencing. Tr. 428-429. Although a violation did occur, corrective action apparently was taken as subsequent inspections contain no further mention of the enclosure.

The alleged structural violations on November 10, 2008 and June 29, 2009 relate to a wolf enclosure. CX-7 and CX-13. Respondents' photographs of the enclosure refute the alleged violations reflecting a thick concrete slab with a sound chain link fence with a clearance of less than three inches at the bottom. RX-47.

Perimeter fence violations:

The Amended Complaint includes allegations of five violations of failing to maintain an adequate perimeter fence on March 14, 2006, August 23, 2006 (2 violations), November 10, 2008 and June 29, 2009. The perimeter fencing violation was first noted on the March 14, 2006 Inspection Report and Mr. Greenly was given until September 14, 2006 in which to correct the deficiency. CX-25. It should be noted that the second citation was written within the period specified for corrective action to be taken; however, both Mr. Greenly's testimony and the absence of further such citations after the deadline indicate that any deficiency was corrected. Tr. 208, 394, CX-21.

It is noted that the Regulations contain no objective standard for perimeter fencing and APHIS officials when asked decline to advise license holders what is needed for compliance.<sup>17</sup> Fact finders are

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<sup>17</sup> The Standards indicate that fences less than 8 feet for dangerous animals and less than six feet for other animals must be approved in writing by the Administrator. 9 C.F.R. § 3.127(d).

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accordingly often faced the unfortunate situation of having to pass upon the appropriateness of the subjective opinion of an inspector as what is necessary when no objective standard exists.

Food storage and failure to remove food waste violations:

Two violations of food storage standards and one of failing to provide for the removal and disposal of food waste are alleged. VMO Sime's citation of the facility on March 14, 2006 for failing to store food supplies in a manner that adequately protects them from contamination arose out of the facility's acceptance of animal carcasses which were left on the upper hill of the facility. The VMO noted that the facility did have freezers available to store the food, but felt they "must not have been doing it in a timely fashion to get it into the freezers" and concluded that "it must have been getting excessive at that time." Tr. 205. Although she also cited the facility for leaving carcasses and carcass remnants in animal enclosures in her Inspection Report, at the hearing, she gave no testimony concerning that alleged violation so that alleged violation will be dismissed.

Mr. Greenly testified that the carcasses came from a variety of sources, including DNR, the state highway department, the city, and from local farmers needing to dispose of dead stock. He went on to say that the carcasses would be dropped off and left on the hill, but that he usually processed them by butchering them the day that they were brought in. If butchering was not done the same day, it would usually be done in less than 24 hours. Some of the meat would be used right away and the rest would be placed in the two walk-in freezers that the facility has. Tr. 389-392. I find Mr. Greenly's explanation reasonable and given that the inspection was conducted in mid March when temperatures in Minnesota are seldom above the freezing point, I see little risk of carcass contamination from spoiling from being left outside until processing could be done and take notice that carnivorous animals in the wild often devour their kill over a number of days. Accordingly, while the sight of carcasses on the property may give the impression of an aceldama and not be esthetically pleasing, I decline to find violations of section 2.100(a) for failure to meet the requirements of sections 3.125(c) or 3.125(d) of the Standards on March 14, 2006.

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The remaining food storage violation was alleged to have been observed on January 11, 2007. Mr. Greenly testified that the three cans were prepared that morning for the afternoon feeding. Tr. 418-419. Greenly acknowledged that the bags of food were on the floor, but noted that he had never been written up for that before and he has since stored food on pallets. Tr. 421.

Record keeping violations:

Respondent was cited on August 23, 2006, July 24, 2007, and June 29, 2009 for failing to make, keep and maintain adequate and accurate records of the acquisition and disposition of the animals at the facility. CX-7, 30 and 43. While one instance might be understandable or explainable as an excusable lapse, it is difficult at best to understand Respondents' callous indifference and continued failure to avoid recurring violations. VMO Sime's testimony concerning the deficiencies clearly establishes the violations. Tr. 211, 218 and 221-224.

Environmental enrichment violation:

This alleged violation was withdrawn by the Complainant. Tr. 408-409.

Failure to provide access for the purpose of inspecting the facility, animals and records on December 19, 2006, June 12, 2007, February 13, 2008, February 23, 2009 and May 13, 2009:

On December 19, 2006, APHIS VMO Debra M. Sime attempted to conduct an unannounced inspection at Respondent's Sandstone property. She met briefly with Mr. Greenly who informed them that he was ill and had to leave for a doctor's appointment. Tr. 413. According to the Interview Log prepared by IES Investigator Leslie Vissage who had accompanied the VMO to the site, VMO Sime "said that she would return to do the inspection another day." CX-37. As it appears that on this occasion both women agreed to return another time, I will decline to find a violation of failing to provide access for an inspection on December 19, 2006.

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Although her testimony consisted of little more than identifying the inspection report made on each occasion, VMO Sime visited Respondent's facility on four other occasions but was unsuccessful in conducting an inspection. Those record establishes that unsuccessful attempts were made on June 12, 2007 (Tr. 200, CX-28), two different times on February 13, 2008 (Tr. 201, CX-10), February 23, 2009 (Tr. 201, CX-3), and May 13, 2009 (Tr. 202, CX-14).

Mr. Greenly testified that on the later occasions it never was a question of denying VMO Sime access, but rather was because he was likely not present at the facility. He went on to explain that he was a sole proprietor and had neither the staff nor the funds to have someone in the office from 9:00 to 5:00. He also indicated that he was frequently out of town, that he had given APHIS inspectors his cell phone number so they could get hold of him and that in the past some inspectors had called to make sure that someone would be present at the facility.<sup>18</sup> Tr. 413-416.

As the requirement to allow USDA access for the purpose of inspecting the facility, the animals and the records during normal business hours is unqualified and contains no exemptions or allowances for sole proprietors, the record supports violations of section 2.126 of the Regulations on June 12, 2007, February 13, 2008, February 23, 2009 and May 13, 2009.

**The Sanction:**

The United States Department of Agriculture's sanction policy provides that Administrative Law Judges and the Judicial Officer must give appropriate weight to sanction recommendations of administrative officials, as follows:

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved,

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<sup>18</sup> VMO Sime made it clear that her inspections were unannounced. Tr. 226-227. Dr. Goldentyer affirmed that was consistent with Department policy. Tr. 569. Although Dr. Hovancsak was not available for cross examination, the record contains a memorandum from her indicating she did not call Mr. Greenly in advance of her inspections. CX-12.

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along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

*In re S.S. Farms Linn County, Inc., supra.*

Like the Judicial Officer, I do not consider such recommendations controlling, and in appropriate circumstances, the sanction imposed may be considerably different, either less or more than that requested.<sup>19</sup> In the actions before me here, the Administrator has recommended that a civil penalty of \$50,000.00 be imposed.

It is well established that correction of violations does not eliminate the fact that a violation may have occurred;<sup>20</sup> however, it is also clear that such corrective action may be taken into account in fashioning the sanction imposed. *In re Lorenza Pearson, d/b/a L & L Exotic Animal Farm*, 68 Agric. Dec. 685, 726-27 (2009). Aside from handling violations, record keeping, and inspection access violations, it appears that most, if not all of the other violations that I have found to have occurred were corrected.<sup>21</sup> As I find that Mr. Greenly's handling violations to be repeated and serious, I am revoking the Respondents'

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<sup>19</sup> *In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. 77,89 (U.S.D.A. 2009); *In re Alliance Airlines*, 64 Agric. Dec. 1595, 1608 (U.S.D.A. 2005); *In re Mary Jean Williams*, (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (U.S.D.A. 2005); *In re George A. Heimos Produce Co.*, 62 Agric. Dec. 763, 787 (U.S.D.A. 2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), enforced as modified, 397 F. 3d 1285 (10th Cir. 2005); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (U.S.D.A. 2002).

<sup>20</sup> *In re Jewel Bond*, 65 Agric. Dec. 92, 109 (U.S.D.A. 2006), *aff'd per curiam* 275 F. App'x 547 (8th Cir. 2008); *In re Eric Drogosch*, 63 Agric. Dec. 623, 643 (U.S.D.A. 2004); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 644 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Susan DeFrancesco*, 59 Agric. Dec. 97, 112 n.12 (U.S.D.A. 2000); *In re Michael A. Huchital*, 58 Agric. Dec. 763, 805 n.6 (U.S.D.A. 1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 184-85 (U.S.D.A. 1999).

<sup>21</sup> Dr. Goldentyer noted that the more recent inspections had noted improvement in the condition of the facility. Tr. 574.

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Animal Welfare Act license, but decline to impose a civil penalty in light of the significant financial impact of the revocation.

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

**Findings of Fact**

1. Respondent Lee Marvin Greenly is an individual residing in the State of Minnesota who holds Animal Welfare Act license number 41-C-0122 as an exhibitor in his own name. CX-2. Greenly exhibits wild and exotic animals to the public both at traveling locations and operates what he refers to as a photographic educational game farm on property that he owns on the Kettle River near Sandstone, Minnesota. Tr. 382-383. On various occasions, he also provides animals for photographic opportunities at other locations on nearby private or public land that he does not own. Tr. 439-440.
2. Respondent Minnesota Wildlife Connection, Inc. is a corporation organized and existing under the laws of Minnesota having the same address for its registered office as that of Mr. Greenly. The affairs of the corporation and Greenly are sufficiently intertwined that they cannot be separated. CX-2, 5, 11, 23, 39, 40, 45, 46, 52 and 75.
3. On February 12, 2009, Respondents allowed two wolves to run free during a photo shoot on acreage owned by Leo Gardner following which the wolves went onto residential property belonging to Linda and Carlyle Zeigler and attacked and killed the Zeigler's dachshund that had been let out "to go to the bathroom." Tr. 52, 439-440. As Mrs. Zeigler watched, one wolf scooped the dog up and the two wolves then proceeded to play tug of war with the pet, tearing and ripping the animal in half. Tr. 55-56.
4. On August 14, 2009, Kimberly Miller, an Animal Care Inspector, was present at the Quarry Days celebration in Sandstone, Minnesota and observed the public having direct contact with and handling raccoons, a possum, and some foxes during photography sessions without any distance or barriers between the animals and the public. Tr. 272, 274-276, CX-41. The show was performed from an elevated stage with chairs for the public in front of the stage a short distance away, but without any

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barrier between the stage and the chairs. Tr. 276. Inspector Miller later observed Greenly standing in front of the area between the stage and the chairs with a mountain lion or cougar in his arms. Tr. 276-279, CX-41. An adult wolf was exhibited on the stage by two young adolescent girls and there were two or three baby wolves that were brought through the audience allowing the public to take photographs or pet the animals. Tr. 277-278.

5. On April 22, 2010, during a work study outing for students from East Range Academy of Technology and Science at Respondents' facility, Respondents exhibited Blue, a 19 or 20 year old bear. Tr. 488-491. During the exhibition, the students and faculty were allowed to feed the bear "Gummi Worms," with the students putting the candy in their mouth and letting the bear then take the candy from their mouths. Tr. 490. During the feeding session, Blue bit Denise Jenson, (Lee Greenly's cousin and then a school employee) who had accompanied the students. A couple of days after the bite, she began to experience pain and after being initially seen in the emergency room was admitted to the hospital the following day for a five day stay. Tr. 120-121. As she declined to have the bear euthanized and tested for rabies, she later underwent the prophylactic series of inoculations for rabies. Tr. 122.

6. Twenty-two months after the previous unleashed wolf incident on October 19, 2010 Respondents were at or near Banning State Park for a photo shoot with a couple of photographers when an unleashed adult wolf came into contact with and injured five year old Johnna "Johnny" Mae Kenowski. Tr. 10-16, 478, 522, CX-45, 46. The child's aunt, Maja Dockal observed the wolf attacking her niece and photographs of bloodied areas on Johnny's face, scalp and arm reflect what appeared to be puncture wounds on the child's face and scalp. Tr. 12, 14, 19, 24-25, 478-480, CX-45. As a result of the incident, it was necessary to euthanize the wolf to verify that it did not have rabies. Tr. 47.

7. On March 14, 2006 and on July 24, 2007, Respondents were cited for failing to provide adequate veterinary care and failing to have a mechanism in place to communicate information to the facility's attending veterinarian; however on both occasions, Respondents had

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communicated with the veterinarian and immediate intervention had not been considered necessary by the veterinarian.

8. On July 24, 2007 the two juvenile woodchucks escaped their enclosure, but were unable to breach the perimeter fencing. Tr. 428-429. Corrective action was taken and subsequent inspections contain no further mention of the enclosure.

9. On March 14, 2006 and August 23, 2006 (2 violations), November 10, 2008 and June 29, 2009, Respondents were cited for perimeter fencing violations. The violation was first noted on the March 14, 2006 Inspection Report and Mr. Greenly was given until September 14, 2006 in which to correct the deficiency. CX-25. The second citation was written within the period specified for corrective action to be taken; however, both Mr. Greenly's testimony and the absence of further such citations after the deadline indicate that any deficiency was corrected. Tr. 208, 394, CX-21.

10. On November 10, 2008 and June 29, 2009 Respondents were cited for perimeter fencing violations relating to a wolf enclosure (CX-7 and CX-13); however, Respondents' photographs of the enclosure refute the alleged violations reflecting a thick concrete slab with a sound chain link fence with a clearance of less than three inches at the bottom. RX-47.

11. On January 11, 2007, Respondents were cited for a food storage violation. Three open cans of food had been prepared that morning for the afternoon feeding (Tr. 418-419) and bags of food were observed on the floor. After receiving the citation, the facility has since stored food on pallets. Tr. 421.

12. On August 23, 2006, July 24, 2007, and June 29, 2009 Respondent failed to make, keep and maintain adequate and accurate records of the acquisition and disposition of the animals at the facility. CX-7, 30 and 43, Tr. 211, 218 and 221-224.

13. On December 19, 2006, APHIS VMO Debra M. Sime appeared at Respondents' facility to conduct an unannounced inspection at Respondent's Sandstone property. She met briefly with Mr. Greenly who informed them that he was ill and had to leave for a doctor's appointment. Tr. 413. The Interview Log prepared by IES Investigator

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Leslie Vissage who had accompanied the VMO to the site, VMO Sime “said that she would return to do the inspection another day.” CX-37.

