APPENDIX 1

SUMMARY OF DECISIONS BY THE JUDICIAL OFFICER

Fiscal Year 1998

Link Directly to Appendix 2

In *In re James J. Everhart*, AWA Docket No. 96-0051, decided by the Judicial Officer on October 2, 1997 (23 pages), the Judicial Officer affirmed the Default Decision by Administrative Law Judge Dorothea A. Baker (ALJ) but granted Complainant's motion, joined by Respondent, to modify the ALJ's Order in the Default Decision. The Judicial Officer assessed a civil penalty of $3,000 against Respondent but suspended the assessment of the civil penalty provided that Respondent does not violate the Animal Welfare Act (Act) or the Regulations and Standards issued under the Act for 10 years; permanently disqualified Respondent from obtaining a license under the Act; and directed Respondent to cease and desist from violating the 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. Neither Respondent's inability to pay the civil penalty assessed nor Respondent's disability is a basis for setting aside or modifying the Default Decision.

In *In re Michael Norinsberg*, PACA-APP Docket No. 96-0009, decided by the Judicial Officer on October 21, 1997 (34 pages), the Judicial Officer reversed Judge Bernstein's (ALJ) decision that Petitioner was not responsibly connected with The Norinsberg Corporation during the time that The Norinsberg Corporation violated the PACA. Petitioner admits that he was the nominal officer of The Norinsberg Corporation during the time that The Norinsberg Corporation violated the PACA. During this time, Petitioner signed 14 checks totaling $59,728.60 which were payable to persons who were not The Norinsberg Corporation's produce creditors. Petitioner's actions enabled persons who presented these checks for payment to receive payment and resulted in the substantial reduction of the resources available to The Norinsberg Corporation to make full payment promptly to produce creditors in accordance with the PACA. Petitioner was therefore actively involved in activities resulting in The Norinsberg Corporation's violations of the PACA and the fact that Petitioner engaged in these activities at the direction of another does not negate Petitioner's active involvement. Since Petitioner, who admits that he was an officer of The Norinsberg Corporation, albeit an officer in name only, has failed to prove by a preponderance of the evidence that he was not actively involved in the activities resulting in The Norinsberg Corporation's violations of the PACA, Petitioner was responsibly connected with The Norinsberg Corporation within the meaning of section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)).

In *In re Jerry Goetz*, BPRA Docket No. 96-0001, decided by the Judicial Officer on November 3, 1997 (74 pages), the Judicial Officer affirmed Judge Hunt's (ALJ) decision that Respondent violated the Beef Promotion and Research Order (7 C.F.R. §§ 1260.101.-.217) (Beef Promotion Order) and the Rules and Regulations (7 C.F.R. §§ 1260.301-.316) (Beef Promotion Regulations) by failing to remit assessments due to a qualified State beef council. In addition, the Judicial Officer found that Respondent violated the Beef Promotion Order and the Beef Promotion Regulations by failing to transmit reports of assessments to the Kansas Beef Council. The Judicial Officer held that the Beef Promotion and Research Act of 1985 (Beef Promotion Act), the Beef Promotion Order, and the Beef Promotion Regulations do not violate Respondent's First Amendment right to

freedom of speech and do not violate Respondent's right to equal protection of the laws. The Beef Promotion Act is a valid regulation of interstate commerce and the assessments required to be collected and remitted under the Beef Promotion Act are not taxes, but rather, mere incidents of the regulation of commerce. Late payment charges under the Beef Promotion Order are not designed to penalize those who fail to remit assessments when due, but rather, are designed to reimburse the entity to which the assessments are not timely remitted for the time value of the assessments. Neither the Beef Promotion Act, the Beef Promotion Order, nor the Beef Promotion Regulations limits the time within which an action to collect unremitted assessments and late payment charges, assess civil penalties, or issue a cease and desist order may be instituted. The Judicial Officer ordered Respondent to pay assessments of $21,423 which Respondent failed to remit in accordance with the Beef Promotion Order and Beef Promotion Regulations and late payment charges of $45,154 to the Kansas Beef Council, ordered Respondent to cease and desist from violating the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations, and assessed Respondent a civil penalty of $69,244.51 in accordance with section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)).

In *In re Samuel Zimmerman*, AWA Docket No. 96-0021, decided by the Judicial Officer on November 6, 1997 (49 pages), the Judicial Officer reversed the decision by Administrative Law Judge James W. Hunt (ALJ). The Judicial Officer found that Respondent violated the Animal Welfare Act (AWA) and the Regulations and Standards issued under the AWA; assessed Respondent a civil penalty of $7,500; issued a cease and desist order; and suspended Respondent's AWA license for 40 days. Complainant proved by a preponderance of the evidence that Respondent: failed to maintain complete records showing the acquisition, disposition, and identification of animals; failed to keep primary enclosures in good repair; failed to remove excreta from primary enclosures on a daily basis; failed to provide adequate veterinary care for animals in need of care; failed to store food in a manner to allow proper cleaning and to prevent infestation; failed to provide for the adequate drainage of water; failed to allow APHIS officials to inspect his facility; and failed to keep premises where housing facilities were located clean and in good repair to protect animals from injury, to facilitate husbandry practices, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin. Congress has declared that the entire class of activities described in the AWA is in interstate or foreign commerce, substantially affects interstate or foreign commerce, or substantially affects the free flow of interstate or foreign commerce and Respondent's activities as a dealer fall within the activities described in the AWA and substantially affect commerce.

In *In re Tolar Farms*, PACA Docket No. D-96-0530, decided by the Judicial Officer on November 6, 1997 (21 pages), the Judicial Officer affirmed Judge Hunt's (ALJ) Decision Without Hearing by Reason of Admissions publishing the finding that Respondents committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) by failing to make full payment promptly for perishable agricultural commodities. Respondents' Answer, in conjunction with their promissory notes, constitutes an admission of the material allegations of fact in the Complaint, and there is no material issue of fact that warrants holding a hearing. It is not necessary to show that the undisputed facts prove all the allegations in the Complaint because the same order would be issued unless the proven violations are *de minimis*. Respondents failed to make full payment promptly to seven sellers of the agreed purchase prices in the total amount of $192,089.03 for 46 lots of perishable agricultural commodities which Respondents had purchased, received, and accepted in interstate commerce. These failures to pay took place over a period of 3 months. Respondents' violations are repeated because repeated means more than one, and Respondents' violations are flagrant because of the number of violations, the amount of money involved, and the time period during which the violations occurred. While willfulness is not a prerequisite to the publication of facts and circumstances of violations of 7 U.S.C. § 499b or the applicability of restrictions on employment provided in 7 U.S.C. § 499h(b), Respondents' violations of 7 U.S.C. § 499b(4) are willful as a matter of law.

In consolidated proceeding *In re Daniel Strebin*, AMAA Docket No.95-0002, AMAA Docket No. 96-0003, and 96

AMA Docket No. F&V 946-1, decided by the Judicial Officer on November 26, 1997 (77 pages), the Judicial Officer affirmed the decision by Judge Hunt (ALJ) holding: 1) that Respondents are ordered to comply with the AMAA, the Order, and the Regulations; 2) that in AMAA Docket Nos. 95-0002 and 96-0003 Respondents violated the Order regulating Irish Potatoes Grown in Washington (7 C.F.R. pt. 946) by shipping uninspected potatoes out of the production area; and 3) that Respondents' (Petitioners') Petition filed pursuant to 7 U.S.C. § 608c(15)(A) is dismissed. However, the Judicial Officer increased the $12,425 civil penalty, assessed by the ALJ against Respondents, to $35,500. AMAA marketing orders displace competition in favor of collective action. *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130, 2134 (1997). Under 5 U.S.C. § 556(d), the proponent of an order has the burden of proof: in AMAA Docket Nos. 95-0002 and 96-0003 Complainant has the burden of proof; but in 96 AMA Docket No. F&V 946-1 Petitioners have the burden of proof. The standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. Respondents concede the violations, but seek lower or no civil penalties, and relief under 7 U.S.C. § 608c(15)(A). A § 15(A) petitioner must show that the rulemaking record does not support the Secretary's decision. Without clear, contrary evidence, administrative regulations are presumed justified and valid. A § 15(A) proceeding is not a forum for Petitioner to debate policy, offer competing alternatives, or vaguely allege that the Secretary's decision is unsupported in the rulemaking record. Petitioners' due process challenge to the rulemaking record fails because the Secretary fulfilled the criteria of the AMAA and the APA. Petitioners' argument that USDA must engage in "required rulemaking" to exempt a county in Oregon, because another handler has an exemption, is without merit. Petitioners' allegedly superior equipment located in a non-exempt county does not mandate an exemption for that county. Rulemaking is not a remedy available in a 7 U.S.C. § 608c(15)(A) proceeding. The Judicial Officer cannot order the Secretary to engage in rulemaking. The Order anticipates that the Secretary may act upon the recommendation of the SWPC, or upon the Secretary's own volition. The AMAA authorizes the Secretary to amend the Order, but does not mandate amendment. The Judicial Officer considers flagrant violation of an Order a "weighty factor" in determining civil penalties, a factor to increase but not decrease civil penalties. *In re Onofrio Calabrese*, 51 Agric. Dec. 131, 156 (1992). The ALJ erroneously reduced civil penalties for Respondents' good faith, when Respondents had not in good faith sought exemption or modification. The ALJ erroneously reduced civil penalties because Complainant did not satisfy mandatory *Calabrese* criteria, but these criteria are permissive, not mandatory. Nevertheless, Complainant met all five *Calabrese* criteria: nature and number of violations; damage to the Order; profit from the violations; prior warnings; and any other circumstance shedding light on culpability. Rules of Practice permit a party to await the other party's appeal before filing a cross-appeal raising any relevant issue, without first filing a protective notice of appeal (7 C.F.R. §§ 1.145(b), 900.65(c)). A litigant may not raise an issue for the first time on appeal, and attempting to resurrect a non-appealed trial level issue in a reply to the response to a litigant's appeal is tantamount to a first time raising of the issue on appeal. Respondents' argument that a cease and desist order may not emanate from a 7 U.S.C. § 608c(14)(B) proceeding is irrelevant because Complainant neither requested a cease and desist order in either of the 7 U.S.C. § 608c(14)(B) Complaints nor proposed it in the proposed order; rather, Complainant sought compliance under the Order, 7 C.F.R. § 946.71. The AMAA is remedial legislation which should be liberally construed to achieve the purposes of the Act. Contemporaneous administrative construction of the AMAA is entitled to great weight. The AMAA has no explicit standards for setting civil penalties. Respondents may only be relieved of civil penalties for violation of the Order under 7 U.S.C. § 608c(14)(B) during the pendency of a proceeding filed in good faith and not for delay pursuant to 7 U.S.C. § 608c(15)(A). Civil penalties authorized under the AMAA are designed by Congress to complement the criminal penalties which the United States Attorneys are authorized to seek.

