APPENDIX 1

SUMMARY OF DECISIONS BY THE JUDICIAL OFFICER

Fiscal Year 1996

In *In re Potato Sales Co.*, PACA Docket No. D-95-517, decided by the Judicial Officer on October 19, 1995 (17 pages), the Judicial Officer affirmed the Decision and Order by Chief Judge Palmer (Chief ALJ) revoking Respondent's license because Respondent committed willful, flagrant and repeated violations of section 2 of the Act (7 U.S.C. § 499b), by failing to make full payment promptly for produce. Since Respondent violated express requirements of the Act and regulations by failing to make full payment promptly, the violations were willful. The violations were also repeated, in view of the number of violations, and they were flagrant because the failures to pay were in amounts that are not *de minimis*. A hearing is not required where the bankruptcy documents show that Respondent has failed to make full payment exceeding a *de minimis* amount. The sanction policy set forth in *S.S. Farms Linn County* does not change the policy set forth in *Caito* that the Act calls for payment--not excuses, and that excuses why payment was not made in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money, usually over an extended period of time.

In *In re Moreno Bros.*, PACA Docket No. D-95-522, decided by the Judicial Officer on November 1, 1995 (20 pages), the Judicial Officer affirmed the Decision and Order by Chief Judge Palmer (Chief ALJ) revoking Respondent's license because Respondent committed willful, flagrant and repeated violations of section 2 of the Act (7 U.S.C. § 499b), by failing to make full payment promptly for produce. Where a timely Answer is not filed, a default order is appropriate. The case is governed by numerous precedents summarized in *In re The Caito Produce Co.*, 48 Agric. Dec. 602 (1989). Since Respondent violated express requirements of the Act and regulations by failing to make full payment promptly, the violations were willful. The violations were also repeated, in view of the number of violations, and they were flagrant because the failures to pay were in amounts that are not *de minimis*. The sanction policy set forth in *S.S. Farms Linn County* does not change the policy set forth in *Caito* that the Act calls for payment--not excuses, and that excuses why payment was not made in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money, usually over an extended period of time.

In *In re Julian J. Toney*, AWA Docket Nos. 92-14, 94-12, decided by the Judicial Officer on December 5, 1995 (110 pages), the Judicial Officer affirmed the decision by Judge Baker (ALJ) permanently revoking Respondents' license, assessing a civil penalty of $200,000, and directing Respondents to cease and desist from various practices. The ALJ found that Respondents willfully maintained false and incomplete records with respect to the source and date of acquisition of dogs; acquired random source dogs in willful violation of the regulations; sold live random source dogs to research facilities by means of forged documents purporting to be certifications from municipal pounds; willfully failed to hold animals for the required period of time after acquisition; willfully failed to maintain individual identity of dogs; and willfully failed to provide appropriate animal care and facilities, as required. Respondents had the burden of showing that their animals fell into an exception to the holding-period requirements. Complainant need only prevail by a preponderance of the evidence. A violation is willful within the meaning of the APA if a person carelessly disregards regulatory requirements. Each animal involved in a violation is a separate violation. The sanction recommended by the administrative officials and adopted by the ALJ is not too severe, considering the hundreds of violations by Respondents of statutory and regulatory provisions designed to deal with the abuses of trafficking in stolen pets and subjecting animals to inhumane conditions. There is no basis for reopening the hearing to receive additional evidence. The Department's rule of practice is similar to the judicial practice regarding newly discovered evidence.

In *In re David Landrum*, HPA Docket No. 92-13, decided by the Judicial Officer on December 5, 1995 (3 pages), the Judicial Officer dismissed the Complaint with prejudice. On February 9, 1995, Judge Bernstein (ALJ) filed an Initial Decision and Order in which he found that Respondent entered, for the purpose of showing or exhibiting, a horse at a horse show while the horse was sore. The ALJ assessed a civil penalty of $500 and disqualified Respondent for 5 years from showing, exhibiting, or entering any horse, and from judging, managing, or otherwise participating in any horse show. The Judicial Officer held that, although Complainant has just barely sustained its burden of proof by a preponderance of the evidence (51 to 49), and although the ALJ properly decided the case based on existing precedent at the time, since an appeal would be taken to the Sixth Circuit, which is of great importance to the enforcement of the Horse Protection Act, such a close case should not be presented to that court at this time.

In *In re Kim Bennett*, HPA Docket No. 93-6, decided by the Judicial Officer on January 3, 1996 (69 pages), the Judicial Officer affirmed the Order by Judge Kane (ALJ) dismissing the Complaint, which alleged that Kim Bennett, as trainer, entered a horse for exhibition while it was sore, and Mr. & Mrs. David Broderick allowed the entry of the horse, while the animal was sore. The Judicial Officer stated that if the ALJ had not retired, he would have issued a Second Remand Order, since it seems to the Judicial Officer that the ALJ did not comply with the first Remand Order. The Judicial Officer believes, however, that Complainant's case is not quite strong enough to justify remanding the case for a new trial before a different ALJ, so he dismissed the Complaint. The Judicial Officer has authority to remand a case to an ALJ under the Department's Rules of Practice. Palpation alone is a highly reliable method of determining whether a horse is sore, within the meaning of the Horse Protection Act. Contrary views in *Young v. USDA*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision) will not be followed by this Department in any future case, including a case in which an appeal would lie to the Fifth Circuit. The expert testimony and Atlanta Protocol relied on by the Court in *Young v. USDA* is devoid of merit. The training given to Department veterinarians by the Department's attorneys and investigators is not a basis for discrediting the veterinarians' opinions. There is a presumption of regularity with respect to the official acts of public officers. The fact that the veterinarians prepare Summary of Alleged Violations forms and affidavits only when violations are found, and when administrative proceedings are anticipated, does not discredit such documents. Such documents are admissible under the Department's Rules of Practice and the Administrative Procedure Act. They would even be admissible in a court proceeding under Federal Rule of Evidence 803(8)(C). The technique employed by the USDA veterinarians rules out "learned avoidance" as a cause of reaction to palpation. The ALJ's suggestion that the Judicial Officer lacks independence from those who evaluate the performance of the office has no basis in fact.