14. Unsuccessful attempts to inspect Respondents’ facility were made on June 12, 2007 (Tr. 200, CX-28), two different times on February 13, 2008 (Tr. 201, CX-10), February 23, 2009 (Tr. 201, CX-3), and May 13, 2009 (Tr. 202, CX-14).

### **Conclusions of Law**

1. The Secretary has jurisdiction in this matter.
2. On February 12, 2009, August 14, 2009, October 19, 2010, and October 22, 2010, Respondents willfully violated 9 C.F.R. § 2.131(b)(1) of the Regulations by failing to handle animals as carefully as possible in a manner that does not cause trauma or physical harm.
3. On February 12, 2009, August 14, 2009, April 22, 2010, and October 19, 2010, Respondents willfully violated 9 C.F.R. § 2.131(c)(1) of the Regulations by failing to handle animals during public exhibition so that there was minimal risk of harm to the animals and the public, with sufficient distance or barriers between the animals and the public so as to assure the safety of the animals and the public.
4. The evidence is insufficient to establish violations of 9 C.F.R. § 2.40(a) or 2.40(b)(3) of the Regulations on either March 14, 2006 or July 24, 2007.
5. The evidence is insufficient to establish violations of 9 C.F.R. § 2.131(b)(1) and § 2.131(c)(1) of the Regulations on August 6, 2009.
6. The structural deficiencies cited on March 14, 2006 and July 24, 2007 have since been corrected and no further action is required.
7. The evidence was insufficient to establish a structurally sound housing facilities violations on August 23, 2006, November 10, 2008 and June 29, 2009.

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8. The perimeter fence violations cited on March 14, 2006, August 23, 2006 (2 alleged violations), November 10, 2008 and June 29, 2009 have since been corrected and no further action is required.

9. The evidence is insufficient to establish violations of 9 C.F.R. § 2.100(a), 3.125(c), or 3.125(d) of the Regulations and Standards on March 14, 2006.

10. Respondents willfully violated 9 C.F.R. § 2.100(a) and 3.125(c) of the Regulations and Standards by having three bags of uncovered canine food stored on the floor.

11. The evidence is insufficient to establish a violation of 9 C.F.R. § 2.100(a) and 3.125(c) of the Regulations and Standards for having uncovered buckets or cans of food prepared for and intended for use that day.

12. Respondents willfully violated 9 C.F.R. § 2.75(b)(1) of the Regulations on August 23, 2006, July 24, 2007, and June 29, 2009 by failing to make, keep and maintain adequate records of the acquisition and disposition of animals at the facility.

13. The evidence is insufficient to establish a violation of 9 C.F.R. § 2.126(a) of the Regulations on December 19, 2006.

14. Respondents willfully violated 9 C.F.R. § 2.126(a) of the Regulations on June 12, 2007, February 13, 2008, February 23, 2009 and May 13, 2009.

**ORDER**

1. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act or the Regulations and Standards issued thereunder.

2. AWA License Number 41-C-0122 is revoked.

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3. This Decision and Order shall become final and effective without further proceedings thirty-five days after service on the Respondents, 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.

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**In re: LEE MARVIN GREENLY.**  
**Docket No. 11-0073.**  
**Decision and Order.**  
**Filed August 22, 2012.**

**AWA.**

Colleen A. Carroll, Esq., for Complainant.

Larry D. Perry, Esq., for Respondents.

*Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.*

## **DECISION AND ORDER**

### **Preliminary Statement**

This Decision and Order involves the second of two actions initiated by Kevin Shea, the Acting Administrator of the Animal and Plant Health Inspection Service (APHIS) against Lee Marvin Greenly (Greenly) seeking termination of his Animal Welfare Act license.<sup>1</sup>

This action, also filed on November 29, 2010, was initiated by the filing of an Order to Show Cause Why Animal Welfare Act License 41-C-0122 Should Not Be Terminated and named Greenly as the Respondent. The Order to Show Cause alleges that Respondent is no

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<sup>1</sup> The other action is In re Lee Marvin Greenly and Minnesota Wildlife Connection, Inc., Docket No. 11-0072

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longer fit for licensure under the Animal Welfare Act, 7 U.S.C. §2131, *et seq.* (the Act or AWA) as a result of a conviction under the Lacey Act (16 U.S.C. §§3371-3378) and other specified grounds and seeks termination of Respondent's license and disqualification of the Respondent, any agent, assigns, or business entity in which the Respondent might hold a position as an officer, agent or representative, or otherwise holds a significant business interest from obtaining an AWA license for a period of two years.

After requesting and being granted an extension of time in which to respond, Respondent filed his Answer on January 14, 2011. The Answer was accompanied by a Motion to Consolidate the two proceedings brought against him and during a teleconference held on January 19, 2011, the Motion was granted with a written Order entered into the record of the same date.<sup>2</sup>

On February 8, 2011, Complainant filed a Motion for Summary Judgment and on March 1, 2011 sought and was granted an Extension of Time in which to comply with the Order of January 19, 2011 concerning the exchange deadlines established for the consolidated hearing. By Order entered on March 8, 2011, the ruling on the Motion for Summary Judgment was deferred pending the hearing of the consolidated actions. On April 14, 2011, the Complainant amended its Complaint in Docket No. 11-0072 and on May 5, 2011, moved to continue the oral hearing of the consolidated cases. By Notice of Hearing entered on April 25, 2012, the actions were rescheduled to be heard on May 1, 2012 in Minneapolis, Minnesota.<sup>3</sup>

At the hearing conducted May 1 and 2, 2012, eleven witnesses testified for the Complainant, seven witnesses testified for the Respondents, fifty-one exhibits were admitted for the Complainant and forty-eight exhibits admitted for the Respondents.<sup>4</sup>

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<sup>2</sup> From the onset, Counsel for Mr. Greenly placed both docket numbers on his pleadings.

<sup>3</sup> The actions had previously been set for hearing on May 1, 2012 in Duluth, Minnesota; however, court space was not available and the location of the hearing was moved to Minneapolis.

<sup>4</sup> Includes sub exhibits introduced by Complainant (2-2c less 2a, 16-16a, and 24-24a).

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### Discussion

In addition to setting forth allegations concerning the Lacey Act plea and conviction, the Show Cause Order indicates that the Respondent is unfit for licensure and that maintenance of a license by him would be contrary to the purposes of the Act. The Show Cause Order also mirrors certain of the allegations contained in Docket No. 11-0072, containing the handling violations alleged on February 12, 2009, August 14, 2010, and October 19, 2010 and inspection access violations alleged to have occurred on December 19, 2006, June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009.

In responding to the Show Cause Order, Respondent suggests: (a) that the plea agreement “that does not bind any federal or state agency;” (b) that there was a genuine dispute related to the land boundaries where the offense was alleged to have occurred; (c) that Minnesota allows baiting of bears in bear season and no laws were broken in that regard; (d) that the Respondent was licensed as a hunting guide; and (e) that the State of Minnesota requires all land where hunting is prohibited to be posted and that the land in question was not posted.

In Respondent’s post hearing brief, Respondent argues that the Lacey Act is not part of the AWA and that USDA has no oversight over wildlife “unless exhibited to the public or used in research or teaching” and raises the defenses of Double Jeopardy and a bar to the action by reason of the Statute of Limitations.

The Animal Welfare Act (the Act) provides that the Secretary shall issue licenses to dealers and exhibitors upon application in such form and manner as the Secretary may prescribe (7 U.S.C. § 2133).<sup>5</sup> The power to require and to issue licenses under the Act includes the power to terminate a license and to disqualify a person from being licensed. *In re: Amarillo Wildlife Refuge, Inc.* 68 Agric. Dec. \_\_\_\_ (U.S.D.A. 2009); *In*

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<sup>5</sup> “. . . Provided that no license shall be issued until the dealer or exhibitor shall have demonstrated that his facility complies . . .”

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*re: Loreon Vigne*, 67 Agric. Dec. \_\_\_\_\_ (U.S.D.A. 2008); *In re: Mary Bradshaw*, 50 Agric. Dec. 499, 507 (U.S.D.A. 1991).

The primary basis of the Administrator's determination that the Respondent is no longer fit to be licensed as an exhibitor under the Animal Welfare Act is based upon evidence that the Respondent was convicted of conspiracy to violate the Lacey Act. In his Answer, the Respondent admits entering into the plea agreement and acknowledges that the plea agreement is a matter of record.

The Lacey Act, introduced by Iowa Congressman John Lacey, was signed into law by President William McKinley on May 25, 1900, and was the first federal law protecting wildlife. The original Act was directed primarily at the preservation of game and wild birds by making it a crime to poach game in one state with the purpose of selling the bounty in another. Following a number of amendments, the Act now protects both plants and wildlife by providing both civil and criminal penalties for a wide array of violations prohibiting trade in wildlife, fish and plants that have been illegally taken, possessed, transported or sold.<sup>6</sup>

Section 2.11 of the Regulations (9 C.F.R. § 2.11) authorizes denial of a license for a variety of reasons, including:

(a) A license will not be issued to any applicant who:

(4) Has pled *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to animal cruelty, within one year of application, or after one year if the Administrator determines that the circumstances render the applicant unfit to be licensed.

....

(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

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<sup>6</sup> Significant amendments were added in 1969, 1981 and 1988. The 1988 amendment was added to cover threats to big game species under the ambit of a "sale."

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*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 issuance of a license would be contrary to the purposes of the Act.

Section 2.12 (9 C.F.R. § 2.12) provides:

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.

The evidence establishes that on November 27, 2006, the United States and Respondent entered into a Plea Agreement and Sentencing Stipulations whereby Respondent pleaded guilty to the Information charging him with a misdemeanor conspiracy violation of the Lacey Act, by making or submitting a false record or account for wildlife under 16 U.S.C. §3372(d), 3372(d)(3)(B)(ii), all in violation of 18 U.S.C. § 371. *United States v. Lee Marvin Greenly*, Crim. No. 060235 (PAM) (D. Minn); CX-120. In the Plea Agreement, Respondent admitted committing the offenses and agreed to and did plead guilty to conspiring to violate the Lacey Act. *Id.* at 2-3. In addition to the admissions contained in the Plea Agreement, the record contains supporting evidence reflecting that Respondent had given statements and submitted records to the Minnesota Department of Natural Resources (DNR) concerning the incident, falsely representing that he had guided a country singer named Troy Gentry on a commercial hunt “in a no-quota zone” where Gentry had killed the bear. CX-32, 33, and 35.

At the hearing, Respondent testified that on Dr. Cathy Hovancsak’s last inspection of his facility, she informed him that under a new policy a bear named “Cubbie” that he was keeping in a seven acre “hot wire” enclosure would need a second barrier installed. Tr. 501-502. At the time, “Cubbie” was experiencing serious dental problems would require

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expensive dental work if the bear were to be kept.<sup>7</sup> As the cost of either the fence or dental care would be an expense Respondent was reluctant to “bear,” after unsuccessful efforts to find the animal another home and discussing the matter with Dr. Hovancsak, Greenly agreed to euthanize the bear. Tr. 503-504. Rather than complying with the facility’s Program of Veterinary Care which required euthanization by injection; however, Respondent searched for an individual who would purchase the animal for slaughter. Tr. 505, CX-75. After receiving one offer for \$1,500 which never reached fruition, he was contacted by a hunting client, Troy Gentry, who expressed interest in purchasing the animal and being filmed killing the bear with a bow and arrow. Tr. 505-507. After the bear was killed on Greenly’s property, it was tagged with a Minnesota Department of Natural Resources hunting license tag and submitted as a lawfully taken bear from the wild population. CX-121. Cubbie’s hide and teeth were then transported to Kentucky to a taxidermist for mounting and tanning. Tr. 506-507.

As the handling and inspection access violations were addressed in the companion case, Docket No. 11-0072, no need exists to discuss them further in this action.

Based upon the record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

**Findings of Fact**

1. Respondent Lee Marvin Greenly is an individual residing in the State of Minnesota who holds Animal Welfare Act license number 41-C-0122 as an exhibitor in his own name. CX-2. Greenly exhibits wild and exotic animals to the public both at traveling locations and operates what he refers to as a photographic educational game farm on property that he owns on the Kettle River near Sandstone, Minnesota. Tr. 382-383. On various occasions, he also provides animals for photographic opportunities at other locations on nearby private or public land that he does not own. Tr. 439-440.

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<sup>7</sup> The causation of the dental problems was not established; however, Respondent frequently feeds his bears a sweet called “Gummi Worms.” Tr.

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2. On November 27, 2006, the United States and Respondent entered into a Plea Agreement and Sentencing Stipulations whereby Respondent agreed to plead guilty to the Information charging him with a misdemeanor conspiracy violation of the Lacey Act, by making or submitting a false record or account for wildlife under 16 U.S.C. §3372(d), 3372(d)(3)(B)(ii), all in violation of 18 U.S.C. §371. *United States v. Lee Marvin Greenly*, Crim. No. 060235 (PAM) (D. Minn); CX-120, 121.

3. Pursuant to the Plea Agreement, Respondent admitted the offense, agreed to and did plead guilty in the United States District Court to conspiring to violate the Lacey Act and to violating the Lacey Act. *Id at* 2-3.

4. On February 26, 2007, Respondent was sentenced by Senior United States District Judge Paul A. Magnuson in the United States District Court for the District of Minnesota to probation for three months, a fine of \$15,000.00, a special assessment of \$25.00 and other terms and conditions contained in the sentencing documents. CX-120-121.

5. Respondent submitted false statements and records to the Minnesota Department of Natural Resources (DNR) concerning the incident, falsely representing that he had guided a country singer named Troy Gentry on a commercial hunt “in a no-quota zone” where Gentry had killed the bear when in fact the bear was killed on Greenly’s property in a fenced enclosure. CX-32, 33, 35, 120 and 121.

#### **Conclusions of Law**

1. The Secretary has jurisdiction in this matter.
2. The Respondent, having been found guilty on February 26, 2007 of a criminal misdemeanor conspiracy violation of the Lacey Act, by making or submitting a false record or account for wildlife under 16 U.S.C. §3372(d), 3372(d)(3)(B)(ii), in violation of 18 U.S.C. §371 by the United States District Court for the District of Minnesota, is found to be unfit to

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hold an Animal Welfare Act license. 9 C.F.R. §2.11(a)(4) and (6); and §2.12.