In *In re Allred's Produce*, PACA Docket No. D-96-0531, decided by the Judicial Officer on December 5, 1997 (44 pages), the Judicial Officer affirmed Judge Hunt's (ALJ) Decision and Order revoking Respondent's PACA license because Respondent committed flagrant and repeated violations of 7 U.S.C. § 499b(4) by failing to make full payment promptly for produce. Complainant proved Respondent's violations of the PACA and past-due debt by a preponderance of the evidence. The Regulations clearly define *full payment promptly* for the purpose of determining violations of the PACA. The sanction of PACA license revocation has the effect of

deterring others in the industry from failing to make full payment promptly in accordance with the PACA and revocation is necessary to fulfill the congressional intent that only financially responsible persons should be engaged in the perishable agricultural commodities industry. Collateral effects of a respondent's PACA license revocation and mitigating circumstances are not relevant. Respondent's violations are repeated because repeated means more than one; Respondent's violations are flagrant because of the number of violations, the amount of money involved, and the time period during which the violations occurred; and willfulness is reflected by Respondent's violation of express requirements of the PACA and in the length of time during which the violations occurred and the number and amount of violative transactions involved. No evidence supports Respondent's contention that it is the target of selective enforcement of the PACA. The issue of the Secretary's receipt of a written notification, raised for the first time in Respondent's Appeal Petition, comes too late. Sanction recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the PACA are relevant and are entitled to great weight; however, the recommendation of administrative officials as to the sanction is not controlling.

In *In re Steven J. Rodgers*, PACA-APP Docket No. 96-0002, decided by the Judicial Officer on December 12, 1997 (51 pages), the Judicial Officer affirmed Judge Baker's (ALJ) decision that Petitioner was responsibly connected with World Wide Consultants, Inc. (World Wide), during the time that World Wide violated the PACA. Petitioner admits that he was a nominal officer and shareholder of World Wide, during the time that World Wide violated the PACA. Petitioner was aware that World Wide employed Harold Marvin Offutt in willful violation of 7 U.S.C. § 499h(b) and made no real effort to stop World Wide's violation; therefore, Petitioner was actively involved in activities resulting in World Wide's violation of the PACA. Petitioner was not a nominal officer and shareholder as demonstrated by: (1) the substantial per centum (33.3%) of the outstanding stock of World Wide held by Petitioner; (2) Petitioner's experience in the produce business; (3) Petitioner's intent, from the beginning of his association with World Wide, to purchase the company; (4) Petitioner's knowledge of the company's financial situation and access to corporate financial records; (5) Petitioner's authority to conduct a number of financial activities for the company, including signing checks drawn on the company's account; and (6) Petitioner's signing of 30 checks for payroll, utilities, and produce. Since Petitioner admits that he was a holder of 33.3 per centum of the stock of World Wide, he is an owner and the defense that World Wide was the alter ego of its president and holder of 66.6 per centum of the stock is not available to Petitioner.

In *In re Samuel Zimmerman*, AWA Docket No. 96-0021, decided by the Judicial Officer on December 22, 1997 (16 pages), the Judicial Officer denied Respondent's Petition for Reconsideration. The $7,500 civil penalty assessed against Respondent and the 40-day suspension of Respondent's Animal Welfare Act license in *In re Samuel Zimmerman*, 56 Agric. Dec. ___ (Nov. 6, 1997), is appropriate under the circumstances in this case and is consistent with the Animal Welfare Act, the Department's sanction policy, and sanctions imposed in other cases for violations of the Animal Welfare Act and the Regulations and Standards. With respect to the sanction imposed against Respondent, consideration was given to each of the factors required to be considered under section 19 of the Animal Welfare Act (7 U.S.C. § 2149), the recommendation of an administrative official charged with responsibility for achieving the congressional purpose of the Animal Welfare Act, and all relevant circumstances, including evidence of Respondent's correction of violations and the circumstances surrounding Respondent's failure to allow Animal and Plant Health Inspection Service officials entry to inspect his facility, and the lack of evidence that Respondent deliberately harmed his animals.

In *In re Cal-Almond, Inc.*, 94 AMA Docket Nos. F&V 981-1, 981-3, 981-4, 981-5, and 981-7, decided by the Judicial Officer on December 24, 1997 (92 pages), the Judicial Officer reversed Judge Palmer's (Chief ALJ) Initial Decision and Order granting Petitions, filed by handlers under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)) (AMAA), seeking relief from the requirement that handlers pay assessments for advertising under the Almond Order (7 C.F.R. pt. 981) based on Petitioners' contention the compelled assessments under the Almond Order violate Petitioners' rights

guaranteed under the First Amendment. The burden of proof in a proceeding under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) rests with Petitioners, and Petitioners have not met their burden. The decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S.Ct. 2130 (1997), in which the Court held that marketing orders which compel handlers of California tree fruit to fund generic advertising do not implicate the First Amendment, is dispositive of the First Amendment issue in the proceeding. Petitioners are not prohibited or restrained by the AMAA, the Almond Order, or the Almond Board from communicating any message to any audience; Petitioners are not compelled to speak either by the AMAA or by the Almond Order; and the Almond Board's almond promotional efforts have no political or ideological content and Petitioners are not compelled by the AMAA or the Almond Order to endorse or finance any political or ideological views. Thus, the requirement under the AMAA and the Almond Order that Petitioners fund the promotion of almonds does not implicate Petitioners' rights guaranteed under the First Amendment.

In *In re Tolar Farms*, PACA Docket No. D-96-0530, decided by the Judicial Officer on January 5, 1998 (21 pages), the Judicial Officer denied Respondents' Petition for Reconsideration. Respondents committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) by failing to make full payment promptly for perishable agricultural commodities. Respondents' violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are repeated, flagrant, and willful, as a matter of law. Respondents' excuse that they violated the payment provisions of the PACA because they had a "bad fall farming season due to weather and markets" is not a defense. Respondents' purported 30-year history of compliance with the PACA is not a relevant circumstance under the Department's sanction policy regarding flagrant or repeated failures to make full payment under the PACA. The adverse impact on Respondents' produce sellers of publication that Respondents have committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) and the requests by Respondents' produce sellers that Respondents be allowed to stay in business is irrelevant to this proceeding.

In *In re Kreider Dairy Farms, Inc.*, Docket No. 94 AMA-M-1-2, decided by the Judicial Officer on January 12, 1998 (19 pages), the Judicial Officer denied Petitioner's late-filed appeal. Section 900.69(d) of the Rules of Practice (7 C.F.R. § 900.69(d)) provides that any document or paper, except a petition filed pursuant to § 900.52, required or authorized to be filed under 7 C.F.R. §§ 900.50-.71, shall be deemed to have been filed when it is postmarked, or when it is received by the hearing clerk. On the extended due date of September 19, 1997, Petitioner gave its appeal petition to Federal Express for delivery to the Office of the Hearing Clerk; however, Petitioner's appeal petition was not postmarked. Therefore, Petitioner's appeal petition was filed September 25, 1997, when it was actually received by the Office of the Hearing Clerk, which was 6 days after the time granted in the Informal Order of September 12, 1997, for filing Petitioner's appeal petition. Since no appeal was filed, or deemed to be filed, on or before September 19, 1997, the Decision and Order on Remand issued by the ALJ became final on September 20, 1997, and the Judicial Officer does not have jurisdiction to consider Petitioner's appeal petition.