In *In re County Produce, Inc.*, PACA Docket No. D-92-521, decided by the Acting Judicial Officer on January 19, 1996 (25 pages), the Acting Judicial Officer affirmed Judge Hunt's (ALJ) decision holding that Respondent permitted Ms. Linda Wright to continue her affiliation with it after being notified that Wright was ineligible to be employed or affiliated with any PACA licensee for a 1-year period because of a disciplinary order issued against Wright's company. The Acting Judicial Officer also affirmed the ALJ's sanction, revoking Respondent's license. Respondent received adequate notice that to continue Wright's affiliation with Respondent could result in suspension or revocation of its license. When Complainant has determined, by the procedure set forth in 7 C.F.R. § 47.47 *et seq.*, that Linda Wright was responsibly connected to a licensed produce dealer found to have engaged in flagrant and repeated PACA violations, the ALJ has no authority to review such determination. Wright's defense that she was not paid is irrelevant, since 7 U.S.C. § 499a(10) proscribes any affiliation, whether compensated or not. Ignorance of PACA laws and regulations is no excuse. Wright's claim, that USDA investigator misled her into signing Consent Decision premised upon USDA's non-enforcement of PACA sanctions, is not credible. Respondent argues that the factual situation herein is the same as in *ABL Produce*, but the ALJ and Acting Judicial Officer find this case more akin to *Tri-County Produce*. In *ABL Produce*, the ALJ recommended a 30-day suspension, but the Agency officials and the Judicial Officer recommended revocation. In this case, however, all three recommended revocation. Some

recent Courts' decisions interpret USDA sanction policy to be "all circumstances of the case relevant to the sanction." In fact, it is opposite to that_-"all *relevant* circumstances" shall be considered in fashioning a sanction, which gives the Judicial Officer the opportunity to consider Congressional intent. Congress regards a non-payer of a reparation award to be a "defiled person likely to contaminate any licensee." Facts of this proceeding contrasted with *ABL Produce* and *Tri-County Produce*. Respondent's mitigating circumstances, when analyzed, are found not at all mitigating: employee's ethics, payment practices, company financial health, and lack of reparation complaints against Respondent not mitigating.

In *In re Jim Fobber*, A.Q. Docket No. 94-19, decided by the Judicial Officer on February 7, 1996 (17 pages), the Judicial Officer affirmed the decision by Administrative Law Judge Paul Kane (ALJ) assessing civil penalties of $1,000 against Respondent Jim Fobber for moving swine interstate without the required certificates, and $500 each against Respondent Jim Fobber and Respondent James Edward Fobber, Jr., based upon a settlement agreement reached on the record with respect to the interstate movement of cattle allegedly in violation of the brucellosis regulations. The right to cross-examine is not denied by a witness' failure to attend the hearing; witness' attendance could not be compelled because the controlling Act does not provide subpoena power. Reliable hearsay is admissible in administrative proceedings. It is not necessary to show that Respondent Jim Fobber's actions resulted in the interstate spread of pseudorabies in order to find that he violated 9 C.F.R. §§ 76.6 and 85.7(c). Settlement agreements reached by parties to litigation should not be upset absent extraordinary circumstances. The sanction imposed is appropriate, based upon similar sanctions in similar cases. The sanction is based upon the sanction policy in *In re S.S. Farms Linn County*.

In *In re Kim Bennett*, HPA Docket No. 93-6, decided by the Judicial Officer on February 12, 1996 (2 pages), the Judicial Officer denied Respondents' Petition for Reconsideration, which requests that certain references in the Decision and Order dismissing the Complaint against Respondents be corrected and that the Judicial Officer issue a second Decision and Order dismissing the Complaint against Respondents with the references corrected. The references were not incorrect and the issuance of a second Decision and Order dismissing the Complaint against Respondents would serve no purpose.

In *In re Jeremy Byrd*, P&S Docket No. D-95-55, decided by the Judicial Officer on February 21, 1996 (19 pages), the Judicial Officer affirmed the decision by Chief Judge Palmer (Chief ALJ) ordering Respondent to cease and desist from engaging in business in any capacity without the required registration and bonding under the Act; failing to pay for livestock; failing to pay, when due, for livestock; and issuing NSF checks in payment for livestock. The Order prohibits Respondent from engaging in business subject to the Act without being registered, and provides that Respondent shall not be registered to engage in business for 5 years and thereafter until properly registered and bonded; provided, however, that upon application, a supplemental order may be issued allowing Respondent registration and bonding after 150 days upon demonstration that all unpaid livestock sellers have been paid in full, and provided further, that the Order may be modified to permit Respondent's salaried employment by another registrant or packer after 150 days. Respondent failed to file a timely Answer, and, therefore, a default order was properly issued. The Bankruptcy Code permits disciplinary proceedings and the imposition of sanctions under the Packers and Stockyards Act notwithstanding bankruptcy. The sanction imposed is appropriate, based upon similar sanctions in similar disciplinary proceedings under the Packers and Stockyards Act, considering the serious nature of the violations.