3. License revocation proceedings do not constitute Double Jeopardy.
4. As Respondent's conviction and sentence were not entered until February 26, 2007, the termination proceedings are not barred by the Statute of Limitations.

**ORDER**

1. Should the revocation of Respondent's Animal Welfare Act License No. 41-C-0122 in Docket No. 11-0072 be vacated for any reason, said license is terminated by this action.
2. The Respondent is disqualified for a period of 2 years from becoming licensed under the Animal Welfare Act or otherwise obtaining, holding, or using an Animal Welfare Act license, directly or indirectly through any corporate or other device or person.
3. This Decision and Order shall become final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to Section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

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

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**In re: JENNIFER CAUDILL, AN INDIVIDUAL KNOWN AS  
JENNIFER WALKER AND JENNIFER HERRIOTT WALKER;  
AND MITCHEL KALMANSON, AN INDIVIDUAL.<sup>1</sup>**

**Docket No. 10-0416.**

**Decision and Order.**

**Filed September 24, 2012.**

**AWA.**

Colleen A. Carroll, Esq. for Complainant.

William J. Cook, Esq. for Respondents.

*Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.*

**DECISION AND ORDER AS TO MITCHEL KALMANSON**

**Preliminary Statement**

This license termination proceeding was initiated on September 7, 2010 by Kevin Shea, the Acting Administrator of the Animal and Plant Health Inspection Service (APHIS) pursuant to Animal Welfare Act (the Act or AWA), 7 U.S.C. § 2131, *et seq.*, by the filing of an Order to Show Cause Why Animal Welfare Act Licenses 58-C-0947, 55-C-0146 and 58-C-0505 Should Not Be Terminated. The action as brought originally named Jennifer Caudill (also known as Jennifer Walker and Jennifer Herriott Walker) (Caudill), Brent Taylor (Taylor) and William Bedford (Bedford), individuals doing business as Allen Brothers Circus, and Mitchel Kalmanson (Kalmanson) as Respondents. When AWA license 55-C-0146 was voluntarily terminated on May 12, 2012, the issues concerning Taylor and Bedford were resolved. APHIS moved to withdraw the Order to Show Cause concerning Bedford and Taylor and an Order of Dismissal was entered as to them on June 15, 2012.<sup>2</sup>

Answers, and as to some of the Respondents, Amended Answers were ultimately filed and multiple pleadings, including several Motions

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<sup>1</sup> The Show Cause Order Caption and contents spell Kalmanson's first name as Mitchell. Correspondence from him however indicates that the proper spelling is Mitchel. Letter, dated September 13, 2010, Docket Entry No. 5.

<sup>2</sup> Order of Dismissal, June 15, 2012, Docket Entry No. 73

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to Dismiss, two Motions for Summary Judgment, a Motion to have Complainant's Counsel disqualified from further involvement in the case, and another to recuse "Administrator" L. Eugene Whitfield (in actuality the Department's Hearing Clerk) were filed by Respondents, all of which were denied.<sup>3</sup> The matter was originally set for oral hearing in Tampa, Florida to commence on March 22, 2011, but was continued and later rescheduled for June 11, 2012.<sup>4</sup>

At the hearing, thirteen witnesses testified.<sup>5</sup> Thirty-five exhibits were introduced by the government and eighteen by the Respondents.<sup>6</sup> Post hearing briefs have been received from all parties and the matter is now ripe for disposition.

**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.<sup>7</sup> Since that time Congress periodically has acted to strengthen

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<sup>3</sup> Docket Entry Nos. 6, 7, 10, 15, 17, 19, 20, 21, 56, and 60.

<sup>4</sup> Docket Entry Nos. 44, 51, 65, and 67.

<sup>5</sup> References to the Transcript will be indicated as Tr. and the page number.

<sup>6</sup> Complainant's exhibits are referred to as CX and the exhibit number. Respondent Caudill's exhibits are referred to as RCX and the exhibit number. Respondent Kalmanson's exhibits are referred to as RKX and the exhibit number. Joint Respondent exhibits are referred to as RCKX and the exhibit number.

<sup>7</sup> 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.

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enforcement, expand coverage to more animals and activities, or conversely, curtail practices that are viewed as cruel or dangerous.<sup>8</sup>

The Act provides that the Secretary shall issue licenses to dealers and exhibitors upon application in such form and manner as the Secretary may prescribe, 7 U.S.C. § 2133.<sup>9</sup> As part of his enforcement authority, the Secretary may suspend or revoke the license of any dealer or exhibitor who violates the Act or its Regulations. 7 U.S.C. § 2149(a). The power to require and to issue licenses under the Act includes the power to terminate a license and to disqualify a person from being licensed. *In re: Amarillo Wildlife Refuge, Inc.* 68 Agric. Dec. 77 (U.S.D.A. 2009); *In re: Loreon Vigne*, 67 Agric. Dec. 9620 (2008), *aff'd with modifications*, 67 Agric. Dec. 1060 (U.S.D.A. 2008); *In re: Mary Bradshaw*, 50 Agric. Dec. 499, 507 (U.S.D.A. 1991). Violations of the Act by licensees can result in the assessment of civil penalties, and the suspension or revocation of licensees. 7 U.S.C. § 2149.

The license termination proceedings brought against Kalmanson and the other Respondents appears to have arisen from concerns, suspicions and unverified conclusions on the part of Dr. Elizabeth Goldentyer, the Eastern Regional Director for the USDA Animal and Plant Health Inspection Service, Animal Care Program, that the Respondents were engaged in activities designed to circumvent an Order of the Secretary of Agriculture revoking the AWA exhibitor's license previously held by Lancelot Kollman Ramos (Ramos), conduct specifically proscribed by Section 2.11(d) of the Regulations, 9 C.F.R. § 2.11(d).<sup>10</sup> APHIS personnel involved in preparing inspection reports were specifically instructed by Goldentyer and her staff to include language in their reports to the effect that "This licensee appears to be circumventing the

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<sup>8</sup> 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 100<sup>th</sup> 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.

<sup>9</sup> ". . . Provided that no license shall be issued until the dealer or exhibitor shall have demonstrated that his facility complies. . ."

<sup>10</sup> "No license will be issued under circumstances that the Administrator determines would circumvent any order suspending, revoking, terminating, or denying a license under the Act." 9 C.F.R. § 2.11(d).

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revocation of Lancelot Kollman Ramos-2.10(b), 2.11(d), 2.12.”<sup>11</sup> Tr. 386-387, CX-20 (McFadden), 23 (Geib), 24 (Baltrush), 25 (Baltrush),<sup>12</sup> 28 (Howard).<sup>13</sup>

Dr. McFadden in her testimony indicated that the direction to include that language had come from her supervisor, Dr. Elder Magrid, who reports to Dr. Goldentyer but indicated it was not a conclusion that she, (McFadden), had reached. Tr. 159-160. Dr. Mary Geib testified that she believed her instructions to include the language came from Dr. Goldentyer. Tr. 177-179. Her testimony makes it clear that that there was no factual basis for the conclusory language from what she had observed. *Id.* Jan Baltrush, an experienced USDA Animal Care Inspector since 1988, testified that the directed language was placed in the report only because she was told to and admitted that she had no factual basis for its inclusion. Tr. 198. While possibly not rising to the level of “fraud upon the Court” as suggested by Kalmanson’s post hearing brief, such egregiously improper and inappropriate actions can only be condemned in the strongest terms possible and casts significant doubt upon the ability of the officials involved to properly execute their responsibilities to the public that they serve as part of the “People’s Department.”<sup>14</sup>

Ramos’s license No. 58-C-0816 had been revoked effective October 19, 2009 following his unsuccessful appeal of administrative

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<sup>11</sup> Dr. Goldentyer admitted directing both inspectors and supervisors to include the language. Tr. 386. Later, she answered “Yeah. They definitely were given that language.” Tr. 437. Excerpts from the APHIS Exhibitor Inspection Guide introduced during the hearing provide that reports should have a clear, detailed description of the non-compliance and include **observations** by the inspecting official and avoid personal comments or administrative messages to the regional office. Tr. 302-303. RCKX-1.

<sup>12</sup> “Should a Contracted Licensee act in a manner that is circumventing the AWA the Cole Brothers Circus may be held responsible.” CX-25.

<sup>13</sup> “This licensee appears to be assisting in the direct circumvention of a USDA revocation order.” CX-28.

<sup>14</sup> Two and a half years after the Department of Agriculture was established in 1862, in what would be his final annual message to Congress, then President Abraham Lincoln called USDA the “People’s Department. As for the obligations of public officials, attention is invited to the oft quoted admonition to prosecutors that while “he may strike hard blows, he is not at liberty to strike foul ones.” *United States v. Berger*, 295 U.S. 78, 88 (1935).

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proceedings.<sup>15</sup> At the time of the revocation of his license, Ramos either owned or had in his possession approximately 37 exotic felids being exhibited at circus venues.<sup>16</sup> CX-9. Subsequent to his license being revoked, Ramos sold a number of his animals that were being exhibited in traveling circuses to Jennifer Caudill who assumed the obligations under the agreements that Ramos had made and in return was entitled to the revenue generated from the use of the animals.

Kalmanson's name appears a total of eight times in the Complaint. It first appears two times in paragraph 4 where he is identified as an individual whose business address is in Maitland, Florida and the holder of AWA License No. 58-C-0505. It next appears in paragraph 5d where it is alleged that seven or eight tigers owned by Ramos were exhibited by Ramos, Soul Circus, Inc., and Respondents Caudill and Kalmanson since February of 2010. Kalmanson's name again appears two times in paragraph 20 which relates to Caudill's preparation of an APHIS Form 7006 conveying seven tigers to Kalmanson<sup>17</sup> and a second form prepared by Kalmanson stating that the animals had been "abandoned" in Atlanta, Georgia. The next mention is in paragraph 22 which relates to a letter from Dr. Goldentyer to Kalmanson expressing her concerns that Lance Kollman (Ramos) intended to use Kalmanson's license. In her letter of March 10, 2010, Dr. Goldentyer wrote that she was "concerned that Mr. Lance Kollman [Ramos] has or intends to use your license, or that of Jennifer Caudill, to engage in activities governed under the Animal Welfare Act...without holding a valid license. CX-16. Paragraph 31 describes a letter that Kalmanson wrote to APHIS and the final mention

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<sup>15</sup> *In re Octagon Sequence of Eight, Inc.*, 66 Agric. Dec. 1093 (2007), *aff'd sub nom. Kollman Ramos v. Dep't of Agriculture*, 68 Agric. Dec. 60 (2009); 322 Fed App'x 814 (11th Cir. 2009) (not selected for publication.) CX-32, 33.

<sup>16</sup> Ten tigers had been travelling with Feld Entertainment, Inc. (d/b/a Ringling Brothers, Barnum & Bailey); eight tigers and one liger were with the Cole Brothers Circus (Cole Bros); eight tigers were with Soul Circus, Inc. (UniverSoul or Soul); and 10 were being kept at property owned by Ramos's mother in Balm, Florida. Tr. 673-674, CX-5, 6.

<sup>17</sup> The APHIS Form from Caudill to Kalmanson appears to have be prepared "after the fact" at the request of Todd Nimms of the Georgia Fish and Game so that he had something for his records indicating that she no longer had the cats. Tr. 581, 666-667, CX-14.

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in Paragraph 34 contains the conclusion that Kalmanson (and Caudill) were operating as Ramos's surrogates.

Complainant's post hearing brief's discussion of Kalmanson's involvement is equally scant and not particularly helpful, containing a proposed finding on page 11 and 12 identifying him as an exhibitor and some discussion of the two APHIS Forms 7006 prepared concerning the seven tigers travelling with Soul. On pages 12 and 13, a proposed finding references Dr. Goldentyer's concerns set forth in her March 10, 2010 letter to Kalmanson.<sup>18</sup> On page 15, another finding relates to Kalmanson's July 13, 2010 letter to APHIS. On page 16, two proposed adverse Conclusion of Law are set forth. Page 19 sets forth the assertion that Kalmanson is unfit for licensure based upon a conclusion that he "engaged in activities to facilitate the circumvention of the Secretary's order revoking Ramos's license...Additional unsupported conclusions are contained on page 21 and 22. Complainant's Post Hearing Brief, Docket Entry No. 81.

In its brief, Complainant asserts that Kalmanson knowingly "acquired" animals from unlicensed entities. Complainant's Brief, p. 21, Docket Entry No. 81. Not only was there no corresponding allegation of such conduct in the Complaint, the evidence of record indicates Kalmanson's acquisition of the animals was prompted by USDA's informing both of the Soul and Cole Bros. circuses that although Caudill had an exhibitor's license she was not considered qualified to exhibit the animals.<sup>19</sup> Tr. 39, 585-586, 658-659. The evidence further strongly suggests that Kalmanson's acquisition was acquiesced in, if not suggested by USDA officials. Tr. 575, 577-579, 584-589, 614. Moreover, although it is clear that USDA was informed by Kalmanson that he had acquired the animals, the record contains no indication that USDA ever corresponded with Kalmanson objecting to his acquisition of

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<sup>18</sup> Kalmanson responded to the Goldentyer letter by certified letter dated March 25, 2010. RKX-6.

<sup>19</sup> AWA Exhibitor's Licenses do not contain any restrictions on the face of the license. Dr. Goldentyer testified that a Class C License authorizes the exhibition of any number of animals including tigers. Tr. 312.

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the animals or advising him that the acquisition itself was in any way improper.<sup>20</sup>Tr. 454, CX-26, RKX-8.