In *In re Peter A. Lang*, AWA Docket No. 96-0002, decided by the Judicial Officer on January 13, 1998 (44 pages), the Judicial Officer affirmed the decision by Chief Judge Victor W. Palmer (Chief ALJ) assessing a civil penalty of $1,500 against Respondent and directing Respondent to cease and desist from violating the Act and the Regulations and Standards issued under the Act. Complainant proved by a preponderance of the evidence that Respondent, in violation of 9 C.F.R. § 2.131(a)(1), failed to handle one male lechwe as expeditiously and carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, and unnecessary discomfort. While the male lechwe in question died, there was no conclusive evidence of the cause of death. However, while one of the purposes of 9 C.F.R. § 2.131(a)(1) is to prevent death, section 2.131(a)(1) is explicitly designed to prevent trauma, overheating, excessive cooling, behavioral stress, physical harm, and even unnecessary discomfort to animals. Therefore, Respondent's failure to handle the male lechwe as expeditiously and carefully as possible need not have been the cause of the June 10, 1994, death of male lechwe in order to find that Respondent violated 9 C.F.R. § 2.131(a)(1). The Chief ALJ did not err by excluding

unduly repetitious evidence. Complainant did introduce evidence at the hearing of violations of the Regulations and Standards that were not alleged in the Complaint. However, the Chief ALJ refused to allow Complainant to amend the Complaint to conform to the proof, and Respondent was only found to have violated 9 C.F.R. § 2.131(a)(1) as alleged in paragraph 5 of the Complaint. Therefore, Respondent was not harmed by Complainant's introduction of evidence of violations of the Regulations and Standards that were not alleged in the Complaint.

In *In re Michael Norinsberg*, PACA-APP Docket No. 96-0009, decided by the Judicial Officer on January 26, 1998 (11 pages), the Judicial Officer denied Petitioner's Petition for Reconsideration. Petitioner may not raise a new argument for the first time on appeal to the Judicial Officer. Further, Petitioner's argument that the pre-November 15, 1995, definition of *responsibly connected* should be applied is directly contrary to the position he consistently advanced throughout the proceeding, and the general rule is that a party is not allowed to argue a legal position on appeal that is contrary to the position argued earlier in the proceeding. Moreover, even if the definition of *responsibly connected* as amended on November 15, 1995, was erroneously applied to determine whether Petitioner was responsibly connected with The Norinsberg Corporation during the period April 1991 through February 1992, it was applied at Petitioner's invitation, and Petitioner cannot challenge the application of the definition of *responsibly connected* as amended on November 15, 1995, to determine Petitioner's status, which, until his Petition for Reconsideration, he consistently requested be applied.

In *In re Scamcorp, Inc.*, PACA Docket No. D-95-0502, decided by the Judicial Officer on January 29, 1998 (68 pages), the Judicial Officer affirmed Judge Palmer's (Chief ALJ) Initial Decision and Order in which he found that Respondent committed violations of 7 U.S.C. § 499b(4) by failing to make full payment promptly for produce. The Judicial Officer found, however, that Respondent's violations of 7 U.S.C. § 499b(4) were willful, flagrant, and repeated. Based on the length of time during which Respondent's violations occurred, the number of Respondent's violations, the dollar amounts which Respondent failed to pay in accordance with the PACA, and the length of time that it took Respondent to achieve compliance with the PACA, the Judicial Officer increased the civil penalty imposed by the Chief ALJ from $30,000 to $82,500. An administrative law judge has broad discretion to govern the conduct of a proceeding from the time the proceeding is assigned to the filing of an appeal. The Chief ALJ did not err by rescheduling the hearing "in light of the possible government shutdown." PACA requires *full payment promptly*, and commission merchants, dealers, and brokers are required to be in compliance at all times with the payment provisions of the PACA. However, rescheduling a hearing in order to give a PACA violator additional time to pay produce suppliers thwarts the Department's policy to encourage PACA violators to pay produce suppliers promptly. Rescheduling a hearing to give a PACA violator additional time to pay produce suppliers unnecessarily delays proceedings, which should be handled expeditiously. The current policy of the Judicial Officer with respect to "no-pay" and "slow-pay" cases may discourage the expeditious handling of these proceedings, which might delay or discourage the prompt payment of produce suppliers by a PACA violator. The Judicial Officer held that in future PACA disciplinary cases in which it is shown that a respondent has failed to pay in accordance with the PACA and a respondent is not in full compliance with the PACA within 120 days after the complaint is served on a respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. Respondent successfully converted the case to "slow-pay" by giving a promissory note to one of its produce sellers. Generally, a note given by a debtor for an existing debt does not extinguish the debt in the absence of an agreement to that effect and the debtor-maker bears the burden of proving that the parties intended that the note extinguish the underlying debt. Respondent proved that the parties intended that the promissory note extinguish the debt for produce. The Judicial Officer held that in future PACA disciplinary cases payment of an antecedent debt for perishable agricultural commodities with a promissory note will not constitute payment in accordance with section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)), even if a respondent can show that the parties agreed that the note would extinguish the debt and constitute payment and the agreement to accept the promissory note as payment was an arm's length transaction and not the product of a respondent's superior bargaining position. The Judicial Officer held where a respondent has failed to pay in accordance with the

PACA but that respondent is in full compliance with the PACA by the date of the hearing, or in future cases, within 120 days after the complaint is served on a respondent, or the date of the hearing, whichever occurs first (a "slow-pay" case), a civil penalty may be imposed. The factors to be considered when deciding whether to impose a civil penalty or a license suspension in a "slow-pay" case include: (1) the length of time a respondent was in violation of the PACA payment requirements; (2) the number of violations and the dollar amounts involved; (3) the roll-over debt, if any, incurred by the PACA violator; (4) the time that it takes the PACA violator to achieve compliance with the PACA; (5) the impact of the violations on the industry as a whole; and (6) whether the PACA violator's financial condition is such that the imposition of a civil penalty, in an amount that would operate as an effective deterrent to future violations of the PACA and would be appropriate under the circumstances of the case, would not substantially increase the risk that the PACA violator's future produce sellers may not be paid in accordance with the PACA. The Judicial Officer stated that a civil penalty would not be an appropriate sanction in a "no-pay" case because the PACA violator's failure to get back into compliance with the PACA would indicate that the violator continues to be financially irresponsible, and the imposition of a civil penalty in a "no-pay" case would require the PACA violator to pay the civil penalty rather than produce sellers to whom the PACA violator owes money; thereby thwarting one of the primary purposes of the PACA which is to ensure that commission merchants, dealers, and brokers make full payment promptly.

In *In re Allred's Produce*, PACA Docket No. D-96-0531, decided by the Judicial Officer on February 2, 1998 (5 pages), the Judicial Officer denied Respondent's Petition for Reconsideration for the reasons previously set forth in the Judicial Officer's decision.

In *In re Kreider Dairy Farms, Inc.*, Docket No. 94 AMA-M-1-2, decided by the Judicial Officer on February 20, 1998 (17 pages), the Judicial Officer denied Petitioner's Petition for Reconsideration. Petitioner has not raised any grounds in its Petition for Reconsideration for finding that Petitioner's Appeal Petition was timely filed. Requests for extensions of time for filing appeal petitions and responses to appeal petitions must be made prior to the time that the respective filing is due. The Federal Rules of Civil Procedure are not applicable to administrative proceedings instituted under the AMAA in accordance with the Rules of Practice (7 C.F.R. §§ 900.50-.71). The Judicial Officer has no jurisdiction under the Rules of Practice to consider the merits in a proceeding in which the initial decision and order has become final. Further, Judicial Officer's consideration of the merits after an initial decision and order becomes final has no effect on the proceeding. Factual findings were made and a decision issued in the proceeding in accordance with the remand order of the United States District Court for the Eastern District of Pennsylvania. Petitioner's contention that the Department proceeding on remand should not have been conducted in accordance with the Rules of Practice (7 C.F.R. §§ 900.50-.71) is raised for the first time in its Petition for Reconsideration, and new arguments cannot be raised for the first time on appeal to the Judicial Officer.

In *In re Lawrence D. Salins*, PACA-APP Docket No. 96-0010, decided by the Judicial Officer on February 26, 1998 (35 pages), the Judicial Officer reversed Judge Hunt's (ALJ) decision that Petitioner had rebutted by a preponderance of the evidence the presumption that, as an officer of Sol Salins, Inc., Petitioner was responsibly connected with Sol Salins, Inc., during the time that Sol Salins, Inc., violated the PACA. The definition of *responsibly connected* in section 1(b)(9) of PACA (7 U.S.C. § 499a(b)(9) (Supp. I 1995)) establishes a rebuttable presumption, which provides as pertinent in the proceeding that: Petitioner, even though a corporate officer, is not deemed responsibly connected if Petitioner proves by a preponderance of the evidence *both* (1) that Petitioner was not actively involved in the activities resulting in Sol Salins, Inc.'s violations *and* (2) that Petitioner either was only nominally an officer of Sol Salins, Inc., or was not an owner of Sol Salins, Inc., which was the alter ego of its owners. However, Respondent proved by a preponderance of the evidence that Petitioner was actively involved in corporate decision making, which resulted in Sol Salins, Inc.'s violations, *e.g.*, that Petitioner attended and participated in weekly corporate staff meetings as secretary-treasurer; that Petitioner handled payroll, taxes, and financial documents; that Petitioner was the only corporate

signatory and issued large numbers of checks for large amounts every month; and that Petitioner decided which suppliers to pay in order to keep produce coming to stay in business. Respondent also proved that Petitioner was not merely a nominal officer of Sol Salins, Inc., because of Petitioner's access to corporate records; knowledge of Sol Salins, Inc.'s financial troubles; familiarity and close relations with unpaid creditors; check writing responsibilities; responsibility for signing corporate documents; and salary. Although Petitioner did not argue that Petitioner was not an owner of Sol Salins, Inc., which was the alter ego of its owners, the argument would have failed because, even though Petitioner was not an owner, there was no evidence that Sol Salins, Inc., was the alter ego of its owners. Petitioner thus having failed by a preponderance of the evidence to rebut the presumption, as an officer of a violating licensee, Petitioner is deemed to be responsibly connected to Sol Salins, Inc.