In *In re Barry Glick*, P.Q. Docket No. 95-10, decided by the Judicial Officer on February 22, 1996 (14 pages), the Judicial Officer affirmed the decision by Administrative Law Judge James W. Hunt (ALJ) assessing a civil penalty of $5,500 against Respondent Barry Glick for importing prohibited and restricted articles into the United States in violation of the Federal Plant Pest Act, the Plant Quarantine Act, and 9 C.F.R. § 319.37 *et seq.* The sanction imposed is appropriate, and Respondent failed to timely raise or prove inability to pay in mitigation of the civil penalty assessed. Default decision properly issued because Respondent failed to appear at the

hearing.

In *In re Big Bear Farm, Inc.*, AWA Docket No. 93_32, decided by the Judicial Officer on March 15, 1996 (53 pages), the Judicial Officer affirmed Judge Hunt's (ALJ) Decision and Order suspending Respondent Big Bear Farm, Inc.'s, license, assessing a civil penalty jointly and severally against Respondents Andrew Burr and Carol Burr, and directing Respondents to cease and desist from violating the Animal Welfare Act (Act) and the regulations and standards issued under the Act. However, the Judicial Officer increased the ALJ's 30-day suspension order to 45 days and increased the civil penalty assessed from $1,500 to $6,750. Complainant, as proponent of the Order, bears the burden of proof and the standard of proof by which burden of persuasion is met is preponderance of the evidence. There is no factual basis for estoppel in this case. The Department's perimeter fence requirements are valid and enforceable. The Complaint filed in the case fully apprised the Respondents of the issues in controversy, satisfies due process, and complies with the applicable Rules of Practice, 7 C.F.R. § 1.135, and there is nothing in the record to indicate that Respondents were misled by the Complaint. Hearsay evidence is admissible in administrative proceedings and hearsay can constitute substantial evidence if reliable and trustworthy. Past recollection recorded is considered reliable, probative, and substantial evidence if made while the events recorded were fresh in the witnesses' minds. The annual renewal of Respondent Big Bear Farm, Inc.'s, license is not a basis for dismissal of the Complaint. Respondents' violations were willful under the Administrative Procedure Act, 5 U.S.C. § 558(c). The sanction imposed is appropriate, and the effect of the assessment of a civil penalty on Respondents' ability to continue to operate as exhibitors under the Animal Welfare Act is not taken into account in determining the amount of the civil penalty to assess.

In *In re Barry Glick*, P.Q. Docket No. 95-10, decided by the Judicial Officer on March 26, 1996 (5 pages), the Judicial Officer denied Respondent's Petition for Reconsideration. The record establishes that Respondent had requisite notice of and an opportunity to participate fully in the proceeding. The record contains nothing to indicate that Respondent was the subject of a government conspiracy or abused by government employees. No further review of this matter is available under the applicable Rules of Practice.

In *In re William Joseph Vergis*, AWA Docket No. 93-25, decided by the Judicial Officer on April 1, 1996 (24 pages), the Judicial Officer affirmed Judge Kane's (ALJ) Decision and Order assessing a civil penalty against Respondent and directing Respondent to cease and desist from violating the Animal Welfare Act (Act) and the regulations and standards issued under the Act. However, the Judicial Officer increased the civil penalty from $500 to $2,500; disqualified Respondent from becoming licensed for a period of 1 year; found that Respondent's violation of a regulation issued under the Act constitutes a violation of the cease and desist provisions of the Consent Decision issued in *In re Studio Animal Rentals, Inc.*, AWA Docket No. 88_7 (Feb. 9, 1989); and, in accordance with the Consent Decision, prohibited Respondent from engaging in any activity for which a license is required under the Act until February 11, 1999. Respondent could have been found to have engaged in business as an exhibitor without a license. However, distinctions unique to this record were made between employees of licensees and independent contractors working for licensees, such that it would have presented a reviewing court with too ambiguous a record. Neither the ALJ's Finding of Fact regarding Respondent's credibility nor the ALJ's basis for finding that Respondent had violated 9 C.F.R. § 2.131(b)(1) are adopted. The sanction imposed is appropriate.

In *In re Hogan Distributing, Inc.*, PACA Docket No. D-94-556 decided by the Judicial Officer on April 22, 1996 (23 pages), the Judicial Officer affirmed the decision by Judge Bernstein (ALJ) publishing the finding that Respondent committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b by failing to make full payment promptly for perishable agricultural commodities. Settlement with some produce creditors and failure of Respondent's customers to pay Respondent are irrelevant to the issue of Respondent's violation of PACA. Respondent should have been adequately capitalized or have been able to obtain additional capital to make full

payment promptly to sellers. There can be no excuses for nonpayment under PACA where there are repeated failures to pay substantial amounts over an extended period. Publication of the facts and circumstances of a violation of 7 U.S.C. § 499b is not dependent on finding that the violation was willful. Willfulness is not relevant to the employment restrictions in 7 U.S.C. § 499h(b). A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or if a person carelessly disregards statutory requirements. Failures to make full payment promptly in numerous transactions over a period in excess of 1 year constitute willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4). In view of the need for prompt payment and financial responsibility in the industry, the sanction of publication, recommended by administrative officials, is appropriate, clearly within the Secretary's discretion, and consistent with recent cases. Collateral effects of the sanction on those responsibly connected with Respondent, and those who have entered into settlement agreements with those responsibly connected with Respondent, are not relevant to a proceeding to determine whether Respondent violated 7 U.S.C. § 499b(4).