The evidence adduced at trial falls short of establishing the allegations contained in the Complaint. Aside from establishing that Kalmanson had known Ramos for as much as 40 years and that the animals that Kalmanson took custody, control and possession of previously belonged to Ramos, the record is completely devoid of any evidence of Ramos's involvement in Kalmanson's exhibition of the animals once Kalmanson took custody of them.<sup>21</sup> After being advised by USDA that Caudill was not qualified to exhibit the animals at their circus (Tr. 56, 658-659), Sedrick "Ricky" Walker, one of the owners of Soul, contacted Kalmanson (who at the time was in the United Kingdom on business) on February 25, 2010 and asked him to take custody, control

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<sup>20</sup> It is well established that the Animal Welfare Act is considered remedial legislation. *In re* Animals of Montana, 68 Agric. Dec. 92, 106 (U.S.D.A. 2009); *In re* Martine Collette, 68 Agric. Dec. 768, 786 (U.S.D.A. 2009); *In re* Sam Mazzola, 68 Agric. Dec. 822, 848 (U.S.D.A. 2009); *In re* Loreon Vigne, 67 Agric. Dec. 1060, 1068 (U.S.D.A. 2008); *In re* Tracey Harrington, 66 Agric. Dec. 1061, 1071 (U.S.D.A. 2007); *In re* Mary Jean Williams, (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (U.S.D.A. 2005); *In re* Richard Miehke, 64 Agric. Dec. 1295, 1313 (U.S.D.A. 2005); *In re* Eric John Drogosch, 63 Agric. Dec. 623, 645-46 (U.S.D.A. 2004); *In re* Wanda McQuarry, 62 Agric. Dec. 452, 479 (U.S.D.A. 2003); *In re* J. Wayne Shaffer, 60 Agric. Dec. 444, 479 (U.S.D.A. 2001); *In re* Reginald Dwight Parr, 59 Agric. Dec. 601, 626 (U.S.D.A. 2000); *In re* Marilyn Shepherd, 57 Agric. Dec. 242, 270 (U.S.D.A. 1998); *In re* Richard Lawson, 57 Agric. Dec. 980, 1012 (U.S.D.A. 1998); *In re* David Zimmerman, 57 Agric. Dec. 1038, 1063 (U.S.D.A. 1998); *In re* Volpe Vito, Inc., 56 Agric. Dec. 269, 272 (1997); *In re* Patrick Hooctor, 56 Agric. Dec. 416, 426 (U.S.D.A. 1997); *In re* S.S. Farms Linn Cnty., Inc. (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (U.S.D.A. 1991); and *In re* Lloyd A. Good, Jr., 49 Agric. Dec. 156, 163 (U.S.D.A. 1990). Despite the remedial nature of the legislation, Dr. Goldentyer expressed unwillingness to give guidance to licensees, particularly if there was an ongoing investigation, as she did not want to "talk people around what the requirements are." Tr. 331-332, 343. While clearly some balancing judgment is necessary, communication of compliance guidance to licensees concerning the standards requirements might well limit if not avoid litigation.

<sup>21</sup> Although Kalmanson indicated that he had written insurance for Kollman (Ramos), his testimony that he had never had any business enterprise with Ramos was not rebutted. Tr. 604, 624.

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and possession of the felids that were on exhibition with the circus.<sup>22</sup> Tr. 569-575, 659. Kalmanson's relationship with Soul was both of long standing and in a variety of capacities. In addition to writing their insurance, he had provided risk management services and in the past provided animals to the corporation. Tr. 568. Jennifer Caudill confirmed that it was Sedrick Walker who had decided to contact Kalmanson. Tr. 659. Given USDA's strong warnings to the circus concerning Jennifer Caudill's lack of qualification to exhibit the animals, despite the financial impact it would have on Caudill, Soul's approaching Kalmanson was entirely reasonable given their established relationship with him. Tr. 658-659. *See*, CX-15.

The second occasion occurred on July 13, 2010 when Kalmanson was approached with a virtually identical request and asked to assume responsibility for the felids travelling with the Cole Bros. Circus. Tr. 595-598, RKX-7. In neither instance was Kalmanson required to pay for the animals. The record makes it abundantly clear that while Kalmanson was willing to assume responsibility for the animals, he had no intention of paying anyone to acquire them.<sup>23</sup> Tr. 580, 587-588, 600, 625-626. The record fails to establish any agreement between Jennifer Caudill and Kalmanson. Tr. 605, 665, 667. Although Ms. Caudill may have entertained hopes that she would eventually get the animals back (Tr. 666, 668), Kalmanson's testimony makes it obvious that he took advantage of a business opportunity which was making money exhibiting the animals and that he had no intention of returning the animals to her. Tr. 599-600, 628-629, 636.

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

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<sup>22</sup> Caudill had sought to overcome USDA's objection to her lack of experience by calling on an old family friend, William Bedford, to assist her and be responsible for the animals. Tr. 40. Bedford had agreed and Caudill had transferred the animals to him. CX-12. By contacting Kalmanson, Walker declined to allow William Bedford, a licensed exhibitor, to continue to assist Caudill and Bedford was told to leave which he did. Tr. 48.

<sup>23</sup> The record does indicate that upon acquiring the animals, he took the animals and spent the money "to bring them up to my standards" by having them micro-chipped and examined by a veterinarian." Tr. 580, 605-613, 635

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### **Findings of Fact**

1. Respondent Mitchell Kalmanson is an individual residing in and operating his business ventures from the State of Florida. In addition to being a wholesale or retail insurance broker specializing in animal entertainment insurance, load master, and risk management consultant, he owns a number of animals and is licensed as an exhibitor under the Act, holding AWA License No. 58-C-0505. Tr. 561-565. He also owns and maintains a 200 acre facility located north of Orlando which is not open to the public at which he keeps some of his animals. Tr. 566.
2. Although the record reflects conflicting evidence as to actual title of the animals, at the request of Soul Circus, Kalmanson took custody, control and possession of seven tigers (Egor, Jellie, Natasha, Savannah, Diva, Gondie, and Chad) on February 25, 2010. An APHIS form 7006 was completed by Kalmanson on that date indicating that the tigers had been abandoned and were delivered by Soul Circus to Kalmanson.<sup>24</sup> CX-14, RKX-3.
3. On or about July 13, 2010, at the request of Cole Bros Circus, Kalmanson took custody, control and possession of eight tigers and one liger (Aztec, Tahar, Appollo, Mohan, Chercon, Rambo, Mariha, Shakira and Zeus) that had been traveling with the Cole Bros. circus. On July 13, 2010, Kalmanson wrote to APHIS concerning the circumstances of his acquiring the animals. CX-26, RKX-8.
4. All of the animals acquired by Kalmanson had previously belonged to Lancelot Kollman Ramos.
5. Kalmanson acknowledged knowing Ramos for “probably 40 years;” however, the record is completely devoid of any contact between the two

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<sup>24</sup> Jennifer Caudill had previously prepared an APHIS Form 7006 conveying the animals to Brent Taylor and William Bedford; however, Bedford later disclaimed ownership. Tr. 60, CX-12, 22. A second form prepared by Caudill purporting to convey the same animals to Kalmanson was completed at the behest of and to satisfy Todd Nimms, a Georgia Fish and Wildlife officer. fn. 17.

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individuals in connection with Kalmanson's acquisition of the animals or with Kalmanson's subsequent use of them.

6. The instructions given by Dr. Elizabeth Goldentyer, the Eastern Regional Director for the USDA Animal and Plant Health Inspection Service, Animal Care Program and her staff to APHIS personnel involved in preparing inspection reports to include language in their reports to the effect that "This licensee appears to be circumventing the revocation of Lancelot Kollman Ramos-2.10(b), 2.11(d), 2.12" impermissively and inappropriately tainted the investigation of Kalmanson's conduct.

**Conclusions of Law**

1. The Secretary has jurisdiction in this matter.
2. The evidence is insufficient to find that Respondent Kalmanson is unfit to hold an AWA license or that maintenance of a license by him would in any way be contrary to the purposes of the Act.
3. Assuming he otherwise meets the eligibility requirements of 7 C.F.R. §1.184, the award of Equal Access to Justice Act (EAJA) fees to Respondent Kalmanson is appropriate.

**ORDER**

1. The determination by the Administrator that Respondent Mitchell Kalmanson is unfit to be licensed as an exhibitor under the Act is **REVERSED** and the license termination proceedings against AWA License No. 58-C-0505 are **DISMISSED**.
2. Any application for EAJA fees shall be submitted not later than 30 days after this Decision and Order becomes final. In the event of appeal by the Complainant within that period, action on the application will be deferred until a final Decision is entered.
3. This Decision and Order shall become final and effective without further proceedings thirty-five days after service on the Respondents, unless appealed to the Judicial Officer by a party to the proceeding

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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.

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**In re: ERIC JOHN DROGOSCH, AN INDIVIDUAL.**  
**Docket No. 11-0024.**  
**Decision and Order.**  
**Filed November 28, 2012.**

AWA.

Colleen A. Carroll, Esq. for Complainant.  
Respondent, pro se.

*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

**DECISION AND ORDER BY REASON OF DEFAULT**  
**(FAILURE TO APPEAR)**

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131, *et seq.*) (the “Act”), by a complaint filed on October 21, 2010, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent violated the Act and the regulations promulgated thereunder.

Respondent Eric John Drogosch was duly notified in writing of the time and place of the oral hearing in this matter (November 27-30, 2012, at 300 West Belknap, Trial Room D, Fort Worth, Texas). Said respondent has failed to appear at the hearing, without good cause. Therefore, pursuant to section 1.141(e) of the applicable Rules of Practice, said respondent is “deemed to have waived the right to an oral hearing in the proceeding and to have admitted any facts which may be presented at the hearing.” 7 C.F.R. § 1.141(e). Complainant has elected to follow the procedure set forth in section 1.139 of the Rules of Practice (7 C.F.R. §1.139). The material facts alleged in the complaint are all

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admitted by the respondent Drogosch's failure to appear at the hearing without good cause, and they are adopted and set forth herein as Findings of Fact and Conclusions of Law. This decision and order is issued pursuant to sections 1.139 and 1.141(e) of the Rules of Practice.

**Findings of Fact**

1. Respondent Eric John Drogosch is an individual who did or does business as Great Cat Adventures, and whose last known business mailing address is P.O. Box 161095, Ft. Worth, TX 76161. At all times mentioned herein, said respondent was (1) operating as an exhibitor, as that term is defined in the Act and the Regulations; or (2) acting for or employed by an exhibitor (respondent Palazzo), and his acts, omissions, or failures within the scope of his employment or office are, pursuant to section 2139 of the Act (7 U.S.C. § 2139), deemed to be his own acts, omissions, or failures, as well as the acts, omissions, or failures of respondent Palazzo. Respondent Drogosch previously held AWA license number 74-C-0536, which license was revoked in 2004, by order of the Secretary.<sup>1</sup>

2. Respondent Drogosch has previously been found to have violated the Act and the Regulations. Respondent Drogosch has knowingly failed to obey a cease and desist order issued by the Secretary.<sup>2</sup> Respondent Drogosch has not shown good faith. Respondent Drogosch, after having specifically been advised that the failure to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, is a violation, has knowingly continued to violate the handling Regulations, and to do so in a manner that presents a serious risk of harm to both people and animals.

3. From approximately February 26, 2010, through September 1, 2010, respondent Drogosch operated as an exhibitor and/or a dealer, without having a valid license to do so.

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<sup>1</sup> *In re* Eric John Drogosch, 63 Agric. Dec. 623 (U.S.D.A. 2004) (Decision and Order).

<sup>2</sup> *See* Note 1.

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4. On or about the following dates, respondent Drogosch failed to handle tigers as carefully as possible in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort:

- a. September 29, 2008 (Tulsa Fair Grounds, Tulsa, Oklahoma)
- b. February 27, 2009 (Brownwood Intermediate School, Brownwood, Texas)
- c. April 11, 2009 (Great Cat Adventures, Atoka, Oklahoma)
- d. March 3, 2009 (Dublin Elementary School, Dublin, Texas)
- e. August 7, 2008 (Washington Town and Country Fair, Washington, Missouri)

5. On or about the following dates, Respondent Drogosch failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public:

- a. September 29, 2008 (Tulsa Fair Grounds, Tulsa, Oklahoma)
- b. February 27, 2009 (Brownwood Intermediate School, Brownwood, Texas)
- c. April 11, 2009 (Great Cat Adventures, Atoka, Oklahoma)
- d. March 3, 2009 (Dublin Elementary School, Dublin, Texas)
- e. August 7, 2008 (Washington Town and Country Fair, Washington, Missouri)

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1. From approximately February 26, 2010, through September 1, 2010 (a total of 157 days), respondent Drogosch operated as an exhibitor and/or a dealer, without having a valid license to do so, in willful violation of section 2134 of the Act, and sections 2.1 and 2.10 of the Regulations.

2. On or about the following five dates, respondent Drogosch failed to handle tigers as carefully as possible in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort, in willful violation of section 2.131(b)(1) of the Regulations. 9 C.F.R. § 2.131(b)(1):

- a. September 29, 2008 (Tulsa Fair Grounds, Tulsa, Oklahoma)
- b. February 27, 2009 (Brownwood Intermediate School, Brownwood, Texas)
- c. April 11, 2009 (Great Cat Adventures, Atoka, Oklahoma)
- d. March 3, 2009 (Dublin Elementary School, Dublin, Texas)
- e. August 7, 2008 (Washington Town and Country Fair, Washington, Missouri)

3. On or about the following five dates, respondent Drogosch failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, in willful violation of section 2.131(c)(1) of the Regulations. 9 C.F.R. § 2.131(c)(1).

- a. September 29, 2008 (Tulsa Fair Grounds, Tulsa, Oklahoma)
- b. February 27, 2009 (Brownwood Intermediate School, Brownwood, Texas)
- c. April 11, 2009 (Great Cat Adventures, Atoka, Oklahoma)

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d. March 3, 2009 (Dublin Elementary School, Dublin, Texas)

e. August 7, 2008 (Washington Town and Country Fair,  
Washington, Missouri)

4. Respondent Drogosch (a) violated section 2134 of the Act (7 U.S.C. § 2134) and sections 2.1 and 2.10 of the Regulations (9 C.F.R. §§ 2.1, 2.10) on 157 occasions; (b) violated section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)), on five occasions; and (c) violated section 2.131(c)(1) of the Regulations (9 C.F.R. § 2.131(c)(1)), on five occasions.

5. In 167 instances, respondent Drogosch knowingly failed to obey a cease and desist order issued by the Secretary of Agriculture in *In re Eric John Drogosch*, 63 Agric. Dec. 623 (U.S.D.A. 2004) (Decision and Order).