In consolidated proceeding *In re JSG Trading Corp.*, PACA Docket No. D-94-0508 and PACA Docket No. D-94-0526, decided by the Judicial Officer on March 2, 1998 (96 pages), the Judicial Officer affirmed the decision of Judge Bernstein (ALJ): (1) revoking JSG's PACA license for payments to the buying agents of its customers, in violation of 7 U.S.C. § 499b(4); (2) publishing the facts and circumstances of G&T's and Mr. Gentile's willful, flagrant, and repeated violations of the PACA; and (3) denying Mr. Gentile's PACA license application for engaging in practices of a character prohibited by the PACA. The legal standard for commercial bribery under the PACA is set forth in *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), *aff'd per curiam*, 945 F.2d 398 (4th Cir. 1991), *cert. denied*, 503 U.S. 970 (1992) and *In re Tipco, Inc*., 50 Agric. Dec. 871 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), *cert. denied*, 506 U.S. 826 (1992). The relevant facts in *Goodman* and *Tipco* are similar to the facts in *JSG Trading Corp*. The standard of proof applicable to administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence and Complainant proved by much more than a preponderance of the evidence that JSG, G&T, and Mr. Gentile willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by engaging in commercial bribery. The Judicial Officer is not bound by an administrative law judge's credibility determinations. However, the consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify and the record does not support reversal of the ALJ's credibility determinations. Section 9(b)(3) of the Perishable Agricultural Commodities Act Amendments of 1995 does not allow the payment of bribes by sellers of perishable agricultural commodities to employees or agents of purchasers of perishable agricultural commodities. Instead, section 9(b)(3) and the applicable legislative history make clear that section 9(b)(3) relates to promotional payments or volume discounts by sellers of perishable agricultural commodities to purchasers of perishable agricultural commodities. Cryptic notes taken of a telephone conversation are not Jencks Act statements and are not required to be produced in accordance with 7 C.F.R. § 1.141(h)(1)(iii). Due process requires an impartial tribunal, and a biased administrative law judge who conducts a hearing unfairly deprives the litigant of this impartiality. However, a substantial showing of legal bias is required to disqualify an administrative law judge or to obtain a ruling that the hearing is unfair. There is no basis for JSG's allegation that the ALJ was biased toward or against any litigant.

In *In re United Foods, Inc.*, MPRCIA Docket No. 96-0001, decided by the Judicial Officer March 4, 1998 (32 pages), the Judicial Officer affirmed Judge Bernstein's (ALJ) Initial Decision and Order dismissing a Petition filed by a mushroom producer under the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended (7 U.S.C. §§ 6101-6112) (MPRCIA) seeking an exemption from or modification of the Mushroom Promotion, Research, and Consumer Information Order (7 C.F.R. §§ 1209.1-.280) (Mushroom Order) on the grounds that compelled assessments under the Mushroom Order violate Petitioner's First Amendment rights to freedom of speech and association. The decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), in which the Court held that marketing orders which compel handlers of California tree fruit to fund generic advertising does not implicate the First Amendment, is dispositive of the First Amendment issue in the proceeding. Petitioner is not prohibited or restrained by the MPRCIA or the Mushroom Order from communicating any message to any audience; Petitioner is not compelled to speak by the MPRCIA

or the Mushroom Order; the promotion program under the MPRCIA and the Mushroom Order has no political or ideological content; and Petitioner is not compelled by the MPRCIA or the Mushroom Order to endorse or finance any political or ideological views. Thus, the requirement under the MPRCIA and the Mushroom Order that Petitioner fund the promotion of fresh mushrooms does not implicate Petitioner's rights to freedom of speech or association. The Federal Rules of Civil Procedure are not applicable to the Department's administrative proceedings. When considering a motion to dismiss filed in accordance with the Rules of Practice (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52), allegations of material fact in a petition must be construed in the light most favorable to a petitioner. Even if the allegations of material fact in the Petition are construed in the light most favorable to Petitioner, the Petition fails to state a claim upon which relief can be granted. Petitioner's statement (that "Petitioner should be entitled to amend its petition to allege factual allegations in light of *Wileman*") in Petitioner's Opposition to Respondent's Motion to Dismiss is in the form of a statement, rather than an application or request for a ruling, and is not a motion. The ALJ did not err by failing to exercise authority under 7 C.F.R. § 900.59(a)(2) to rule on Petitioner's putative motion for leave to amend its Petition.

In *In re Cal-Almond*, 97 AMA Docket No. 97-0001, decided by the Judicial Officer on March 6, 1998 (18 pages), the Judicial Officer affirmed Chief Judge Palmer's (ALJ) Initial Decision and Order dismissing a Petition filed by an almond handler under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)) (AMAA), seeking relief from the requirement that handlers pay assessments for advertising under the Almond Order (7 C.F.R. pt. 981) on the ground that compelled assessments under the Almond Order violate Petitioner's First Amendment right to freedom of speech. The decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), in which the Court held that marketing orders which compel handlers of California tree fruit to fund generic advertising does not implicate the First Amendment, is dispositive of the First Amendment issue in the proceeding. Any doubt that *Wileman* has equal application to the Almond Order was overcome in *Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997). Petitioner is not prohibited or restrained by the AMAA or the Almond Order from communicating any message to any audience; Petitioner is not compelled to speak by the AMAA or the Almond Order; the promotion program under the AMAA and the Almond Order has no political or ideological content; and Petitioner is not compelled by the AMAA or the Almond Order to endorse or finance any political or ideological views. Thus, the requirement under the AMAA and the Almond Order that Petitioner fund the promotion of almonds does not implicate Petitioner's rights to freedom of speech or association. Further, the use of assessments to defray the costs of litigation to defend a marketing order from a legal challenge against the use of assessments for generic advertising is germane to the purposes of the marketing order and satisfies the test in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). The Rules of Practice (7 C.F.R. § 900.52(c)) provide that an administrative law judge's decision upon a motion to dismiss must be made after due consideration of the motion and any opposition to the motion but, otherwise, leave the timing of a decision on a motion to dismiss to the discretion of the administrative law judge. When considering a motion to dismiss filed in accordance with the Rules of Practice (7 C.F.R. §§ 900.52(c)(2)-.71), allegations of material fact in a petition must be construed in the light most favorable to a petitioner. However, even if the allegations of material fact in the Petition are construed in the light most favorable to Petitioner, *Wileman* is dispositive of Petitioner's First Amendment claims and the Petition fails to state a claim upon which relief can be granted. The formalities of court practice do not apply to motions filed in administrative proceedings, and, where Respondent is not prejudiced, the Chief ALJ did not err by treating Petitioner's statements as a motion to amend the Petition and exercising authority under 7 C.F.R. § 900.59(a)(2) to rule on Petitioner's "motion" to amend its Petition. The Chief ALJ correctly denied Petitioner's motion to amend the Petition based on the fact that the amendment requested by Petitioner would be a challenge to a "speech related" action of the Almond Board which, according to *Wileman*, is not subject to scrutiny under the standards of First Amendment jurisprudence.

In *In re C.C. Baird*, AWA Docket No. 95-0017, decided by the Judicial Officer on March 20, 1998 (72 pages), the Judicial Officer affirmed the decision by Judge Hunt (ALJ) that Respondent failed to fully and correctly maintain records disclosing the names, addresses, driver's license numbers, and vehicle license numbers of

sellers from whom he acquired animals (9 C.F.R. § 2.75(a)(1)), that Respondent acquired *random source* dogs from prohibited sources (9 C.F.R. § 2.132), and that Respondent failed to comply with the Standards for the care of animals (9 C.F.R. § 3.1(f)), as required by the Animal Welfare Act and the Standards and Regulations. However, since the ALJ erroneously found no willfulness on this record and imposed only a $5,000 civil penalty and a cease and desist order, the Judicial Officer reversed the ALJ's willfulness finding and increased the sanction. Complainant need only prevail by a preponderance of the evidence. Federal agencies have broad discretion to decide against whom to institute disciplinary proceedings and may even use selective enforcement if the administrative decision to do so is not arbitrary. Hearsay is routinely admissible in USDA proceedings. Signed affidavits are admissible hearsay. A violation is willful within the meaning of the APA if a person carelessly disregards statutory requirements (*Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996)). A class "B" dealer may not acquire *random source* dogs except from authorized sources. Any unlicensed sellers from whom Respondent acquires dogs must have bred and raised the dogs on their own premises. Respondent has not fully and correctly maintained proper records where Respondent made no effort to verify sellers' information provided to Respondent. Non-enforcement of a regulation neither affects the validity of a regulation nor estops the Department from subsequent enforcement, but non-enforcement may affect the sanction. Each animal involved in a violation is a separate violation. The Department's sanction policy places great weight on the sanction recommendations of administrative officials. The administrative officials recommended a cease and desist order, a $50,000 civil penalty, and license revocation. However, the Judicial Officer modified the recommended sanction, as follows: 1) the Judicial Officer adopted the ALJ's cease and desist order; 2) the civil penalty is increased to $9,250; and 3) Respondent's license is suspended for 14 days and thereafter until Respondent demonstrates to APHIS full compliance with the AWA.