In *In re Saulsbury Enterprises*, AMAA Docket No. 94-2, decided by the Judicial Officer on May 7, 1996 (65 pages), the Judicial Officer affirmed the decision by Judge Hunt (ALJ) holding that the Respondents violated the Raisin Marketing Order's requirements that each handler have its incoming and outgoing raisins inspected; and, file various reports with the Raisin Administrative Committee. However, the Judicial Officer increased the $3,000 civil penalty assessed by the ALJ jointly and severally against Respondents, to $219,000, plus assessments. Specifically, the Judicial Officer: increased the civil penalties to $120,000 for failure to have incoming and outgoing inspections on raisins shipped to Canada; increased the civil penalties to $40,000 for failing to file reports; added civil penalties of $59,000 for failing to hold raisins in reserve; and ordered Respondents to pay assessments for tonnage shipped to Canada of $557.33 for crop year 1988-89; $594.68 for 1989-90; and $521.29 for 1990-91. The standard of proof in AMAA cases is a preponderance of the evidence. Respondents' version of the facts in this case is not credible. A "wet grape product" would deteriorate in the weeks Respondents claim product was in storage in late summer California heat. Complainant's witnesses' credible testimony shows Respondents' product was raisins and ALJ properly found product to be raisins in accordance with the definition of "raisins" in the Raisin Order. The Judicial Officer is not bound by credibility determinations of the ALJ, but can make his own determinations, so long as they are based upon substantive evidence. Respondents' witnesses, Mayes and Saulsbury, were found by Judicial Officer to have little credibility. Respondents' proclaimed ignorance of the Marketing Order, and professed inadvertent violation of the Marketing Order, was not credible. Remedial legislation should be liberally construed to achieve the Act's purpose. The administrative construction of a statute by the officials charged with its enforcement is entitled to great weight. Marketing Order's civil penalties are designed by Congress to complement the criminal penalties which U.S. Attorneys have authority to seek.

In *In re Ruma Fruit and Produce Co., Inc.*, PACA Docket No. D-94-565, decided by the Judicial Officer on May 16, 1996 (41 pages), the Judicial Officer affirmed Judge Baker's (ALJ) decision suspending Respondent's license for 45 days but remanded the case to determine whether the assessment of a civil penalty in lieu of the 45-day suspension would be appropriate, and if so, the amount of the civil penalty to be assessed. Respondent willfully violated 7 U.S.C. § 499h(b) by employing Dean W. Hopkins (Hopkins) after being notified that Hopkins was ineligible to be employed by or affiliated with any PACA licensee, without both the Secretary's approval and an approved surety bond, because Hopkins failed to pay a reparation award. The reparation complainant's (Boston Tomato) December 19, 1991, filing of a state court action, involving the same issues set forth in its March 28, 1992, reparation complaint against Hopkins, does not deprive the Secretary of subject matter jurisdiction, where the Department was not made aware of the state court action. Boston Tomato was therefore not compelled to choose remedies; and, both the state court action and the reparation action proceeded to judgment without mention of the other. The reparation order issued prior to the state court order was *res judicata* as to the state court action. The instant PACA disciplinary proceeding was not stayed either by Hopkins' filing a Bankruptcy Petition or by the May 20, 1993, discharge of Hopkins' debt to Boston Tomato. Pursuant to 7 U.S.C. § 499g(d), the reparation order against Hopkins in favor of Boston Tomato was not

satisfied until the Secretary was notified on March 11, 1994, and, therefore, employment restrictions on Hopkins remained in effect until March 11, 1994, despite any previous settlement of the reparation award by Hopkins and Boston Tomato. The Secretary has sole authority to enforce the employment bar under 7 U.S.C. § 499h(b); the reparation complainant has no authority to waive the enforcement of the employment bar. The 45-day suspension of Respondent's license is appropriate under the circumstances; however, pursuant to 7 U.S.C. § 499h(e), the case is remanded to the ALJ to determine the propriety of a civil penalty in lieu of a 45-day PACA license suspension.

In *In re Jim Fobber*, A.Q. Docket No. 94-19, decided by the Judicial Officer on May 21, 1996 (6 pages), the Judicial Officer denied Respondent Jim Fobber's late-filed Petition to Reconsider. Respondent Jim Fobber's purported intention, when he purchased swine, to move the swine directly to slaughter does not relieve him of liability for violating 9 C.F.R. §§ 76.6 and 85.7(c) when Respondent did not in fact move the swine directly to slaughter. It is not necessary to show that the swine were infected with a disease in order to find that Respondent Jim Fobber violated 9 C.F.R. §§ 76.6 and 85.7(c). The record contains sufficient evidence to infer that the swine were not vaccinated for pseudorabies. Settlement agreements reached by parties to litigation should not be upset absent extraordinary circumstances.