### **ORDER**

1. Respondent Eric John Drogosch, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act, Regulations and Standards.

2. Respondent Eric John Drogosch is assessed a civil penalty of \$108,857 for his 167 violations herein.

3. Respondent Eric John Drogosch is assessed a civil penalty of \$27,550 for his knowing failures to obey the cease and desist order issued by the Secretary of Agriculture.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 of 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

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**EQUAL ACCESS TO JUSTICE ACT**

**EQUAL ACCESS TO JUSTICE ACT**

**DEPARTMENTAL DECISION**

**In re: APPLICATION FOR ATTORNEY’S FEES AND COSTS OF LARRY THORSON, ESQ., COUNSEL FOR RESPONDENTS CRAIG PERRY, AN INDIVIDUAL DOING BUSINESS AS PERRY’S EXOTIC PETTING ZOO; PERRY’S WILDERNESS RANCH & ZOO, INC., AN IOWA CORPORATION.**

**Docket No. 12-0645.**

**Decision and Order.**

**Filed September 27, 2012.**

**EAJA.**

Colleen A. Carroll, Esq. for Complainant.

Larry J. Thorson, Esq. for Respondents.

*Decision and Order entered by Janice K. Bullard, Administrative Law Judge.*

**MISCELLANEOUS DECISION AND ORDER AMENDING THE  
CAPTION AND GRANTING ATTORNEY FEES AND COSTS TO  
LARRY THORSON, ESQ., COUNSEL FOR PERRY  
RESPONDENTS**

The above captioned matter<sup>1</sup> involves an application for attorney’s fees and costs filed by counsel for one group of Respondents in an administrative disciplinary proceeding initiated by the Administrator of the Animal and Plant Health Inspection Service (“APHIS”), an agency of the United States Department of Agriculture (“USDA”; “Complainant”). APHIS filed a complaint against Craig Perry, an individual d/b/a Perry’s Exotic Petting Zoo and Perry’s Wilderness Ranch & Zoo, Inc. (“Respondents”). The complaint against Respondents was consolidated

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<sup>1</sup> At the suggestion of the Judicial Officer for USDA (“Judicial Officer”) in his Order of May 22, 2012, the caption has been amended to limit the instant matter to an application for attorney’s fees and costs related to certain Respondents in docket No. 09-0155. In addition, pleadings related to the application were filed in a separate file and a new docket number was assigned by the Hearing Clerk for USDA’s Office of Administrative Law Judges (Docket No. 12-0645).

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with other tenuously related matters under docket No. 09-0155. A hearing commenced on February 17, 2011 and continued through February 25, 2011, in person in Washington, D.C., and through audio-visual equipment located in Texas, Iowa and Missouri.

### **Procedural History**

On December 20, 2011, I issued Findings of Facts and Conclusions of Law in docket No. 09-0155, in a Decision and Order ("D&O") that segregated the Perry Respondents from other Respondents in the matter. I found that the majority of the Complainant's allegations linking the Perry Respondents to actions of other Respondents were not substantiated. I further found that Complainant had established that Respondents' failure to allow an inspection of Respondents' premises violated the Act, but concluded that the circumstances underlying the violation did not merit the imposition of a sanction.

On January 17, 2012, counsel for the Perry Respondents, Larry Thorson, Esq., filed an application for an award of attorney fees. On January 23, 2012, APHIS filed a petition to appeal my D&O to the Judicial Officer. On February 3, 2012 Complainant filed objections to an award of fees, alleging that the application was not ripe. Counsel for Respondents did not file a response.

By Order issued February 6, 2012, I deferred ruling on the petition and referred the matter to the Judicial Officer. By Order issued May 22, 2012, the Judicial Officer concluded that he lacked jurisdiction over the application for fees and remanded the matter to me. On July 19, 2012, the Judicial Officer issued a Decision and Order on appeal, in which he upheld my findings, except that he concluded that the Perry Respondents' failure to allow access to APHIS officials for inspection represented a willful violation of 7 U.S.C. § 2146(2) and 9 C.F.R. § 2.126 and warranted a sanction of \$500.00.

Neither party requested reconsideration of the Judicial Officer's Decision and Order and the Perry Respondents did not appeal his

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decision. Therefore, the matter of the pending application for attorney's fees and costs is ripe.<sup>2</sup>

**Discussion**

An award of attorney fees for the successful prosecution of claims is governed by the Equal Access to Justice Act ("EAJA") section of the Administrative Procedures Act ("APA"). 5 U.S.C. § 504. A prevailing party must file an application for fees within thirty (30) days after the final disposition of a proceeding. 5 U.S.C. § (a)(2); 7 C.F.R. § 1.193. The date of a final disposition is "the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding...becomes final and unappealable, both within the Department and to the courts." 7 C.F.R. § 1.193(b). In addition, "days" is defined by prevailing regulations as "calendar days", and therefore intervening weekends or holidays are not excluded from the computation of time. 7 C.F.R. § 1.180(a).

USDA objected to an award of fees because Mr. Thorson filed his application **before** my Decision and Order became final. Mr. Thorson's application was not untimely filed in the classic sense of failing to meet a deadline. Instead, having concluded all of his services with respect to the case before me, he protectively filed an application for fees. There is no prejudice to USDA in having notice of an application for fees and costs before the time expires within which one must file such application. USDA cites to no precedent for striking an early-filed application. There is nothing of record to suggest that the substance of Mr. Thorson's application would have changed had he waited to file his fee petition until after the final disposition of the case.

Although USDA characterizes Mr. Thorson's application as "premature", I have declined to rule upon it until it had "matured" following the expiration of the time to appeal the Judicial Officer's

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<sup>2</sup> I would have welcomed a renewed application for attorneys' fees and costs, particularly considering USDA's objections on the ground that Mr. Thorson's application was pre-maturely filed. I note that in light of the assessment of a civil penalty, Mr. Thorson may have concluded that his application would be denied. However, as I discuss *infra*, the failure to prevail on one allegation does not totally preclude an award of fees and costs.

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Decision and Order of July 19, 2012. Accordingly, USDA's objection to Mr. Thorson's application on the grounds that it was premature is overruled, and the Motion to Strike the application is DENIED.

An award of attorney's fees against the Government is appropriate if (1) the applicant is a prevailing party; (2) the Government's position was not "substantially justified; and (3) an award would not be rendered unjust due to special circumstances. See *Davidson v. USDA*, 62 Agric. Dec. 49 (U.S.D.A. 2003), citing *Sims v. Apfel*, 238 F.3d 597, 699-700 (5th Cir. 2000). An applicant for attorney fees may be said to be a prevailing party if the applicant succeeded on any significant issue. *Id.*

In order to be deemed a "prevailing party", a party must "receive at least some relief on the merits of his claim . . ." *Buckhannon B. & Care Home, Inc. v. W. Va. Dep'T of Health & Human Res.*, 532 U.S. 598, 604 (2001) (quoting *Hewitt v. Helms*, 482 U.S. 755, 760 (1987)). No award of fees may be granted if the position of the United States was substantially justified. See 28 U.S.C. § 2412(d)(1)(A).

The Judicial Officer substantially upheld my findings that dismissed the majority of the government's allegations against the Perry Respondents. USDA charged the Perry Respondents with liability for violations involving the care and exhibition of animals owned by other licensed exhibitors. I rejected that argument, and so did the Judicial Officer. Accordingly, I find that the position of the government was not substantially justified, and that the Perry Respondents were prevailing parties.

I find no circumstances that would make an award of fees "unjust". I credit the affidavits accompanying the application that attest that Respondent Craig Perry's net worth did not exceed two million dollars at the time of the adjudication and that the business Respondents did not have a net worth in excess of seven million dollars.

Considering all of the evidence, an award of attorneys' fees and costs is warranted. I find that the number of hours charged by Mr. Thorson are reasonable. I note that Mr. Thorson's total charges would likely have

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been more modest but for the government's unsuccessful attempt to impute the actions of other Respondents to his client. Mr. Thorson's documented expenses of \$603.83 appear to be reasonable.

It is generally appropriate to exclude from an award for fees and costs those that can be attributed to services rendered on issues that were unsuccessful. Since my finding that the Perry Respondents had violated the Act by not having a responsible individual on site to allow inspection by APHIS officials was upheld by the Judicial Officer, it is appropriate to calculate and exclude the costs of Mr. Thorson's services for that defense. At the hearing, a witness testified about the circumstances that led to Mr. Perry's absence from his establishment. Mr. Thorson consulted the witness before the hearing, as evidenced by his itemized time records. Mr. Thorson made argument on that issue in his written closing argument. I estimate a total of four hours of Mr. Thorson's services were devoted exclusively to the defense of this charge, and I therefore adjust his claimed total of 110.30 hours to 106.30 hours.

In addition, I must reduce Mr. Thorson's hourly rate for services. Although Mr. Thorson's rate of \$160.00 per hour is objectively reasonable, an award of fees under EAJA is limited to an hourly rate of \$150.00, pursuant to 7 C.F.R. § 1.186 (March 3, 2011). Accordingly, a total of \$16,548.83 (\$150.00 X 106.30 hours + 603.83 costs) is hereby awarded to Larry Thorson, Esq.

**ORDER**

For the reasons set forth herein, *supra*, the application for attorney fees by Larry Thorson, Esq., counsel for the Perry Respondents is GRANTED.

Attorney fees and costs in the amount of \$16,548.83 are hereby awarded to Larry Thorson, Esq.

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

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The Hearing Clerk shall serve copies of this Miscellaneous Order upon the parties.

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**FOREST RESOURCES CONSERVATION AND SHORTAGE  
RELIEF ACT**

**FOREST RESOURCES CONSERVATION AND SHORTAGE  
RELIEF ACT**

**DEPARTMENTAL DECISION**

**In re: STIMSON LUMBER COMPANY.**

**Docket No. 12-0338.**

**Decision and Order.**

**Filed July 3, 2012.**

**FRC-SRA.**

James K. Hein, Esq., for Petitioner.

Lori Polin Jones, Esq., for Respondent.

*Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.*

**DECISION AND ORDER**

This is an administrative proceeding under the Forest Resources Conservation and Shortage Relief Act of 1990, as amended, 16 U.S.C. §620, *et seq.* (Act) in which the Stimson Lumber Company (Stimson) is applying for approval of a sourcing area under section 490(c) of the Act. A Sourcing Area Application dated December 30, 2011 was originally submitted by the Stimson to the Hearing Clerk's Office. As the Application failed to disclose whether there had been an informal review by the Forest Service, no action was taken on it at that time. By letter dated April 4, 2012 received by the Hearing Clerk on April 5, 2012, the Department's Office of General Counsel subsequently requested that the matter be docketed as a request for formal review.

On May 9, 2012, an Order was entered directing the Regional Forester to provide additional information concerning the Application, including whether there had been an informal review; dates of any meetings with the Stimson's representatives; whether any "submissions had been received; a statement of any issues, both resolved and unresolved; and a description of all actions taken by the Regional Forester since the case had been docketed. The Regional Forester's Response to the Order was filed on May 18, 2012 along with a copy of

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the Notice of the Sourcing Area Application with a list of the newspapers of general circulation in which the Notice was published and an indication that additional information concerning the Application was available to the public on Region 1's website.

On June 15, 2012, The Regional Forester filed her Comments and Analysis of the Stimson's Sourcing Area Application. Additional comments on the application were received from the public during the comment period from Stolze Land & Lumber Company, The Lands Council, Idaho Forest Group LLC, and Friends of the Clearwater, each of which have been filed as part of the record.

By letter dated June 28, 2012, the Regional Forester filed her review of the Comments received during the Comment period and recommended approval of the Sourcing Application as filed, subject to the requirement that the Stimson amend their application to include the certification language as published in the Interim Rule at 36 C.F.R. §223.190(c)(4)(1995).

On July 2, 2012, the Hearing Clerk's Office received a letter from the Stimson dated June 29, 2012 supplementing its application. In the letter, Stimson, while questioning the technical deficiency in the Application's certification language, advised that it was "ready, willing and able" to provide any certification required by law. Additionally, Stimson expressed their willingness to address the concern raised in several of the comments that land in eastern Washington had not been included as part of its proposed sourcing area by agreeing to include additional relevant lands identified on a revised description and map.

### **Discussion**

The Forest Resources Conservation and Shortage Relief Act was enacted because of the recognized need to conserve timber resources in short supply, including the need to limit the export of unprocessed timber. To this end, 16 U.S.C. §620(a)(2), (6)-(8) provides:

**FOREST RESOURCES CONSERVATION AND SHORTAGE  
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(2) Forests, forest resources, and the forest environment are exhaustible natural resources that require efficient and effective conservation efforts.

....

(6) There is evidence of a shortfall in the supply of unprocessed timber in the western United States.

(7) There is reason to believe that any shortfall which may already exist may worsen unless action is taken.

(8) In conjunction with the broad conservation actions expected in the next few months and years, conservation action is necessary with respect to exports of unprocessed timber.

The objectives of the Act are to preserve work for domestic sawmills and to preclude the export of federal timber and the substitution of federal timber for exported private timber. These objectives are accomplished when a person's approved sourcing area is economically and geographically separate from any geographic area from which that person harvests for export timber originating from private lands. These objectives are not advanced by restricting sourcing areas to only those who exported lumber in 1990. *In re Springdale Lumber*, 53 Agric. Dec. 1185, 1193 (1994).

In its current Application, Stimson's President and CEO certified that Stimson had "not exported unprocessed timber originating from private lands within the boundaries of the sourcing area which is the subject of this application in the previous 24 months."<sup>1</sup> The Application seeks to acquire federal timber to source Stimson's St. Maries, Priest River, and Plummer Idaho sawmills. In attempting to determine whether the proposed sourcing area was geographically and economically separate from any geographic areas from which Stimson harvests for export any unprocessed timber originating from private lands, the Regional Forester reviewed historical timber sale records, log transfer agreements from Forest Service timber sales, and obtained personal knowledge from local Contracting Officers in Regions 1, 4 and 6 to determine Stimson's

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<sup>1</sup> Administrative decisions concerning two prior applications by Stimson for approval of sourcing areas appear of record. *In re Stimson Lumber Company*, 54 Agric. Dec. 155 (1955) and *In re Stimson Lumber Company*, 56 Agric. Dec. 480 (1997).

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purchasing patterns on both federal and private lands over an extended period of time.<sup>2</sup> Based upon the available information, it was also concluded that the size and location of the sourcing area proposed by Stimson does not differ significantly from other mills located in the same general vicinity.

The Regional Forester also carefully evaluated the comments received during the comment period and concluded that nothing within the comments altered her recommendation that the application be approved.