In *In re Colonial Produce Enterprises, Inc.*, PACA Docket No. D-95-534, decided by the Judicial Officer on March 30, 1998 (25 pages), the Judicial Officer affirmed Chief Judge Palmer's (Chief ALJ) decision assessing Respondent a civil penalty of $15,000 or in lieu thereof imposing a 45-day suspension of Respondent's PACA license. The record supports the conclusion that Respondent willfully violated 7 U.S.C. § 499h(b) by neither terminating, nor posting a USDA-approved surety bond for, the employment of an individual responsibly connected to a corporation which had repeatedly and flagrantly violated failure to pay requirements (7 U.S.C. § 499b(4)) within the 30-day time period given by certified letter dated May 5, 1994. Section 8(e) of the PACA (7 U.S.C. § 499h(e) (Supp. I 1995)) authorizes the assessment of a civil penalty in lieu of a license suspension or license revocation. When determining the amount of the civil penalty, due consideration must be given to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Complainant's sole argument on appeal is that any alternative civil penalty in lieu of a 45-day suspension is not appropriate. Complainant is not persuasive that the Chief ALJ did not consider the factors under section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 (7 U.S.C. § 499h(e) (Supp. I 1995)).

In *In re Jerry Goetz*, BPRA Docket No. 94-0001, decided by the Judicial Officer on April 3, 1998 (25 pages), the Judicial Officer denied Respondent's Petition for Reconsideration and denied in part and granted in part Complainant's Petition for Reconsideration. The Collection - Compliance Reference Guide, prepared by the Cattlemen's Beef Promotion and Research Board to assist qualified State beef councils to understand the Beef Promotion and Research Order and Beef Promotion Regulations, which provides that collecting persons must maintain records for at least 3 years, does not establish a 3-year statute of limitations on claims to collect assessments and late payment charges or on proceedings instituted under section 9(a) of the Beef Promotion and Research Act of 1985 (7 U.S.C. § 2908(a)). Further, the Collection - Compliance Reference Guide is not a regulation binding on any collecting person or producer and is not evidence of what qualified State beef councils, the Cattlemen's Beef Promotion and Research Board, and the Secretary require of collecting persons. Respondent is not required to maintain records for a longer period than other similarly situated persons subject to the Beef Promotion and Research Act of 1985, nor is Respondent's burden with respect to the defense in the proceeding any greater than it would be for others charged with the same violations of Beef Promotion Order and the Beef Promotion Regulations. There is no evidence that Respondent failed to maintain records in

violation of the Beef Promotion and Research Act of 1985. Respondent is responsible for collecting and remitting assessments for 174 cattle which Respondent sold not later than 10 days from the date on which Respondent acquired ownership. In accordance with 7 C.F.R. § 1260.311(c), the brand inspector, not Respondent, was the collecting person and responsible for collecting the assessment from the producer of 228 cattle, which Respondent purchased on February 22, 1992, in Imperial, Nebraska.

In *In re Gallo Cattle Co.*, NDPRB Docket No. 96-0001, decided by the Judicial Officer April 22, 1998 (36 pages), the Judicial Officer affirmed Judge Baker's (ALJ) Initial Decision and Order dismissing a Petition filed by a milk producer under the Dairy Production Stabilization Act of 1983, as amended (7 U.S.C. §§ 4501-4513) (DPSA) seeking an exemption from, or modification of, the Dairy Promotion Program (7 C.F.R. §§ 1150.101-.278) (Dairy Order) on the grounds that compelled assessments to promote fluid milk and dairy products under the DPSA and the Dairy Order violate Petitioner's First Amendment rights to freedom of speech and association and Petitioner's Fifth Amendment rights to due process of law and equal protection of the law. The decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), in which the Court held that marketing orders which compel handlers of California tree fruit to fund generic advertising do not implicate the First Amendment, is dispositive of the First Amendment issues in the proceeding. Petitioner is not prohibited or restrained by the DPSA or the Dairy Order from communicating any message to any audience; Petitioner is not compelled to speak by the DPSA or the Dairy Order; the promotion program under the DPSA and the Dairy Order has no political or ideological content; and Petitioner is not compelled by the DPSA or the Dairy Order to endorse or finance any political or ideological views. Thus, the requirement under the DPSA and the Dairy Order that Petitioner fund the promotion of fluid milk and dairy products does not implicate Petitioner's rights to freedom of speech or association. When considering a motion to dismiss filed in accordance with the Rules of Practice (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52), allegations of material fact in a petition must be construed in the light most favorable to a petitioner. Even if the allegations of material fact in the Petition are construed in the light most favorable to Petitioner, the Petition fails to state a claim upon which relief can be granted. Bloc voting by cooperatives in accordance with the DPSA (7 U.S.C. § 4508) does not violate Petitioner's rights to equal protection and due process guaranteed by the Fifth Amendment. The government has a legitimate interest in strengthening the dairy industry's position in the marketplace and maintaining and expanding the markets and uses for fluid milk and dairy products. The collection of assessments from milk producers and the use of the collected funds to promote fluid milk and dairy products is rationally related to the purposes of the DPSA, and Petitioner's right to equal protection of the laws is not violated by the use of the funds collected from Petitioner for the promotion of dairy products which Petitioner does not sell.

In *In re Jack Stepp*, HPA Docket No. 94-0014, decided by the Judicial Officer on May 6, 1998 (31 pages), the Judicial Officer affirmed the Decision by Judge Hunt (ALJ) in which he: (1) found that Respondent Stepp entered, for the purpose of showing or exhibiting, a horse in a horse show while the horse was sore, in violation of 15 U.S.C. § 1824(2)(B); (2) found that Respondent Reinhart allowed the entry, for the purpose of showing or exhibiting, a horse in a horse show while the horse was sore, in violation of 15 U.S.C. § 1824(2)(D); and (3) assessed a civil penalty of $2,000 against each Respondent and disqualified each 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. Altered documents can be trustworthy and admitted into evidence. Respondents are precluded, by their failure to object to the admission of altered documents, from appealing the ALJ's rulings granting Complainant's motions for admission of documents into evidence (7 C.F.R. §§ 1.141(h)(2), .145(a)). The Administrative Procedure Act provides that a sanction may not be imposed or an order issued except on consideration of the whole record or those parts of the record cited by a party (5 U.S.C. § 556(d)). The record establishes that the ALJ considered the whole record including Respondents' evidence that Honey's Threat, the horse in question, was not sore and that Honey's Threat was confused with another horse. The sanction routinely imposed for the first violation of the Horse Protection Act by a respondent is the minimum 1-year disqualification period and a $2,000 civil penalty. In determining the amount of the civil penalty, the Secretary must take into account the ability to pay the civil penalty and the effect of the civil penalty on the ability to

continue to conduct business. However, the burden is on a respondent against whom a civil penalty may be assessed to come forward with evidence indicating an inability to pay the civil penalty or inability to continue to conduct business if the civil penalty is assessed. Respondents did not introduce evidence indicating inability to pay or inability to continue to conduct business.

In *In re Steven M. Samek*, AWA Docket No. 97-0015, decided by the Judicial Officer on May 12, 1998 (6 pages) (Ruling Denying Motion to Appoint Public Defender as to Steven M. Samek), the Judicial Officer ruled that, while the Administrative Procedure Act (5 U.S.C. § 555(b)) provides that a party may appear by or with counsel in agency proceedings, Respondent has no right under the Constitution of the United States, the Administrative Procedure Act, or the Rules of Practice (7 C.F.R. §§ 1.130-.151) to have counsel provided by the government in disciplinary administrative proceedings such as those conducted under the Animal Welfare Act.