In *In re Gallo Cattle Company*, NDPRB Docket No. 96-1, decided by the Judicial Officer on May 29, 1996 (4 pages), the Judicial Officer denied an application for interim relief. Under the governing Rules of Practice, (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52), interim relief is only available to a person who files a petition pursuant to 7 C.F.R. § 900.52. (See 7 C.F.R. § 900.70(a).) Petitioner filed its petition pursuant to 7 C.F.R. § 1200.52, not 7 C.F.R. § 900.52; therefore, interim relief is not available to Petitioner. Further, even if interim relief had been available, Petitioner did not comply with the requirements for filing an application for interim relief, (7 C.F.R. § 900.70(a), (b).) Finally, even if interim relief had been available to Petitioner and Petitioner had filed a separate application for interim relief in accordance with the applicable Rules of Practice, Petitioner's request for interim relief would be denied based upon established precedent.

In *In re Johnny E. Lewis* (Decision on Remand as to Jerry M. Morrison), HPA Docket No. 92-37, decided by the Judicial Officer on May 31, 1996 (10 pages), the Judicial Officer found that Respondent Morrison allowed, as owner, the entry of a horse for the purpose of showing or exhibiting the horse in a horse show, while the horse was sore, and assessed a civil penalty of $2,000 and disqualified Respondent Morrison for a period of 1 year from showing exhibiting, or entering any horse, and from judging, managing, or otherwise participating in any horse show. The United States Court of Appeals for the Eleventh Circuit remanded the case to the Judicial Officer to determine whether Respondent Morrison "allowed" the entry of a horse using *Burton* test with a slight caveat. *Burton v. United States Department of Agriculture*, 683 F.2d 280 (8th Cir. 1982), was erroneously decided and will only be followed in proceedings in which appeal would lie to the Eighth Circuit and *Lewis v. Secretary of Agriculture*, 73 F.3d 312 (11th Cir. 1996), was erroneously decided and will only be followed in proceedings in which appeal would lie to the Eleventh Circuit. Applying the *Burton* test, as modified by *Lewis*, Respondent Morrison "allowed" the entry of a horse in a horse show for the purpose of showing or exhibiting the horse while the horse was sore in violation of 5(2)(D) of the Horse Protection Act, (15 U.S.C. § 1824(2)(D)).

In *In re Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc., and Kenney Transport, Inc.* (Order Denying Late Appeal as to Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc.), A.Q. Docket No. 95-41, decided by the Judicial Officer on June 6, 1996 (25 pages), the Judicial Officer denied Respondent Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc.'s, late-filed appeal. The Judicial Officer has no jurisdiction to consider Respondent's appeal filed after Chief Administrative Law Judge Victor W. Palmer's Default Decision and Order became final. Even if Respondent's appeal had been timely filed, it would have been denied based upon Respondent's failure to file an Answer which, under the Rules of Practice, (7 C.F.R. § 1.136(c)), constitutes an admission of the allegations in the Complaint. Respondent's assertions regarding the

length of time he has been in business, a license obtained from another federal agency, and his belief that he has a good defense are not relevant. Respondent's contention that he was not aware of the proceeding until after the Default Decision and Order became final and effective is not supported by the record. Actual notice is required neither under the Rules of Practice, which provide for service by certified mail, nor under the Due Process Clause, which only requires that notice be sent in a manner reasonably calculated to apprise Respondent of the pendency of the action and afford him an opportunity to present objections. Respondent's contention that he relied upon his custom broker to handle the proceeding is not supported by the record. Neither 21 U.S.C. § 111 nor 9 C.F.R. § 95.12 limit responsibility for compliance with 9 C.F.R. § 95.12 to custom brokers, and Respondent's reliance on a custom broker to assist with importation and to handle and treat products in accordance with 9 C.F.R. § 95.12 does not relieve Respondent of responsibility for compliance with 9 C.F.R. § 95.12.

In *In re Velasam Veal Connection*, FMIA Docket No. 96-8 and PPIA Docket No. 96_7, decided by the Judicial Officer on June 25, 1996 (7 pages), the Judicial Officer dismissed an interlocutory appeal from a ruling by Administrative Law Judge Edwin S. Bernstein (ALJ) on the ground that interlocutory appeals are not permitted under the Rules of Practice.

In *In re Velasam Veal Connection*, FMIA Docket No. 96-6 and PPIA Docket No. 96_5, decided by the Judicial Officer on June 25, 1996 (7 pages), the Judicial Officer dismissed a late-filed appeal. Administrative Law Judge Edwin S. Bernstein (ALJ) issued a Consent Decision and Order on March 26, 1996, which became final upon issuance in accordance with 7 C.F.R. § 1.138. The Judicial Officer has no jurisdiction to consider Respondents' appeal after an ALJ's Consent Decision and Order becomes final.

In *In re Field Market Produce, Inc., d/b/a The Produce Place*, PACA Docket No. D_95_516, decided by the Judicial Officer on July 10, 1996 (22 pages), the Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer has no jurisdiction to consider Respondent's appeal filed after Administrative Law Judge Edwin S. Bernstein's Decision Without Hearing by Reason of Admissions became final. Respondent is bound by the acts and omissions of its attorney. The double jeopardy clause cannot be interposed to bar this administrative disciplinary proceeding. Respondent's petition to reopen the hearing filed pursuant to 7 C.F.R. § 1.146(a)(2) is denied because no hearing preceded Respondent's petition to reopen hearing. Respondent's petition to reconsider filed pursuant to 7 C.F.R. § 1.146(a)(3) before the Judicial Officer issued a decision is denied as prematurely filed.