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

**Findings of Fact**

1. The Applicant is a corporate entity with Executive Offices in Portland, Oregon.
2. A map of the proposed sourcing area was included with the Application which is of sufficient scale and detail to show the following items:
  - a. The Applicant's desired sourcing area boundary.
  - b. The location of the three timber manufacturing facilities owned or operated by Stimson within the proposed sourcing area where Stimson intends to process timber originating from federal land.
  - c. Private lands within and outside the desired sourcing area.
3. The boundaries of the proposed sourcing area follow appropriate features such as the Continental Divide; Interstate 15, 84, and 90; U.S. Highways 20 and 26; the Snake River; and State and International borders, including the borders between Idaho and Oregon, Idaho and

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<sup>2</sup> The period of time indicated was since the early 1990s although most of the information related to the past decade.

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Washington; and the border between the United States and Canada. The specific Area Description is as follows:

Beginning at a point on the Continental Divide that adjoins the border between the United States of America and Canada, proceeding south on the crest of the Continental Divide to the point where it is crossed by Interstate 90 east of Butte, Montana. From this point, south and west on Interstate 90 to its junction with Interstate 15, west of Butte, Montana. From this point, south on Interstate 15 to its juncture with State highway 26 near Blackfoot, Idaho. From this point, west on State highway 26 to Arco, Idaho where State highway 26 joins with State highway 20. From this point, west on State highway 20 to its intersection with Interstate 84 at Mountain Home, Idaho. From this point, west and north on Interstate 84 to where this roadway hits the border between the states of Idaho and Oregon. From this point, north on the border between Idaho and Oregon to where Idaho, Oregon and Washington meet. From this point, continuing north on the border between Idaho and Washington to the border between the United States of America and Canada. From this point, east to the point of beginning.

4. The boundaries of the proposed sourcing area include both private and federal lands from which Stimson intends to acquire unprocessed timber for its mills.
5. The Application identified 13 other lumber manufacturing facilities in Idaho and 6 facilities in Montana that are in the same general vicinity of its mills and proposed sourcing area.
6. The Application contains a signed certification statement.
7. The Application is on Stimson Lumber Company letterhead, is signed by Andrew W. Miller, President and CEO, and was notarized on February 6, 2012 by a commissioned Notary Public for Oregon.

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8. Appropriate notice to the public has been given by publication of notice of Stimson's Sourcing Area application in newspapers of general circulation in the proposed sourcing area and further notice has been given on Region I's website.

9. The Regional Forester has provided comment and an analysis of the Application and the comments received during the prescribed comment period.

10. No request for a hearing was received from any interested party.

#### **Conclusions of Law**

1. The Secretary has jurisdiction of this matter.

2. Stimson has satisfied all of the procedural and with one remediable minor deficiency all technical requirements of the Act.

3. The sourcing area that is the subject of the Application is geographically and economically separate from any geographic area from which Stimson harvests for export any unprocessed timber originating from private lands.

3. The Application's certification is technically deficient in that it fails to repeat the language of the Interim Rule published at 36 C.F.R. §223.190(c)(4)(1995); however, such deficiency may be remedied by amendment of the certification by Stimson.

4. The Regional Forester's recommendation that the Sourcing Application be approved only as originally submitted subject to the amendment of the certification is supported by the record before me.<sup>3</sup>

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<sup>3</sup> As Stimson's willingness to include land in eastern Washington as reflected on the proposed revised description and map would appear to require republication and additional opportunity to comment by any affected parties, only the original proposed boundaries will be considered in this Decision.

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**ORDER**

1. Subject to Stimson's amendment of the certification of its Application, its Sourcing Area Application is **APPROVED**, and the sourcing area is established pursuant to the Act and its regulations.
2. Amendment of the certification shall be effected no later than 10 days after service of the Decision and Order upon the Applicant.
3. This Decision and Order shall become final, unless appealed to the Department's Judicial Officer as provide in the Rules of Practice.

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

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**SALARY OFFSET ACT**  
**DEPARTMENTAL DECISIONS**

**In re: WESLEY COLLATZ.**  
**Docket No. 12-0464.**  
**Decision and Order.**  
**Filed September 6, 2012.**

SOA.

Petitioner, pro se.  
Sheonna Gibson for ARS.  
*Decision and Order entered by Janice K. Bullard, Administrative Law Judge.*

**DECISION AND ORDER**

This matter is before the Office of Administrative Law Judges (“OALJ”) upon the request of Wesley Collatz (“Petitioner”) for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Agricultural Research Service (“Respondent”; “USDA-ARS”); and if established, the ability of Petitioner to pay.

On June 7, 2012, Petitioner timely requested a hearing before the Office of Administrative Law Judges (“OALJ”). A telephone conference was held with Petitioner and Respondent’s representative, Linnette Williams, and a hearing was scheduled to commence on August 30, 2012. The parties were directed to provide information and documentation to the Hearing Clerk for the Office of Administrative Law Judges for the United States Department of Agriculture (“Hearing Clerk”). On August 10, 2012, Respondent filed a Narrative, together with supporting documentation. On August 13, 27, and 30, 2012, Petitioner filed documents and argument.

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The hearing commenced as scheduled and I admitted the parties' documents to the record. Petitioner represented himself and testified. Ms. Williams and Lynn Pearson testified on behalf of the USDA-ARS.

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

**Findings of Fact**

1. Petitioner worked part-time for USDA-ARS when he was a student earning an hourly rate for variable hours.
2. Petitioner recorded his hours of work on a web-based computer time-keeping system that often reflected error codes that Petitioner was instructed to overlook.
3. Towards the end of his tenure, Petitioner requested leave under the Family Medical Leave Act (FMLA).
4. During his tenure with USDA-ARS, Petitioner was provided no training regarding time-keeping and he worked with administrative assistant Lynn Pearson to correct time-keeping entries.
5. Petitioner's leave balances varied due to his varying hours of work, and his status of being on FMLA leave.
6. Petitioner's immediate supervisor was out on leave during much of the period that he worked for USDA-ARS, and he did not know who else to ask for explanations of confusing leave information recorded on his time sheets.
7. Upon the termination of Petitioner's employment with USDA-ARS, the agency discovered that during his employment he had been paid for 38.75 hours of annual leave and 1 hour of sick leave that he had not earned.
8. Petitioner believed that errors in processing timesheets through the on-line system caused him to be mistakenly paid for leave.

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9. By letter dated August 16, 2011, Petitioner was presented with a demand for payment of a debt to Respondent in the amount of \$429.94.

10. Petitioner was notified that late fees and penalties would be assessed on any balance delinquent for more than 90 days.

11. On September 14, 2011, Petitioner wrote to USDA's National Finance Center, disputing the debt and asking for a review of the circumstances.

12. Petitioner spoke with a representative of ABCO, who advised that the matter would be investigated by USDA-ARS.

13. Petitioner received an additional demand for payment on March 16, 2012.

14. On March 16, 2012, Petitioner again wrote to ask that collection be suspended pending review of the debt, noting his original letter and his expectation that USDA-ARS was reviewing his claim and request for waiver.

15. The matter was referred to Ms. Linnette Williams on April 17, 2011, and she reviewed all of the information pertinent to the payment of unearned leave.

16. In a letter that she drafted for her supervisor's signature dated May 4, 2012, Ms. Williams concluded that waiver was not appropriate despite administrative errors, because Petitioner should have known that he had been paid for leave that he had not earned.

17. In support of her conclusions, Ms. Williams cited to determinations by the Department of Defense Board of Claims and the Comptroller General, which held that individuals who had been paid unearned amounts of leave were liable to repay the amount regardless of administrative error.

18. Ms. Williams corroborated her findings in her credible testimony.

**SALARY OFFSET ACT**

19. Ms. Pearson credibly testified that the computer-based time and attendance program was error-ridden; that Petitioner had asked for help; and that part-time employees such as Petitioner were not trained in leave processes or in keeping time and attendance.

20. There is no evidence that Petitioner intentionally or negligently entered information that allowed for the erroneous accrual of leave.

**Conclusions of Law**

1. The Secretary has jurisdiction in this matter.
2. Petitioner's request for a hearing was timely filed.
3. Unpaid debts that are delinquent are subject to the assessment of penalties and fines.
4. USDA assessed penalties and fines in the amount of \$46.15 (difference between original demand for payment of \$429.94 on August 16, 2011 and most recent demand for payment of \$476.09 on March 14, 2012).
5. The penalties and fines were improperly assessed on Petitioner's account because he immediately requested a waiver on the debt, which should have suspended collection action.
6. Petitioner's request for review and waiver was not forwarded to USDA-ARS until months later, in mid-April, 2012, through no fault of Petitioner, who diligently pursued resolution of this matter.
7. Once Linnette Williams was assigned the review of Petitioner's account and request for waiver, she acted with all alacrity, reaching a determination by May 4, 2012.
8. Although Ms. Williams' determination is not unreasonable, based as it was upon other rulings involving erroneous accrual of leave, the facts of the instant matter are different from those set forth in the cases she relied upon.

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9. In the matter of Board of Claims Case No. WL 5775295, the Board noted that the employee should have realized that he had received an unexplained increase of pay, considering that the employee was aware that he had run out of annual and sick leave. In contrast, Petitioner's leave balances varied; he did not have a complete understanding of his electronic time sheet which recorded information about earned and projected leave; the timekeeping program was error-prone, and he relied upon Ms. Pearson's help to correct errors; he received no training in keeping leave; and his supervisor was not available to assist him.

10. In the matter of Comptroller General Decision Case No. B-250228, it was determined that an employee had erroneously been credited with an accrual of annual leave greater than the amount to which he was entitled, and therefore, an adjustment to the accrued leave was warranted despite the administrative error that created the problem. In contrast, Petitioner had limited experience working for the government in any capacity and had no training or instruction about the accrual and use of leave; his time and attendance records were fraught with computer errors and he had no training on how to correct errors; his supervisor was absent frequently; and he worked erratic hours, making it difficult for him to determine his accrued leave from the balances noted on his time and attendance records.

11. The preponderance of the evidence establishes that Petitioner acted in good faith in recording his hours of work, and was not at fault or responsible for inaccurate records of time and attendance.

12. It would be unreasonable to conclude that Petitioner should have known that an administrative error existed, where time keeping errors occurred frequently; where his hours of work and pay fluctuated; where his supervisor was not available to assist him; where he had no training or resources other than another employee to help correct errors; and where he was on Family Medical Leave Act leave for a period of time, which imputes absence from the office and erratic statements concerning leave balances.

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13. Waiver is appropriate in these circumstances, as Petitioner reasonably did not know whether he was entitled to leave when it was paid during his tenure with USDA-ARS.

14. Petitioner's debt account should be cancelled.

15. The debt should NOT be collected from Petitioner by income tax offset, administrative wage garnishment, or any other manner.

**ORDER**

Neither Treasury nor USDA-ARS may collect any amount on Petitioner's account as waiver of this debt is appropriate.

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

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**In re: ROMINA A. HENNIG, D.V.M.**  
**Docket No. 12-0083.**  
**Decision and Order.**  
**Filed October 4, 2012.**

**SOA.**

Petitioner, pro se.  
Evelyn McGovern for FSIS.  
*Decision and Order entered by Jill S. Clifton, Administrative Law Judge.*

**DECISION AND ORDER**

**Issue**

1. The issue is whether Dr. Hennig shall reimburse USDA- Food Safety and Inspection Service **\$10,305.74**, for the unearned portion of her second year's recruitment incentive pay. USDA-FSIS seeks repayment, through *salary offset*.

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### **Procedural History**

2. The hearing by telephone was held on June 15, 2012. Romina A. Hennig, D.V.M., the Petitioner (Dr. Hennig) participated. The Respondent also participated, represented by Evelyn McGovern and Susan Bowen. The Respondent is the Food Safety and Inspection Service, an agency of the United States Department of Agriculture (USDA). Frequently herein, the Respondent is called "USDA- Food Safety and Inspection Service" or "USDA-FSIS".

### **Summary of the Facts Presented**

3. Dr. Hennig is a veterinarian who works for USDA- Food Safety and Inspection Service.

4. Dr. Hennig's Hearing Request dated September 27, 2011 with attached "Service Agreement for Receipt of Payment for a Recruitment/Relocation Incentive" is admitted into evidence, together with the testimony of Dr. Hennig, and Dr. Hennig's exhibits PX 1 through PX 4, and Dr. Hennig's email dated August 24, 2012.

5. The Salary Offset Hearing Request Transmittal Form dated November 22, 2011 with all attachments<sup>1</sup> is admitted into evidence, together with the testimony of Evelyn McGovern and Susan Bowen, and USDA- Food Safety and Inspection Service's Exhibits RX-1 through RX-16.

6. As a veterinarian, Dr. Hennig was recruited to work in poultry inspection at Sumter, South Carolina. Dr. Hennig was paid a sign-on bonus ("recruitment incentive"), worth \$14,102.75 per year for up to 4

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<sup>1</sup> The attachments include not only Dr. Hennig's Hearing Request dated September 27, 2011, with attached "Service Agreement for Receipt of Payment for a Recruitment/Relocation Incentive"; but also Notification of Personnel Action showing Effective Date of 12/05/10; Notification of Personnel Action showing Effective Date of 03/13/11; the email from Dr. Hennig dated April 18, 2011 that includes the email from Brian Fleming dated March 30, 2011; the Notice of Intent to Offset Salary; Dr. Hennig's letter to USDA, FSIS, HRD dated June 2, 2011; and Susan L. Bowen's (undated) letter to Dr. Hennig.

**SALARY OFFSET ACT**

years. This was her first job with USDA-FSIS; she was hired as a Public Health Veterinarian.

7. The recruitment incentive would be paid for only the time that the recruit continued to work in poultry inspection at Sumter, South Carolina. Dr. Hennig did complete her first year in poultry inspection at Sumter, South Carolina, thereby earning the entire \$14,102.75 for the first year (paid in advance). The \$14,102.75 for the second year was also paid in advance. *See* Notification of Personnel Action showing Effective Date of 12/05/10, with Box 20 showing \$14,102.75. Remarks include: Payment 2 of 4. USDA-FSIS is asking for the unearned portion of that second payment to be repaid.

8. Dr. Hennig's first year working in poultry inspection at Sumter, South Carolina was December 6, 2009 through December 5, 2010. During her second year in the job, Dr. Hennig transferred (within USDA-FSIS, but no longer doing poultry inspection and no longer working at Sumter, South Carolina). USDA-FSIS is not asking for the entire \$14,102.75 for the second year to be repaid, but only a proportional amount.