In *In re Peter A. Lang*, AWA Docket No. 96-0002, decided by the Judicial Officer on May 13, 1998 (26 pages), the Judicial Officer denied Respondent's Petition for Reconsideration. Petitions for reconsideration filed pursuant to 7 C.F.R. § 1.146(a)(3) relate to reconsideration of the Judicial Officer's decision only; not to reconsideration of an administrative law judge's decision. The Rules of Practice provide that either party may reopen a hearing to take further evidence (7 C.F.R. § 1.146(a)(2)). Respondent did not file a petition to reopen; therefore, new evidence attached to the Petition for Reconsideration is not part of the record and is not considered in connection with the Petition for Reconsideration. The Administrative Procedure Act and the Rules of Practice require that the complaint include allegations of fact and provisions of law that constitute a basis for the proceeding and the Due Process Clause of the Fifth Amendment to the Constitution of the United States requires that the complaint reasonably apprise a respondent of the issues in controversy. Therefore, while mere allegations in a complaint could possibly harm a respondent's business or reputation, proceedings of this type may only be instituted by filing a complaint and including in the complaint allegations of fact and provisions of law which constitute a basis for the proceeding. The impact on a respondent's business of the institution of a disciplinary proceeding under the Animal Welfare Act is not one of the factors required to be considered when determining the amount of the civil penalty to be assessed against a respondent. Willfulness is not a prerequisite for concluding that a respondent has violated the Animal Welfare Act or assessing a civil penalty or issuing a cease and desist order in accordance with 7 U.S.C. § 2149(b). Complainant proved by a preponderance of the evidence that Respondent, in violation of 9 C.F.R. § 2.131(a)(1), failed to handle one lechwe as expeditiously and carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, and unnecessary discomfort. The Chief ALJ did not err by excluding irrelevant evidence. Respondent's expertise with respect to handling animals is not relevant to whether on a particular occasion Respondent violated the Regulations and Standards.

In *In re Queen City Farms, Inc.*, PACA Docket No. D-97-0020, decided by the Judicial Officer on May 13, 1998 (23 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 Default Decision and Order became final. Even if Respondent's appeal had been timely filed, it would have been denied based both upon Respondent's failure to file objections to Complainant's motion for a default decision and proposed default decision, in accordance with the Rules of Practice (7 C.F.R. § 1.139), and upon Respondent's admissions in a bankruptcy filing that it failed to make full payment promptly to 19 sellers of the agreed purchase prices for perishable agricultural commodities in a total amount of at least $713,638.10. Publication of the facts and circumstances of violations of 7 U.S.C. § 499b is not dependent on finding that the violations were willful. A violation is willful if, irrespective of evil motive, 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 7 months constitute willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4).

In *In re John D. Davenport*, AWA Docket No. 97-0046, decided by the Judicial Officer on May 18, 1998 (71 pages), the Judicial Officer affirmed the decision by Chief Judge Palmer (Chief ALJ) that Respondent willfully failed to provide urgent veterinary care to an elephant (9 C.F.R. § 2.40); that Respondent willfully failed to provide routine skin care and routine foot care to two elephants (9 C.F.R. § 2.40); that Respondent willfully handled eight llamas and two elephants in a manner that caused trauma, overheating, behavioral stress, and physical harm and discomfort to the animals (9 C.F.R. §§ 2.100(a), .131(a)(1)); that Respondent willfully failed to keep and maintain complete records on his animals (7 U.S.C. § 2140; 9 C.F.R. § 2.75(b)(1)); that Respondent willfully transported 11 animals in a primary conveyance, which conveyance did not have a properly designed and constructed cargo space (9 C.F.R. §§ 2.100, 3.138(a)); that Respondent willfully transported an elephant while she was in obvious physical distress (9 C.F.R. §§ 2.100(a), 3.140(a)); that Respondent willfully transported eight llamas in a primary enclosure which did not provide sufficient space (9 C.F.R. §§ 2.100(a), 3.128); that Respondent willfully transported animals in a primary conveyance without sufficient clean, suitably absorbent litter to absorb and cover excreta (9 C.F.R. §§ 2.100(a), 3.137(d)); and that Respondent willfully failed to provide three elephants with food appropriate to that species (9 C.F.R. §§ 2.100(a), 3.129(a)) as required by the Animal Welfare Act and the Regulations and Standards. The Judicial Officer also affirmed the sanction, which was the same as that recommended by the administrative officials, in which the Chief ALJ assessed Respondent a civil penalty of $200,000; permanently revoked Respondent's license and permanently disqualified Respondent from obtaining a license under the Animal Welfare Act and the Regulations; and barred Respondent, directly or indirectly through any corporate entity, agent, or other device, from engaging in any activity as an exhibitor or dealer within the meaning of the Animal Welfare Act and the Regulations; in particular, and without limitation of the preceding clause, barred Respondent from operating as an independent contractor in conjunction with any exhibitor or dealer, or from leasing, renting, or otherwise providing animals to any person or entity or undertaking engaged in business as an exhibitor or dealer. The Department's sanction policy places great weight on the sanction recommendations of administrative officials. Burden of proof in Animal Welfare Act cases is a preponderance of the evidence. An action is willful if done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. Individuals are bound by federal laws and regulations, irrespective of bad advice by federal employees. The Regulations and Standards are not an instruction manual, but require that licensees maintain an acceptable level of husbandry as set forth in 9 C.F.R. §§ 3.125-.142. It is not an unreasonable interpretation of 9 C.F.R. § 2.75(b)(1) for Respondent to be expected to carry copies of animals' records when the animals are being transported or the regulation would be ineffective for its purpose. The act of a person employed by or acting on behalf of an exhibitor within the scope of the employee's office is deemed the act of the exhibitor (7 U.S.C. § 2139).

In consolidated proceeding *In re JSG Trading Corp.*, PACA Docket No. D-94-0508 and PACA Docket No. D-94-0526, decided by the Judicial Officer on June 1, 1998 (27 pages), the Judicial Officer denied JSG Trading Corp.'s Petition for Reconsideration. JSG's petition to reopen the hearing, which was filed after the issuance of the Decision and Order, was denied as untimely (7 C.F.R. § 1.146(a)(2)). JSG alleges in its Petition for Reconsideration that the ALJ erred; however, the Rules of Practice (7 C.F.R. § 1.146(a)(3)) provide that a party to a proceeding may only seek reconsideration of the decision of the Judicial Officer. The evidence is sufficient to support the conclusion that JSG engaged in commercial bribery in violation of 7 U.S.C. § 499b(4). Complainant, as proponent of an order, has the burden of proof, and there is nothing in the Decision and Order that indicates that the Judicial Officer shifted the burden of proof to Respondents. Since the issuance of *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), *cert. denied*, 506 U.S. 826 (1992), the produce industry has been on notice that payments of anything more than a *de minimis* amount can constitute commercial bribery. JSG's act of bestowing a $3,317 Rolex watch upon Mr. Gentile at the time that JSG was selling large quantities of tomatoes to L&P through Mr. Gentile constitutes a commercial bribe in violation of 7 U.S.C. § 499b(4). The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard, and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA, including those in

which the potential sanction is revocation of a PACA license, is preponderance of the evidence. Due process and the Administrative Procedure Act (5 U.S.C. § 556(b)) require an impartial tribunal, and a biased administrative law judge who conducts a hearing unfairly deprives the litigant of this impartiality. However, a substantial showing of legal bias is required to disqualify an administrative law judge or to obtain a ruling that the hearing is unfair. JSG committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) by making payments to Mr. Gentile and Mr. Lomoriello to induce them to make purchases of tomatoes for L&P and American Banana, respectively. This case is, in all material respects, similar to *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), *aff'd per curiam*, 945 F.2d 398 (4th Cir. 1991), *cert. denied*, 503 U.S. 970 (1992), and *In re Tipco, Inc*., 50 Agric. Dec. 871 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), *cert. denied*, 506 U.S. 826 (1992). JSG's payments to Mr. Gentile and Mr. Lomoriello warrant revocation of JSG's PACA license. The cost of defending a disciplinary action and the impact on a respondent's business of the institution of a disciplinary proceeding are not relevant to the sanction to be imposed on a respondent found to have violated 7 U.S.C. § 499b(4). Collateral effects of a respondent's PACA license revocation are relevant, neither to a determination whether a respondent violated 7 U.S.C. § 499b(4) nor to the sanction to be imposed for flagrantly or repeatedly violating 7 U.S.C. § 499b(4).

In *In re Kinzua Resources, LLC*, FSSAA Docket No. 98-0001, decided by the Judicial Officer on June 5, 1998 (24 pages), the Judicial Officer affirmed the Initial Decision and Order by Chief Judge Palmer (Chief ALJ) approving the Applicant's proposed sourcing area. The sourcing area is geographically and economically separate from the geographic area from which the Applicant harvests for export timber originating from private lands. The evidence adequately supports the Chief ALJ's Findings and Conclusions. *In re Stimson Lumber Co.*, 54 Agric. Dec. 155 (1995), does not hold that geographic separation is determined by comparing the distance between the sourcing area and an applicant's timber manufacturing facilities to the distance between the area from which an applicant harvests for export unprocessed timber originating from private lands and the applicant's timber manufacturing facilities; instead, *Stimson* holds that areas located west of the Cascade Mountain Range are geographically and economically separate from timber manufacturing facilities located east of the crest of the Cascade Mountain Range. Although two commenters requested a hearing during the comment period, no request for a hearing was made during the review period, which is the only time during which a hearing may be requested (7 C.F.R. § 1.417(c)); therefore, the failure to hold a hearing was not error. The Rules of Practice (7 C.F.R. §§ 1.410-.429) are published in the Federal Register; thereby constructively notifying the parties of the requirement that requests for a hearing must be filed during the 10-day review period. The record establishes that the Regional Forester considered the comments and that the Chief ALJ responded to all of the relevant comments. Parties may file an appeal within 10 calendar days after receiving service of the judge's decision (7 C.F.R. § 1.426), and generally, administrative law judges and the judicial officer are bound by rules of practice. However, administrative law judges and the judicial officer may modify rules of practice when modification is necessary to comply with statutory requirements, such as the deadline in 16 U.S.C.A. § 620b(c)(3)(A). The Chief ALJ did not err when he modified the Rules of Practice to meet a statutory deadline.