In *In re Mike Thomas*, HPA Docket No. 94-28, decided by the Judicial Officer on July 15, 1996, (61 pages), the Judicial Officer affirmed the Decision by Judge Hunt (ALJ) in which he found that Respondent entered, for the purpose of showing or exhibiting, a horse in a horse show while the horse was sore. The ALJ assessed a civil penalty of $2,000 against Respondent and disqualified Respondent for 1 year from showing, exhibiting, or entering any horse, and from judging, managing, or otherwise participating in any horse show or horse exhibition. A horse may be found to be sore based upon the professional opinion of USDA veterinarians who relied solely upon palpation of the horse's pasterns. The Department's use of palpation is not a "rule" under the Administrative Procedure Act. Thus, the use of palpation need not be preceded by rule making in accordance with the notice-and-comment procedures in the Administrative Procedure Act, (5 U.S.C. § 553). Hearsay evidence is admissible under the Administrative Procedure Act, (5 U.S.C. § 556(d)), and the Rules of Practice governing this proceeding, (7 C.F.R. §§ 1.130-.151). Past recollection recorded in the form of affidavits and a summary made while the events were fresh in the witnesses minds is reliable, probative, and substantial. *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995), is not controlling in this proceeding. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum 1-year disqualification period on Respondent, in addition to a $2,000 civil penalty.

In *In re Sandra L. Reid*, P.Q. Docket No. 95-47, decided by the Judicial Officer on July 17, 1996 (17 pages), the Judicial Officer affirmed the Default Decision by Chief Administrative Law Judge Victor W. Palmer (Chief ALJ) assessing a civil penalty of $375 against Respondent for importing a mango into the United States in violation of the Federal Plant Pest Act, the Plant Quarantine Act, and 7 C.F.R. § 319.56(c). The Rules of Practice, 7 C.F.R. § 1.145(a), provide that appeal to the Judicial Officer must be filed within 30 days after service of the decision. Respondent's appeal to the Judicial Officer filed 32 days after service of the Default Decision could have been denied as being late-filed. However, in accordance with the Rules of Practice, 7 C.F.R. § 1.139, a Default Decision does not become final and effective until 5 days after the 30-day appeal time has elapsed. This provision allows the Judicial Officer to grant up to a 4-day extension of time for filing an appeal, and Respondent was granted a 2-day extension. Under the Rules of Practice, Respondent's failure to file a timely Answer is deemed an admission of the allegations in the Complaint, (7 C.F.R. § 1.136(c)), and constitutes a waiver of hearing, (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Application of the default provisions of the Rules of Practice does not deny Respondent due process. The Department is not required to hold a hearing; therefore, under *Kaplinsky*, the civil penalty requested in the Complaint is reduced by one-half.

In *In re Jim Singleton*, HPA Docket No. 94-12, decided by the Judicial Officer on July 23, 1996 (7 pages), the Judicial Officer affirmed the decision by Administrative Law Judge Paul Kane (ALJ) dismissing the Complaint which alleges that Respondent Jim Singleton entered for the purpose of showing or exhibiting, showed, and allowed the entry and showing of a horse while it was sore, and Respondent Jackie Singleton showed a horse while it was sore. Complainant, as proponent of the Order, bears the burden of proof, and the standard of proof by which the burden of persuasion is met is preponderance of the evidence. Complainant's evidence is not strong enough to justify reversal of the ALJ's findings of fact. However, the Judicial Officer disagreed with most of the Initial Decision and Order and did not adopt it as the final Decision and Order. Even if a party's disagreement with the Judge's decision is based solely upon the Judge's determination as to the credibility of witnesses, the party may appeal to the Judicial Officer in accordance with 7 C.F.R. § 1.145(a), and the Judicial Officer can, in appropriate circumstances, reverse a decision by an ALJ even though the ALJ's decision is based on the ALJ's determination as to the credibility of witnesses.

In *In re Billy Jacobs, Sr.*, HPA Docket No. 95-5, decided by the Judicial Officer on August 15, 1996 (17 pages), the Judicial Officer affirmed the Default Decision by Judge Baker (ALJ) assessing a civil penalty of $3,000 against Respondent, but reversed with respect to the imposition of a 5-year disqualification period against Respondent. The record in this case does not establish a basis for imposing a disqualification period against Respondent for his failure to obey a previously-imposed disqualification period in violation of 15 U.S.C. § 1825(c). Respondent's failure to file a timely Answer is deemed an admission of the allegations in the Complaint, (7 C.F.R. § 1.136(c)), and constitutes a waiver of hearing, (7 C.F.R. § 1.139). The Rules of Practice provide that Respondent shall file with the Hearing Clerk an Answer, (7 C.F.R. § 1.136(a)); but Complainant's counsel's receipt of Respondent's Answer does not constitute filing with the Hearing Clerk. Further, Complainant's counsel is not obligated to file with the Hearing Clerk on a Respondent's behalf any Answer which Complainant's counsel may receive from a Respondent. The Rules of Practice clearly place the duty on Respondent for filing Respondent's Answer with the Hearing Clerk, (7 C.F.R. § 1.136(a)). Accordingly, the Default Decision was properly issued.