9. Dr. Hennig's partial second year was December 6, 2010 through March 12, 2011. *See* Notification of Personnel Action showing Effective Date of 03/13/11, for transfer from District #16 - Raleigh, NC, Position Title Supervisory Veterinary Medical Officer (Public Health); to District #15 - Beltsville, MD, Position Title Consumer Safety Officer. Remarks include: Training is a condition of employment for retention in this position. RX-7, p. 1.

10. From December 6, 2010 through March 12, 2011, there were 7 pay periods:

12/05/2010 - 12/18/2010;  
12/19/2010 - 01/01/2011;  
01/02/2011 - 01/15/2011;  
01/16/2011 - 01/29/2011;  
01/30/2011 - 02/12/2011;  
02/13/2011 - 02/26/2011; and  
02/27/2011 - 03/12/2011.

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I have reviewed carefully RX 16 and agree with the mathematical calculation and conclude that the unearned portion of Dr. Hennig's second year recruitment incentive is **\$10,305.74**. Also I have considered carefully Dr. Hennig's email dated August 24, 2012, a copy of which I am filing with the Hearing Clerk. Dr. Hennig believes her transfer date was June 6, 2011, after the required training. I disagree with Dr. Hennig, based on the Notification of Personnel Action showing Effective Date of 03/13/11. *See* paragraph 9. [There is a Notification of Personnel Action showing Effective Date of 06/05/11 (*see* RX-7, p. 2), which when compared to RX-7 p. 1, shows higher locality pay and a change of duty station from West Columbia Lexington SC to Beltsville Prince Georges MD, but nevertheless I find that the new job began on March 13, 2011, even though the job began with training.]

11. The recruitment incentive ("bonus") that was part of Dr. Hennig's pay package when she worked in poultry inspection at Sumter, South Carolina (RX- 4) would not carry over to her new job that began March 13, 2011. RX 7, p. 1. If the facts discussed thus far were all that needed to be considered, I would conclude that Dr. Hennig owes USDA-FSIS **\$10,305.74**, and the next step would be to consider whether she can withstand *salary offset* in the amount of 15% of her disposable pay without that causing her financial hardship. Before going to that step, however, there are 2 other considerations.

12. Dr. Hennig testified credibly that she was told by someone at USDA-FSIS Human Resources that so long as she stayed within the Agency (USDA-FSIS), she would not have to repay any portion of the second year recruitment incentive. Dr. Hennig's letter to USDA, FSIS, HRD dated June 2, 2011, includes:

The disagreement over indebtedness arose because of the information I was given by FSIS Human Resources before I accepted the new position. I was offered the EIAO position on February 23 and was given 24 hours to decide if I wanted to accept it. During that time, I gathered as much information as I could to made an educated decision. The language in the paperwork I was

**SALARY OFFSET ACT**

given regarding the PHV incentives when I initially joined the agency is not clear as to what will have to be repaid and under what circumstances repayment will be required. I did my due diligence and inquired at the FSIS Human Resources office by phone about whether I would lose the incentives given as a PHV if I took the EIAO position. I was informed that in such a case, I would *not* get the remaining installments of my bonus, but that I also would *not* have to pay back any of the bonus already paid to me because my new position would still be within FSIS. The same statement was made regarding the loan repayment incentive. Either this information was incorrect or I was erroneously billed.

I made the decision to accept the position as an EIAO on February 24 based on this information provided by HR. If I had known that I would go into such serious debt by taking the EIAO position, I would not have accepted it. By the time I was informed that I would have to repay the bonus, I had already attended four weeks of EIAO training and my PHV position had been offered to someone else. I had also already made the commitment to the Beltsville District Office to take the position as an EIAO, so I could not go back to my former position as a PHV. I truly believe that my knowledge as a veterinarian and my scientific skills would be an asset and not a detriment to the Agency as I perform the duties of an EIAO. I am committed to the Agency's mission and my decision to accept the EIAO position was made in good faith. I made every effort possible to determine if my transfer would lead to indebtedness and I was ultimately either given the wrong information by FSIS Human Resources or I was erroneously billed. Therefore, I must request a hearing to have the question of indebtedness reviewed further.

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13. Dr. Hennig wanted EIAO training, which would probably enhance her promotion potential. EIAO stands for Enforcement Investigations and Analysis Officer.<sup>2</sup>

14. Dr. Hennig inquired about getting the EIAO training while working at her Sumter, South Carolina duty station. Dr. Hennig's email dated June 17, 2010 inquired; the response the same day showed no current opportunity for her where she was, but encouraged her "to take the opportunity to speak with EIAOs about their job to determine if you might be interested in applying for an EIAO position. Good luck in your career!" PX 1.

15. Dr. Hennig knew that obtaining the EIAO training would be valuable; nevertheless I accept her statement as true, that if she had known that she would go into such serious debt by taking the EIAO position, she would not have accepted the reassignment. When Dr. Hennig was told that she would not have to repay any portion of the bonus she had already been paid because she was staying within FSIS, that was wrong. Having been given the wrong information and having relied on it, Dr. Hennig is nevertheless not entitled to debt forgiveness. The wrong information Dr. Hennig was given does not negate the obligation USDA-FSIS has to recover the unearned portion of Dr. Hennig's second year recruitment incentive of **\$10,305.74**. Dr. Hennig was misled, but that does not justify forgiving the repayment due.

16. Now, to the last consideration. When Dr. Hennig reported to her new job within USDA-FSIS, Dr. Hennig was leaving a job in pay band 4 (AP-4) [comparable to GS 12/13], Supervisory Veterinary Medical Officer; she was taking a reassignment to a job also in pay band 4 (AP-4), Consumer Safety Officer. Her pay band did not change, and the new job had no "built-in" "career ladder" to a promotion with higher pay. Consequently, USDA-FSIS Human Resources determined that Dr. Hennig's new job was without higher promotion potential. See Brian Fleming's email dated March 30, 2011, which states in part: "The EIAO position does not have a recruitment incentive like the PHV position.

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<sup>2</sup> See [http://www.fsis.usda.gov/FSIS\\_Employees/EIAO\\_Training\\_Modules/index.asp](http://www.fsis.usda.gov/FSIS_Employees/EIAO_Training_Modules/index.asp).

**SALARY OFFSET ACT**

Your movement to the EIAO also is considered a reassignment to a position without higher promotion potential. For these reasons you will be billed, on a pro rated basis (approximately eight and a half months), for the recruitment incentive that you received this past December only.” RX-8.

17. Dr. Hennig stayed within USDA-FSIS when she took the reassignment, and she does not have to repay the recruitment incentive on a pro rata basis, **IF** she was “promoted or **reassigned to a position with greater promotion potential in FSIS.**” USDA-FSIS Directive 4300.8 regarding Recruitment, Relocation, and Retention Incentives (*see* RX-15, p. 12).

18. Dr. Hennig has persuaded me that she does have greater promotion potential in FSIS in her new job, even though the new job has no “built-in” “career ladder” to a promotion with higher pay. This was no easy thing to prove. First, Dr. Hennig proved that she tried to get EIAO training while working at her Sumter, South Carolina duty station and could not. *See* paragraph 14. *See* PX 1. Next, Dr. Hennig proved that she could get EIAO training if she accepted the reassignment; in fact, the EIAO training was a condition of employment for retention. Dr. Hennig then proved that “out of seven (7) Front Line Supervisors in the Beltsville District, six (6) have completed EIAO training.” PX 2. [Dr. Hennig testified that the other one (the 7th of 7), had more than 20 years’ experience in food safety and inspection service.] Dr. Hennig proved next that, “There are approximately 140 FLS at FSIS. Of these, approximately 111 FLS have completed EIAO training.” PX 3. That, Dr. Hennig pointed out, is 79.3%.

19. Dr. Hennig showed the importance of the EIAO course, including its importance to becoming a Front Line Supervisor. A Front Line Supervisor is in pay band 5, comparable to GS-14. Dr. Hennig had reason to expect that the EIAO course would be available to her. *See*, for example, FSIS Directive 4300.10 regarding Ensuring that Inspection Program Personnel Have Proper Training to Cover Work Assignments, PX 4, p. 14.

20. Dr. Hennig accepted reassignment within USDA-FSIS to a job that would include EIAO training, which for that reason **was a position with**

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**greater promotion potential in FSIS**, because promotion to Front Line Supervisor would be more likely if she had EIAO training.

### **Findings, Analysis and Conclusions**

21. The Secretary of Agriculture has jurisdiction over the parties, Dr. Hennig and USDA- FSIS, and over the subject matter, which is *salary offset*.

22. Dr. Hennig's evidence persuades me that, by being reassigned to a job within USDA-FSIS that would include EIAO training, which she had tried to get but couldn't while working in poultry inspection at Sumter, South Carolina, Dr. Hennig was "**reassigned to a position with greater promotion potential in FSIS**" and that consequently she does not have to repay the recruitment incentive on a pro rata basis.

23. Dr. Hennig does **not** have to repay the unearned portion of her second year recruitment incentive of **\$10,305.74**.

### **ORDER**

24. USDA-FSIS shall record that Dr. Hennig took a **reassignment to a position with greater promotion potential in FSIS**, and that consequently she does **not** have to repay the recruitment incentive on a pro rata basis. [Dr. Hennig is more likely to advance because she has the EIAO training.]

25. USDA-FSIS shall **not offset** Dr. Hennig's pay or other **Federal monies** payable to the order of Dr. Hennig to recover the **\$10,305.74** or any portion of it.

26. Dr. Hennig owes no repayment to USDA-FSIS as a result of her reassignment on March 13, 2011.

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

**MISCELLANEOUS ORDERS****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 (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/](http://www.dm.usda.gov/oaljdecisions/).*

**ADMINISTRATIVE WAGE GARNISHMENT ACT****CATHERINE BROWN.****Docket No. 12-0709.****Miscellaneous Order.****Filed July 9, 2012.****PAULA A. PEACE.****Docket No. 12-0330.****Miscellaneous Order.****Filed July 17, 2012.****LUCAS JONES.****Docket No. 12-0320.****Miscellaneous Order.****Filed July 18, 2012.****JEFF LATTIMER.****Docket No. 12-0418.****Miscellaneous Order.****Filed July 18, 2012.****MARGARITA GONZALES.****Docket No. 12-0435.****Miscellaneous Order.****Filed July 19, 2012.**

Miscellaneous Orders  
71 Agric. Dec. 1048-1061

**CLAYTON CALLAHAN.**

**Docket No. 12-0434.**

**Miscellaneous Order.**

**Filed July 20, 2012.**

**BARBARA ANDERSON, F/K/A BARBARA BROCK.**

**Docket No. 12-0459.**

**Miscellaneous Order.**

**Filed July 23, 2012.**

**JANIELLE CORRALES.**

**Docket No. 12-0364.**

**Miscellaneous Order.**

**Filed July 24, 2012.**

**CINDY MCGUIRE.**

**Docket No. 12-0449.**

**Miscellaneous Order.**

**Filed July 26, 2012.**

**ABEL SERRATA, JR.**

**Docket No. 12-0451.**

**Miscellaneous Order.**

**Filed July 26, 2012.**

**PAUL LAROCHE.**

**Docket No. 10-0129.**

**Miscellaneous Order.**

**Filed July 30, 2012.**

**CHRISTOPHER INGRAM.**

**Docket No. 12-0385.**

**Miscellaneous Order.**

**Filed July 31, 2012.**

**MISCELLANEOUS ORDERS**

**ROBERT JURJEVICH.**  
Docket No. 12-0432.  
Miscellaneous Order.  
Filed July 31, 2012.

**ERIC TRUMAN.**  
Docket No. 12-0448.  
Miscellaneous Order.  
Filed August 1, 2012.

**JOHNNY BARDWELL.**  
Docket No. 12-0527.  
Miscellaneous Order.  
Filed August 1, 2012.

**MARDY B. GABUYA.**  
Docket No. 12-0481.  
Miscellaneous Order.  
Filed August 9, 2012.

**RUDOLPH GABUYA.**  
Docket No. 12-0482.  
Miscellaneous Order.  
Filed August 9, 2012.

**BENJAMIN KELSEY.**  
Docket No. 12-0411.  
Miscellaneous Order.  
Filed August 13, 2012.

**ADAM MASON.**  
Docket No. 12-0483.  
Miscellaneous Order.  
Filed August 13, 2012.

**TIFFANY MUMFORD, F/K/A TIFFANY HOLT.**  
Docket No. 12-0479.  
Miscellaneous Order.  
Filed August 13, 2012.

Miscellaneous Orders  
71 Agric. Dec. 1048-1061

**JOSHUA BARTLEY.**  
**Docket No. 12-0484.**  
**Miscellaneous Order.**  
**Filed August 15, 2012.**

**TERRY SMITH.**  
**Docket No. 12-0501.**  
**Miscellaneous Order.**  
**Filed September 7, 2012.**

**ERIC CANTRELL.**  
**Docket No. 12-0609.**  
**Miscellaneous Order.**  
**Filed September 13, 2012.**

**JOSE G. SALDANA.**  
**Docket No. 12-0591.**  
**Miscellaneous Order.**  
**Filed September 25, 2012.**

**JENNIFER SNYDER.**  
**Docket No. 12-0590.**  
**Miscellaneous Order.**  
**Filed September 26, 2012.**

**ROCKY COPELAND.**  
**Docket No. 12-0568.**  
**Miscellaneous Order.**  
**Filed September 27, 2012.**

**LARRY THORSON.**  
**Docket No. 12-0645.**  
**Miscellaneous Order.**  
**Filed September 27, 2012.**

**MISCELLANEOUS ORDERS**

**THERESA M. SKINNER, N/K/A THERESA M. HEIDECKER.**  
**Docket No. 12-0592.**  
**Miscellaneous Order.**  
**Filed September 28, 2012.**

**TRAVIS THANGVIJIT.**  
**Docket No. 12-0532.**  
**Miscellaneous Order.**  
**Filed October 16, 2012.**

**DENISE CHRISTOPHER.**  
**Docket No. 12-0486.**  
**Miscellaneous Order.**  
**Filed October 22, 2012.**

**RICKY B. MAXWELL.**  
**Docket No. 12-0509.**  
**Miscellaneous Order.**  
**Filed October 24, 2012.**

**BRENNA BYRD.**  
**Docket No. 12-0505.**  
**Miscellaneous Order.**  
**Filed October 25, 2012.**

**DENNIS DAVIS.**  
**Docket No. 12-0607.**  
**Miscellaneous Order.**  
**Filed November 13, 2012.**

**MELANIE GONZALEZ.**  
**Docket No. 13-0018.**  
**Miscellaneous Order.**  
**Filed December 6, 2012.**

**KARA MARTIN, F/K/A KARA DOOLITTLE.**  
**Docket No. 13-0005.**  
**Miscellaneous Order.**  
**Filed December 10, 2012.**

Miscellaneous Orders  
71 Agric. Dec. 1048-1061

**ELIDA O. SALAZAR, N/K/A ELIDA ESPINOZA.**  
**Docket No. 13-0001.**  
**Miscellaneous Order.**  
**Filed December 11, 2012.**

**CRYSTAL DAWN COMBS.**  
**Docket No. 13-0098.**  
**Miscellaneous Order.**  
**Filed December 14, 2012.**

**BRIDGET WYNKOOP.**  
**Docket No. 13-0101.**  
**Miscellaneous Order.**  
**Filed December 20, 2012.**

**SETH WYNKOOP.**  
**Docket No. 13-0102.**  
**Miscellaneous Order.**  
**Filed December 20, 2012.**

**BRIDGET WYNKOOP.**  
**Docket No. 13-0101.**  
**Miscellaneous Order.**  
**Filed December 20, 2012.**

**AGRICULTURE MARKETING AGREEMENT ACT**

**GREINER'S GREENACRES, INC., A/K/A GREINER'S GREEN  
ACRES, INC.**  
**Docket No. 12-0617.**  
**Miscellaneous Order.**  
**Filed December 5, 2012.**

**MISCELLANEOUS ORDERS**

**ANIMAL WELFARE ACT**

**In re: CRAIG A. PERRY, AN INDIVIDUAL; PERRY'S WILDERNESS RANCH & ZOO, INC., AN IOWA CORPORATION; AND LE ANNE SMITH, AN INDIVIDUAL.**

**Docket No. 05-0026.**

**Miscellaneous Order.**

**Filed July 2, 2012.**

**AWA.**

Colleen A. Carroll, Esq. for Complainant.