In *In re Jack Stepp*, HPA Docket No. 94-0014, decided by the Judicial Officer on June 18, 1998 (7 pages), the Judicial Officer denied Respondents' Petition for Reconsideration because it was not timely filed (7 C.F.R. § 1.146(a)(3)).

In *In re Marilyn Shepherd*, AWA Docket No. 96-0084, decided by the Judicial Officer on June 26, 1998 (62 pages), the Judicial Officer affirmed the decision by Judge Hunt (ALJ) that Respondent failed to comply with the Regulations by not providing veterinary care to an animal (9 C.F.R. § 2.40) and by failing to identify dogs (9 C.F.R. § 2.50); that Respondent failed to comply with the Standards of care for animals; that Respondent failed to maintain dog housing facilities in good repair (9 C.F.R. § 3.1(a)); that Respondent failed to provide housing surfaces free of excessive rust (9 C.F.R. § 3.1(c)(1)(i)); that Respondent failed to dispose of waste properly (9

C.F.R. § 3.1(f)); that Respondent failed to provide outdoor dog housing facilities which protect dogs from the elements (9 C.F.R. § 3.4(b)); that Respondent failed to provide primary enclosures that were structurally sound, free of sharp points or edges, and kept clean (9 C.F.R. §§ 3.6(a)(1), .11(a)); and that Respondent failed to keep food and water receptacles clean and sanitized (9 C.F.R. §§ 3.9(b), .10), as required by the Animal Welfare Act and the Regulations and Standards. A violation is willful within the meaning of the Administrative Procedure Act if a person carelessly disregards statutory requirements. *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996). The Judicial Officer found that Respondent's violations were willful. The Department's sanction policy places great weight upon the recommendations of administrative officials, who recommended a $5,000 civil penalty, a 10-day suspension, and a cease and desist order. However, the Judicial Officer: (1) issued a cease and desist order, (2) assessed a $2,000 civil penalty, and (3) suspended Respondent's license for 7 days, or if Respondent is not licensed, disqualified Respondent from becoming licensed for 7 days.

In *In re C.C. Baird*, AWA Docket No. 95-0017, decided by the Judicial Officer on July 7, 1998 (21 pages), the Judicial Officer denied in part and granted in part Respondent's Petition for Reconsideration. Respondent's violations of the Animal Welfare Act and the Regulations and Standards were willful violations. Respondent's failures to examine the drivers' licenses of persons who sold him dogs or cats do not constitute violations of 9 C.F.R. § 2.75(a)(1); however, Respondent's failure to fully and correctly maintain records which disclosed the names, addresses, and drivers' licenses of persons from whom he acquired animals are violations of 9 C.F.R. § 2.75(a)(1). "Substantial evidence" is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The record contains substantial evidence of Respondent's willful violations of 7 U.S.C. § 2140 and 9 C.F.R. §§ 2.75(a)(1), 2.100, 2.132, and 3.1(f). The facts establish that a 10-day suspension of Respondent's Animal Welfare Act license and the assessment of a $5,350 civil penalty against Respondent are warranted.

In *In re Queen City Farms, Inc.*, PACA Docket No. D-97-0020, decided by the Judicial Officer on July 7, 1998 (15 pages), the Judicial Officer denied Respondent's petition to reopen the hearing and petition for reconsideration. The Rules of Practice (7 C.F.R. § 1.146(a)(2)) provide that a petition to reopen the hearing may be filed at any time prior to the issuance of the decision of the Judicial Officer and Respondent's petition to reopen the hearing, filed after the issuance of the Judicial Officer's Order Denying Late Appeal, was not timely filed. Even if Respondent's petition to reopen the hearing had been timely filed, it would be denied because no hearing had been held in this proceeding prior to Respondent's filing its petition to reopen the hearing. There is no requirement in the Rules of Practice that filings in the proceeding must be served on officers, owners, and directors of a corporate respondent. The filings were properly served on the only respondent in the proceeding, Queen City Farms, Inc.

In *In re Jack D. Stowers*, AWA Docket No. 97-0022, decided by the Judicial Officer on July 16, 1998 (32 pages), the Judicial Officer affirmed the Default Decision by Administrative Law Judge Edwin S. Bernstein assessing a civil penalty of $5,000 against Respondent and directing Respondent to cease and desist from violating the Animal Welfare Act (AWA) and the Regulations and Standards issued under the AWA. 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 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. There is no indication in the disposition of a previous disciplinary proceeding instituted against Respondent, *In re Jack D. Stowers*, 56 Agric. Dec. 279 (1996), *modified by In re Jack D. Stowers*, 56 Agric. Dec. 300 (1997) (Order Modifying Order), that the United States Department of Agriculture would initiate no further action against Respondent for violations of the AWA and the Regulations and Standards. The civil penalty assessed against Respondent is warranted in law and justified by the facts.

In *In re IBP, inc.*, P & S Docket No. D-95-0049, decided by the Judicial Officer on July 31, 1998 (76 pages), the Judicial Officer reversed Chief Administrative Law Judge Victor W. Palmer's Decision. The Judicial Officer concluded that Respondent's right of first refusal under an agreement between Respondent and nine feedlots (Beef Marketing Agreement) obviates Respondent's need to bid competitively for cattle at those nine feedlots; and therefore violates section 202 of the Packers and Stockyards Act (7 U.S.C. § 192) because the right of first refusal has the effect or potential effect of reducing competition. The Packers and Stockyards Act gives the Secretary of Agriculture broad power, including the power to regulate Respondent's use of the agreements that it has with feedlots and to impose sanctions against Respondent, if the Secretary finds that Respondent's use of the agreement causes any harm which the Packers and Stockyards Act is designed to prevent. The Judicial Officer is not bound by an administrative law judge's credibility, legal, and factual determinations, but gives great weight to the findings by and the credibility determinations of an administrative law judge. Formalities of court pleading are not applicable in administrative proceedings, and the complaint apprised Respondent that all the terms of the Beef Marketing Agreement were at issue in the proceeding. Respondent's failure to make the terms of the Beef Marketing Agreement available to all similarly situated feedlots in Kansas is a discriminatory practice, but Complainant failed to prove that Respondent's failure to make the terms available to all feedlots in Kansas is unjustly discriminatory in violation of section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)). Similarly, while the Beef Marketing Agreement gives nine feedlots a preference and an advantage and subjects other similarly situated feedlots in Kansas to a prejudice and a disadvantage, Complainant failed to prove that the preference, advantage, prejudice, or disadvantage was undue or unreasonable in violation of section 202(b) of the Packers and Stockyards Act (7 U.S.C. § 192(b)).

In *In re Joseph T. Kocot*, PACA-APP Docket No. 97-0006, decided by the Judicial Officer on August 10, 1998 (43 pages), the Judicial Officer affirmed Judge Baker's (ALJ) decision that Joseph T. Kocot (Petitioner) was responsibly connected with Caito & Mascari, Inc., during the time that Caito & Mascari, Inc., violated the PACA. Petitioner admits that he was the president, a director, and a holder of 38 per centum of the outstanding stock of Caito & Mascari, Inc., during the time that Caito & Mascari, Inc., violated the PACA. The definition of *responsibly connected* in section 1(b)(9) of PACA (7 U.S.C. § 499a(b)(9) (Supp. II 1996)) establishes a rebuttable presumption, which provides that: a petitioner, even though a corporate officer, director, or holder of more than 10 per centum of the stock of a violating corporation is not deemed responsibly connected if the petitioner proves by a preponderance of the evidence *both* (1) that petitioner was not actively involved in the activities resulting in the violations *and* (2) that the petitioner either was only nominally an officer, director, and shareholder of the violating corporation or was not an owner of the violating corporation which was the alter ego of its owners. Petitioner failed to prove that he was not actively involved in activities that resulted in Caito & Mascari, Inc.'s violations of the PACA or that his positions with Caito & Mascari were merely nominal. Instead, the evidence reveals that Petitioner was intimately involved with the formulation of policies concerning Caito & Mascari, Inc.'s finances and Caito & Mascari, Inc.'s day-to-day operations. Petitioner knew of Caito & Mascari, Inc.'s violations of the PACA; issued checks to persons other than produce sellers, thereby reducing Caito & Mascari, Inc.'s ability to pay produce sellers in accordance with the PACA; and allowed the continuation of a scheme designed to prevent detection of Caito & Mascari, Inc.'s violations. Since Petitioner admits that he was a holder of 38 per centum of the stock of Caito & Mascari, Inc., he is an owner of Caito & Mascari, Inc., and the defense that Caito & Mascari, Inc., was the alter ego of others, is not available to Petitioner.