In *In re John T. Gray* (Decision and Order as to Glen Edward Cole), HPA Docket No. 94-35, decided by the Judicial Officer on August 19, 1996 (50 pages), the Judicial Officer reversed the Decision of Judge Kane (ALJ) and found that Respondent Cole allowed the entry, for the purpose of showing or exhibiting, of a horse in a horse show while the horse was sore, in violation of 15 U.S.C. § 1824(2)(D). The proponent of an order has the burden of proof in proceedings under the Administrative Procedure Act, and the standard of proof by which the

burden of persuasion is met is the preponderance of the evidence standard. Hearsay evidence is admissible in administrative proceedings and can constitute substantial evidence if reliable. Past recollection recorded is reliable, probative, and substantial evidence if recorded while the events were fresh in the witnesses' minds. Respondent admitted that he was the owner of the horse and the horse was entered in a horse show. Complainant proved that the horse was entered while sore and that the entry was with Respondent's authorization. Respondent introduced evidence that he took an affirmative step to prevent soring. However, even applying the test in *Baird v. United States Dep't of Agric.*, 39 F.3d 131 (1994), Respondent allowed the entry of the horse while sore because Respondent's evidence that he instructed his trainer not to sore the horse is not credible. Palpation alone is a reliable method of determining whether a horse is sore within the meaning of the Horse Protection Act. The Department's use of palpation is not a "rule" under the Administrative Procedure Act. Thus, the use of palpation need not be preceded by rule making in accordance with the notice-and-comment procedures in the Administrative Procedure Act. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum 1-year disqualification period on Respondent, in addition to a $2,000 civil penalty.

In *In re Bibi Uddin*, P.Q. Docket No. 95-55, decided by the Judicial Officer on August 23, 1996, (21 pages), the Judicial Officer affirmed the Default Decision by Chief Administrative Law Judge Victor W. Palmer (Chief ALJ) assessing a civil penalty of $250 against Respondent for importing approximately 7 cucurbits (bitter melons) and 20 *Manilkara zapota* (sapodillas), in violation of 7 C.F.R. § 319.56. Respondent was served with the Complaint and Complainant's Motion for Default Decision in accordance with 7 C.F.R. § 1.147(c)(1). Under the Rules of Practice, (7 C.F.R. §§ 1.136(c), .139), Respondent's failure to file a timely Answer constitutes an admission of the allegations in the Complaint and a waiver of hearing. Respondent's denial of the material allegations of the Complaint, filed more than 9 months after service of the Complaint on Respondent, is too late. Intent is not relevant to an administrative proceeding for the assessment of a civil penalty for a violation of a regulation issued under the Plant Quarantine Act. The civil penalty assessed against Respondent is warranted and consistent with civil penalties requested and assessed in similar circumstances.

In *In re Andershock Fruitland, Inc.*, PACA Docket No. D-95-531, decided by the Judicial Officer on September 12, 1996 (38 pages), the Judicial Officer affirmed in part and reversed in part Judge Hunt's (ALJ) Decision and Order (1) revoking Respondent Fruitland's PACA license (because Respondent Fruitland committed flagrant and repeated violations of 7 U.S.C. § 499b(4) by failing to make full payment promptly for produce); and (2) denying Respondent AAA Recovery's application for a PACA license (because James A. Andershock, doing business as AAA Recovery, engaged in practices of a character prohibited by the PACA while an officer of Respondent Fruitland). The Judicial Officer reversed both the ALJ's stay of the ALJ's order of revocation, and the ALJ's provision for an automatic rescission of the ALJ's order of revocation, because the stay and automatic rescission do not carry out the remedial purposes of the PACA. Moreover, the factors cited by the ALJ for his decision to stay the revocation of Respondent Fruitland's PACA license are not relevant circumstances under the Department's sanction policy for flagrant or repeated failures to make full payment promptly. Excuses for payment violations and collateral effects of revocation of a PACA license are neither relevant to proceedings to determine whether the Respondent has failed to make full payment promptly, nor relevant to the sanction to be imposed on a Respondent who flagrantly or repeatedly fails to make full payment promptly for produce. The sanction policy in *In re S.S. Farms Linn County, Inc.*, does not alter the doctrine in *In re The Caito Produce Co.* that, because of the peculiar nature of the produce industry, and the congressional purpose that only financially responsible persons should be engaged in the produce industry, excuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been flagrant or repeated failures to pay a substantial amount of money over an extended period of time. The record does not justify reversing the ALJ's finding, based upon credibility determinations, that Respondent Fruitland paid one of its produce creditors prior to the hearing. The Judicial Officer found that in addition to being flagrant and repeated Respondent Fruitland's violations of 7 U.S.C. § 499b(4) were willful.

In *In re City of Orange, California*, AWA Docket No. 96-44, decided by the Judicial Officer on September 12, 1996 (19 pages), the Judicial Officer affirmed the Default Decision by Administrative Law Judge James W. Hunt (ALJ) assessing a civil penalty of $5,000 against Respondent and directing Respondent to cease and desist from violating the Animal Welfare Act (Act) and the Regulations and Standards issued under the Act. Respondent's failure to file a timely Answer is deemed an admission of the allegations in the Complaint, (7 C.F.R. § 1.136(c)), and constitutes a waiver of hearing, (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Application of the default provisions of the Rules of Practice does not deny Respondent due process. The civil penalty assessed is warranted and appropriate in light of the factors that must be considered under section 19(b) of the Act, (7 U.S.C. § 2149(b)), and the Department's sanction policy, and is consistent with civil penalties assessed in previous cases for similar violations of the Act and the Regulations and Standards issued under the Act.