Larry J. Thorson, Esq. for Respondents.

Initial Decision by Jill S. Clifton, Administrative Law Judge.

*Ruling by William G. Jenson, Judicial Officer.*

**ORDER EXTENDING TIME FOR FILING  
ADMINISTRATOR'S APPEAL PETITIONS**

On June 29, 2012, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], by telephone, requested that I extend to July 5, 2012, the time for appealing two initial decisions issued by Administrative Law Judge Jill S. Clifton in the instant proceeding, *In re Le Anne Smith*, \_\_\_ Agric. Dec. \_\_\_ (Mar. 30, 2012), and *In re Craig A. Perry*, \_\_\_ Agric. Dec. \_\_\_ (Mar. 29, 2012). For good reason stated, the Administrator's motion to extend the time for filing appeal petitions is granted. The time for filing the Administrator's appeal petitions is extended to, and includes, July 5, 2012.<sup>1</sup>

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<sup>1</sup> The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure the appeal petitions are received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, July 5, 2012.

Miscellaneous Orders  
71 Agric. Dec. 1048-1061

**In re: TRI-STATE ZOOLOGICAL PARK OF WESTERN  
MARYLAND, INC., A MARYLAND CORPORATION; AND  
ROBERT L. CANDY, AN INDIVIDUAL.  
Docket No. 11-0222.  
Miscellaneous Order.  
Filed September 25, 2012.**

AWA.

Colleen A. Carroll, Esq. for Complainant.  
Respondents, pro se.  
Initial Decision by Janice K. Bullard, Administrative Law Judge.  
*Ruling by William G. Jenson, Judicial Officer.*

**ORDER EXTENDING TIME TO FILE A RESPONSE TO  
RESPONDENTS' APPEAL PETITION**

On September 24, 2012, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], requested that I extend the time for filing a response to Respondents' appeal petition to October 25, 2012. For good reason stated, the Administrator's motion to extend the time for responding to Respondents' appeal petition is granted. The time for filing the Administrator's response to Respondents' appeal petition is extended to, and includes, October 25, 2012.<sup>1</sup>

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<sup>1</sup> The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure the response to Respondents' appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, October 25, 2012.

**MISCELLANEOUS ORDERS**

**In re: JENNIFER CAUDILL, A/K/A JENNIFER WALKER, A/K/A JANNIFER HERRIOTT WALKER, AN INDIVIDUAL; BRENT TAYLOR AND WILLIAM BEDOFRD, INDIVIDUALS, D/B/A ALLEN BROTEHRS CIRCUS; AND MITCHELL KALMANSON.  
Docket No. 10-0416.**

**Miscellaneous Order.**

**Filed October 10, 2012.**

**AWA.**

Colleen A. Carroll, Esq. for Complainant.

William J. Cook, Esq. for Mitchell Kalmanson.

Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.

*Ruling by William G. Jenson, Judicial Officer.*

**ORDER EXTENDING TIME FOR FILING APPEAL PETITION**

On October 4, 2012, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], requested an extension of time within which to appeal the initial Decision and Order as to Mitchell Kalmanson issued on September 24, 2012, by Chief Administrative Law Judge Peter M. Davenport. The Administrator requests that I extend the time for filing an appeal petition with respect to the initial Decision and Order as to Mitchell Kalmanson to 30 days after service of an initial decision and order as to Jennifer Caudill on the Administrator's counsel. For good reason shown, the Administrator's time for filing an appeal petition with respect to the initial Decision and Order as to Mitchell Kalmanson is extended to 30 days after the Administrator's counsel is served with an initial decision and order as to Jennifer Caudill. Should this extended time for filing an appeal petition with respect to the initial Decision and Order as to Mitchell Kalmanson expire on a Saturday, Sunday, or Federal holiday, the time for filing an appeal petition pursuant to this Order Extending Time for Filing Appeal Petition shall be extended to include the following business day.<sup>1</sup>

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<sup>1</sup> The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, any appeal petition filed pursuant to this Order Extending Time for Filing Appeal Petition must be received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, on the date due.

Miscellaneous Orders  
71 Agric. Dec. 1048-1061

**In re: LEE MARVIN GREENLY, AN INDIVIDUAL; SANDY GREENLY, AN INDIVIDUAL; AND MINNESOTA WILDLIFE CONNECTION, INC., A MINNESOTA CORPORATION.**

**Docket No. 11-0072.**

**Miscellaneous Order.**

**Filed October 18, 2012.**

AWA.

Colleen A. Carroll, Esq. for Complainant.

Larry Perry, Esq. for Respondents.

Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.

*Ruling by William G. Jenson, Judicial Officer.*

**ORDER EXTENDING TIME TO FILE A RESPONSE TO  
RESPONDENTS' APPEAL PETITION**

On October 17, 2012, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], requested that I extend the time for filing a response to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.'s appeal petition to October 29, 2012. For good reason stated, the Administrator's motion to extend the time for responding to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.'s appeal petition is granted. The time for filing the Administrator's response to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.'s appeal petition is extended to, and includes, October 29, 2012.<sup>1</sup>

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<sup>1</sup> The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure the response to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.'s appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, October 29, 2012.

**MISCELLANEOUS ORDERS**

**In re: TRI-STATE ZOOLOGICAL PARK OF WESTERN MARYLAND, INC., A MARYLAND CORPORATION; AND ROBERT L. CANDY, AN INDIVIDUAL.**

**Docket No. 11-0222.**

**Miscellaneous Order.**

**Filed October 25, 2012.**

**AWA.**

Colleen A. Carroll, Esq. for Complainant.

Respondents, pro se.

Initial Decision by Janice K. Bullard, Administrative Law Judge.

*Ruling by William G. Jenson, Judicial Officer.*

**SECOND ORDER EXTENDING TIME TO FILE A RESPONSE  
TO RESPONDENTS' APPEAL PETITION**

On October 25, 2012, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], by telephone, requested that I extend the time for filing a response to Respondents' appeal petition to October 26, 2012. For good reason stated, the Administrator's motion to extend the time for responding to Respondents' appeal petition is granted. The time for filing the Administrator's response to Respondents' appeal petition is extended to, and includes, October 26, 2012.<sup>1</sup>

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<sup>1</sup> The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure the response to Respondents' appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, October 26, 2012.

Miscellaneous Orders  
71 Agric. Dec. 1048-1061

**In re: LEE MARVIN GREENLY, AN INDIVIDUAL; SANDY GREENLY, AN INDIVIDUAL; AND MINNESOTA WILDLIFE CONNECTION, INC., A MINNESOTA CORPORATION.**

**Docket No. 11-0072.**

**Miscellaneous Order.**

**Filed October 31, 2012.**

AWA.

Colleen A. Carroll, Esq. for Complainant.

Larry Perry, Esq. for Respondents.

Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.

*Ruling by William G. Jenson, Judicial Officer.*

**ORDER EXTENDING TIME TO FILE A RESPONSE TO  
RESPONDENTS' APPEAL PETITION**

On October 31, 2012, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], by telephone, requested that I extend the time for filing a response to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.'s appeal petition to November 2, 2012. For good reason stated, the Administrator's motion to extend the time for responding to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.'s appeal petition is granted. The time for filing the Administrator's response to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.'s appeal petition is extended to, and includes, November 2, 2012.<sup>1</sup>

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<sup>1</sup> The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure the response to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.'s appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, November 2, 2012.

**MISCELLANEOUS ORDERS**

**LAWRENCE C. WALLACH.**

**Docket No. 12-0233.**

**Miscellaneous Order.**

**Filed November 9, 2012.**

**EQUAL ACCESS TO JUSTICE ACT**

**In re: CRAIG A. PERRY, AN INDIVIDUAL; PERRY'S WILDERNESS RANCH & ZOO, INC., AN IOWA CORPORATION; AND LE ANNE SMITH, AN INDIVIDUAL.**

**Docket No. 05-0026.**

**Miscellaneous Order.**

**Filed October 31, 2012.**

**EAJA—AWA.**

Colleen A. Carroll, Esq. for Complainant.

Larry J. Thorson, Esq. for Respondents.

Initial Decision by Jill S. Clifton, Administrative Law Judge.

*Ruling by William G. Jenson, Judicial Officer.*

**ORDER EXTENDING TIME TO FILE AN APPEAL PETITION**

On October 31, 2012, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], by telephone, requested that I extend the time for filing an appeal petition in this proceeding to November 2, 2012. For good reason stated, the Administrator's motion to extend the time for filing an appeal petition is granted. The time for filing the Administrator's appeal petition is extended to, and includes, November 2, 2012.<sup>1</sup>

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<sup>1</sup> The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure the appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, November 2, 2012.

Miscellaneous Orders  
71 Agric. Dec. 1048-1061

**In re: CRAIG A. PERRY, AN INDIVIDUAL; PERRY'S  
WILDERNESS RANCH & ZOO, INC., AN IOWA  
CORPORATION; AND LE ANNE SMITH, AN INDIVIDUAL.**

**Docket No. 05-0026.**

**Miscellaneous Order.**

**Filed November 2, 2012.**

**EAJA—AWA.**

Colleen A. Carroll, Esq. for Complainant.

Larry J. Thorson, Esq. for Respondents.

Initial Decision by Jill S. Clifton, Administrative Law Judge.

*Ruling by William G. Jenson, Judicial Officer.*

**SECOND ORDER EXTENDING TIME**  
**TO FILE AN APPEAL PETITION**

On November 2, 2012, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], by telephone, requested that I extend the time for filing an appeal petition in this proceeding to November 5, 2012. For good reason stated, the Administrator's motion to extend the time for filing an appeal petition is granted. The time for filing the Administrator's appeal petition is extended to, and includes, November 5, 2012.<sup>1</sup>

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<sup>1</sup> The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure the appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, November 5, 2012.



Consent Decisions  
71 Agric. Dec. 1063 - 1064

**CONSENT DECISIONS**

**ANIMAL HEALTH PROTECTION ACT**

DHL Express (USA), Inc., d/b/a DHL, d/b/a DHL Express, d/b/a DHL Worldwide Express, Inc., AQ-12-0522.

**ANIMAL WELFARE ACT**

G. Frederick Keating, AWA-11-0224, 08/08/12.  
Loki Clan Wolf Refuge, Inc. & Myrtle Clapp, AWA-11-0224, 10/11/12.  
Terri Wilson, d/b/a Whistlin W. Kennel, AWA-11-0422, 10/11/12.  
Cynthia McConnell, AWA-12-0163, 11/15/12.  
Brenda Walter, AWA-12-0392, 12/31/12.

**FEDERAL CROP INSURANCE ACT**

Reza Kalantari, FICA-09-0169, 10/12/12.  
Ficus Farm, Inc., FICA-09-0170, 10/12/12.

**FEDERAL MEAT INSPECTION ACT**

R-Ventures, d/b/a Fasta & Ravioli Company, & Robert J. Ricketts, FMIA-12-0540, 07/27/12.  
Bowman's Butcher Shop, LLC and Nicholas A. Johnson, FMIA-D-12-0610, 08/29/12.

**FOOD AND NUTRITION ACT**

Maryland Department of Human Resources, FNS-12-0521, 10/09/12.  
Arizona Department of Economic Security, FNS-12-0523, 12/21/12.

**HORSE PROTECTION ACT**

Derrick S. Butner, HPA-11-0307, 07/24/12.  
Gerale Martin & Derrick Brown, HPA-D-12-0291, 08/17/12.  
Jackie McConnell, HPA-D-12-0466, 08/23/12.

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**CONSENT DECISIONS**

Lloyd W. Sebastian & B-Sha Sebastian, HPA-11-0307, 10/03/12.  
Gerale Martin, HPA-12-0291, 10/17/12.  
Regina Fritsch, HPA-11-0305, 11/02/12.  
Thomas Vest, HPA-11-0305, 11/02/12.  
Jeanette Baucom, HPA-11-0311, HPA-12-0619, 12/31/12.

**PLANT PROTECTION ACT**

DHL Express (USA), Inc., d/b/a DHL, d/b/a DHL Express, d/b/a DHL  
Worldwide Express, Inc., PQ-12-0522.

**POULTRY PRODUCTS INSPECTION ACT**

R-Ventures, d/b/a Fasta & Ravioli Company, & Robert J. Ricketts,  
PPIA-12-0540, 07/27/12.