In *In re Garland E. Samuel*, A.Q. Docket No. 98 0002, decided by the Judicial Officer on August 17, 1998 (13 pages), the Judicial Officer affirmed Judge Baker's (ALJ) Default Decision and Order assessing a civil penalty of $2,000 for eight violations of the Swine Health Protection Act and the regulations issued under the Swine Health Protection Act. Respondent failed to file a timely answer to the Complaint, and the Default Decision and Order was properly issued in accordance with 7 C.F.R. § 1.139. Respondent may appear by or with counsel in an agency proceeding (5 U.S.C. § 555(b)), but Respondent bears the responsibility of obtaining counsel and has no right in disciplinary administrative proceedings under the Swine Health Protection Act to have counsel provided by the government. Respondent's inability to pay a civil penalty is a circumstance to be considered for

the purpose of determining the amount of a civil penalty to be assessed in an animal quarantine case. However, the burden is on Respondent to plead and prove, by producing documentation, the lack of ability to pay the civil penalty. Based on Respondent's suggestion that he is able to pay the civil penalty by making monthly payments and Complainant's agreement to the payment of the civil penalty over a period of 80 months, the ALJ's Order assessing a $2,000 civil penalty is modified to provide that Respondent shall pay the civil penalty in 80 monthly payments of $25 each.

In *In re Limeco, Inc.*, PACA Docket No. D-97-0017, decided by the Judicial Officer on August 18, 1998 (37 pages), the Judicial Officer affirmed the Decision by Chief Judge Palmer (Chief ALJ) concluding that Respondent willfully, flagrantly, and repeatedly violated: (1) 7 U.S.C. § 499b(5) by misrepresenting the origin of 411 cartons of limes that Respondent sold to three customers; (2) 7 U.S.C. § 499b(4) by making false statements regarding the origin of limes; and (3) 7 U.S.C. § 499i by maintaining documents which incorrectly identify the origin of limes. The Judicial Officer increased the 15-day suspension of Respondent's PACA license imposed by the Chief ALJ to 45 days. Respondent's violations were willful; therefore, a written warning, pursuant to 7 C.F.R. § 46.45(e)(5) and 5 U.S.C. § 558(c), offering Respondent an opportunity to achieve compliance, is not required. Respondent's violations were knowing, were designed to deceive, and occurred more than once; and therefore, were flagrant and repeated. The lack of evidence establishing Respondent's motive for or substantial benefits from its violations of the PACA and evidence of Respondent's cooperation with the investigation of its violations are not relevant either to a finding that Respondent violated PACA or to the sanction to be imposed for Respondent's violations. A 45-day suspension of Respondent's PACA license is not more severe than sanctions imposed in other similar cases. A sanction by an administrative agency is not rendered invalid in a particular case merely because it is more severe than sanctions imposed in other cases and will be overturned only if it is unwarranted in law or without justification in fact. The Secretary of Agriculture has broad authority to fashion appropriate sanctions under the PACA, and the PACA has no requirement that sanctions imposed on violators be uniform. Respondent's financial condition is not relevant to the issue of the length of the period during which Respondent's PACA license should be suspended. The Secretary of Agriculture may choose to assess a civil penalty for a violation of 7 U.S.C. § 499b, in lieu of license revocation or suspension, but license revocation or license suspension is appropriate for egregious violations of the PACA. Each misrepresentation by Respondent constitutes a separate violation of 7 U.S.C. § 499b(5), each false and misleading statement made by Respondent for a fraudulent purpose constitutes a separate violation of 7 U.S.C. § 499b(4), and each failure by Respondent to keep accounts, records, and memoranda that fully and correctly disclose all transactions involved in its business constitutes a separate violation of 7 U.S.C. § 499i.

In *In re Hines and Thurn Feedlot, Inc.*, P&S Docket No. D-96-0046, decided by the Judicial Officer on August 24, 1998 (30 pages), the Judicial Officer affirmed the decision by Judge Baker (ALJ) ordering Respondents to cease and desist from failing to pay for livestock; failing to pay, when due, for livestock; and issuing NSF checks in payment for livestock. The Order provides that Respondents shall not be registered to engage in business for 5 years. Respondents failed to file a timely answer and admitted the material allegations of fact contained in the complaint in their untimely answer; therefore, a default order was properly issued. Given the large number of Respondents' violative transactions and the dollar amounts involved, the sanction imposed is appropriate. Further, the sanction imposed was recommended by administrative officials and is consistent with other cases involving failures to pay for livestock. The hardship to Respondents' creditors, which might result from a suspension order, is given no weight in determining the sanction since the national interest of having fair and competitive conditions in the livestock industry prevails over the interests of creditors who might be damaged as a result of a suspension order.

In *In re Marilyn Shepherd*, AWA Docket No. 96-0084, decided by the Judicial Officer on September 15, 1998 (6 pages), the Judicial Officer denied Respondent's Petition for Reconsideration because it was not timely filed (7 C.F.R. § 1.146(a)(3)).

In *In re H. Schnell & Company, Inc.*, PACA Docket No. 97-0024, decided by the Judicial Officer on September 17, 1998 (12 pages), the Judicial Officer vacated Administrative Law Judge Baker's (ALJ) Decision Without Hearing and remanded the case to the ALJ to provide Respondent with an opportunity for an oral hearing. While admissions made by a party during a prehearing conference can constitute an adequate basis for findings of fact in a decision and the issuance of a default decision, Respondent's attorney's *indication*, during a conference call, that Respondent would not be able to pay all of its produce sellers by the date of the hearing, appears to be contrary to Respondent's position, taken during the April 29, 1998, and May 13, 1998, conference calls, that it does not concede the amounts which remain unpaid. Moreover, the ALJ states in the Decision Without Hearing that Respondent declined to admit an inability to pay. Under these circumstances, Respondent's attorney's *indication* does not constitute an admission of the material allegations of the Complaint or an admission that Respondent would be unable to make full payment of amounts owed to produce sellers by the date of the hearing. Accordingly, the Decision Without Hearing was not properly issued, and Respondent was deprived of its rights under the due process clause of the Fifth Amendment to the United States Constitution.

In *In re Western Sierra Packers, Inc.*, PACA Docket No. D-97-0004, decided by the Judicial Officer on September 30, 1998 (40 pages), the Judicial Officer reversed the Decision by Chief Judge Palmer (Chief ALJ) in which the Chief ALJ only published the facts and circumstances of Respondent's violation of 7 U.S.C. § 499i. The evidence was not sufficient to find that Respondent made the false or misleading statements for a fraudulent purpose, in violation of 7 U.S.C. § 499b(4); however, any misrepresentation of the subject matter described in 7 U.S.C. § 499b(5), even if the misrepresentation is unintentional or accidental, constitutes a violation of 7 U.S.C. § 499b(5), and the Judicial Officer found that Respondent misrepresented, by word or statement, the character or kind of at least 2,319 cartons of grapefruit, in violation of 7 U.S.C. § 499b(5). A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. Willfulness is reflected by Respondent's violations of express requirements of 7 U.S.C. §§ 499b(5) and 499i and the number of Respondent's violations. Respondent's violations are "repeated" because repeated means more than one. Each misrepresented carton of grapefruit constitutes a separate violation of 7 U.S.C. § 499b(5), and each inaccurate record constitutes a separate violation of 7 U.S.C. § 499i. Sanction recommendations of administrative officials charged with responsibility for achieving the congressional purpose of the PACA are entitled to great weight. However, sanction recommendations of administrative officials are not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials. The Judicial Officer rejected the sanction recommendation of administrative officials because it was based, in part, on the allegation that Respondent violated 7 U.S.C. § 499b(4), and the Judicial Officer did not find that Respondent violated 7 U.S.C. § 499b(4). Further, Respondent did not engage in the violations in order to deceive its customers; but rather, the violations appear to have been the result of Respondent's lack of concern for distinguishing between Oroblanco grapefruit and Melogold grapefruit. The Judicial Officer imposed a 20-day suspension of Respondent's PACA license (15 days for violations of 7 U.S.C § 499b(5) and 5 days for violations of 7 U.S.C. § 499i). In lieu of a 20-day suspension, the Judicial Officer assessed Respondent a civil penalty of $19,500 for violations of 7 U.S.C. § 499b(5) and imposed a 5-day suspension of Respondent's PACA license for violations of 7 U.S.C. § 499i.

APPENDIX 2

September 30, 1998

PENDING CASES APPEALED TO THE JUDICIAL OFFICER

Richard Lawson, Stanley Curtis & John M. Curtis, Resps.

AWA 96-0047 -- **Ref to JO 5/21/98**

Hunt, ALJ -- D&O 1/13/98

R's reply to C's Appeal Pet. 5/19/98

C's appeal pet. & Brief in support, etc., 4/21/98

R's Motion to Dismiss C's appeal 3/2/98

Sunland Packing House Co., Resp.

PACA D-96-0532 -- **Ref to JO 7/31/98**

Baker, ALJ -- D&O 6/1/98

R's request for oral argument 7/30/98 (faxed)

R's response to C's appeal 7/30/98 (faxed)

C's appeal 7/1/98