In *In re Scamcorp, Inc.*, PACA Docket No. D-95-502, decided by the Judicial Officer on September 18, 1996 (9 pages) (Ruling on Respondent's Motion to Dismiss Appeal), the Judicial Officer ruled that the Office of the Hearing Clerk's practice of sending Complainant's counsel Initial Decisions and Orders through the Department's interoffice mail system does not constitute service by *mail*, as that word is defined in section 1.132 of the Rules of Practice. Instead, Complainant was served by delivery to a responsible individual at the last known principal place of business of Complainant's counsel in accordance with 7 C.F.R. § 1.147(c)(3)(i) on the day that Complainant's counsel verified receipt of the Initial Decision and Order by signing and dating the Office of the Hearing Clerk's cover letter transmitting the Initial Decision and Order.

In *In re Billy Jacobs, Sr.*, HPA Docket No. 95-5, decided by the Judicial Officer on September 20, 1996 (4 pages), the Judicial Officer denied the Petition for Reconsideration because it was not timely filed. If it had been timely filed, it would have been denied on the merits for the reasons set forth in the Decision and Order filed August 15, 1996.

In *In re Far West Meats*, FMIA Docket No. 91-0002 and PPIA Docket No. 91-0001, decided by the Judicial Officer on September 27, 1996 (11 pages), the Judicial Officer ruled in response to two questions certified by Judge Hunt (ALJ) that an ALJ may certify a question to the Judicial Officer that arises in the context of a proceeding in which there is no right of appeal to the Judicial Officer and that an ALJ has authority to entertain and rule on motions to modify Consent Decisions. Since a Consent Decision under the Rules of Practice is to reflect agreement of the parties, the ALJ should not modify the Consent Decision in a manner that is opposed by a party, but rather, in extraordinary circumstances, should vacate the Consent Decision. The parties would then be free to proceed with litigation of the case or to agree to the entry of a new Consent Decision.

APPENDIX 2

September 30, 1996

PENDING CASES APPEALED TO THE JUDICIAL OFFICER

Cal-Almond, Inc., et al., Pets.
94 AMA F&V 981-1, 981-3, 981-4, 981-5, 981-7 -- **Ref to JO 9/22/95**
Palmer, ALJ -- D&O 6/15/95

Pets' response to R's proposed FOF 9/21/95
Pets' joint response to R's appeal filed 9/20/95
R's response to Pets appeal 8/10/95
R's appeal to JO 8/4/95
Pets' appeal 7/19/95
This case on hold for Supreme Court decision

Gary R. Edwards, et al., Resps.
HPA 91-113 -- **Ref to JO 1/29/96**
Kane, ALJ -- Third D&O 8/11/95
R's response to C's appeal 1/23/96
C's appeal 11/20/95

Volpe Vito, Inc., dba Four Bears Water Park & Rec. Area., Resp.
AWA 94-8 -- **Ref to JO 3/12/96**
Kane, ALJ -- D&O 9/15/95
R's response to C's appeal 3/11/96
C's appeal & Opposition to R's appeal 1/5/96
R's appeal 11/17/95

Havana Potatoes of New York Corp. & Havpo, Inc., Resps.
PACA D-94-560 -- **Ref to JO 3/19/96**
Bernstein, ALJ -- D&O 10/19/95
C's response to Rs' appeal 3/18/96
Rs' appeal 2/20/96

Garelick Farms, Inc., Pet.
AMA M 1-1 -- **Ref to JO 3/22/96**
Kane, ALJ -- D&O 12/28/95
Pet's resonse to R's appeal 3/21/96
R's appeal 2/23/96

Carl Edwards & Sons Stables, et al., Resps.
HPA 93-15 -- **Ref to JO 5/6/96**
Kane, ALJ -- D&O 11/24/95
Rs' response to C's appeal 5/1/96
C's appeal 2/20/96

Saulsbury Enterprises, et al., Resps.
AMAA 94-2 -- **Ref to JO 7/1/96**
C's response to R's Pet. for Rehearing 6/28/96
R's Pet. for Rehearing of JO decision 5/23/96

Ann M. Veneman, et al., Pets.
NDPRB 95-1 -- **Ref to JO 7/16/96**
Palmer, ALJ -- D&O 3/22/96
R's response to Pets. appeal 7/15/96
Pets. appeal 4/26/96

Kanowitz Fruit & Produce Co., Resp.
PACA D-95-504 -- **Ref to JO 7/18/96**
Bernstein, ALJ -- Bench D&O 5/29/96
C's response to R's appeal 7/17/96
R's appeal 6/24/96

Donald B. Mills, Inc., Pet.
MPRCIA 95-1 -- **Ref to JO 8/7/96**
Bernstein, ALJ -- D&O 4/26/96
Pet's response to USDA's & AMI's appeal 8/5/96
Pet's reply to R's response to Pet's appeal 7/31/96
R's appeal re: FofF, Concl. of Law & Order 7/16/96
R's appeal petition 7/16/96
Intervenor AMI appeal from 4/26/96 & 6/12/96 Decisions of the ALJ & Intervenor's response to Pet's 5/30 appeal 7/12/96
Pet. appeal 5/30/96

Midway Farms, Inc., Pet.
94 AMA F&V 989-1 -- **Ref to JO 9/9/96**
Palmer, ALJ -- Dismissal of Petition 5/10/96
Pet's response to R's appeal 9/6/96
R's appeal & Opposition 8/9/96
Pet's appeal 6/4/96

Arizona Livestock Auction, Inc., Resp.
P&S D-96-0026 -- **Ref to JO 9/23/96**
Baker, ALJ -- DD&O 7/23/96
C's response to R's appeal 9/19/96
R's appeal 8/28/96