APPENDIX 1

SUMMARY OF DECISIONS BY THE JUDICIAL OFFICER

Fiscal Year 1999

In *In re Jerry Lynn Stokes, d/b/a Taylor Cattle*, A.Q. Docket No. 98-0007, decided by the Judicial Officer on October 6, 1998 (9 pages), the Judicial Officer affirmed Chief Administrative Law Judge Palmer's (Chief ALJ) Default Decision and Order. The Judicial Officer found that Respondent was deemed to have admitted the material allegations of the Complaint by his failure to file an answer. The Judicial Officer rejected Respondent's contention that because his violation of 9 C.F.R. § 78.8 was accidental, the $3,000 civil penalty assessed against Respondent by the Chief ALJ was excessive. Civil penalties may be imposed for violations of the brucellosis regulations (9 C.F.R. §§ 78.1-.43), even under circumstances in which the violations are unintentional and result from a mistake or accident. The Judicial Officer denied Respondent's request that the civil penalty be waived or significantly reduced on the ground that Respondent was unable to pay the civil penalty. A violator's inability to pay a civil penalty is a mitigating circumstance to be considered for the purpose of determining the amount of the civil penalty to be assessed in animal quarantine cases and plant quarantine cases. However, the burden is on the respondents in animal quarantine cases and plant quarantine cases to prove, by producing documentation, the lack of ability to pay the civil penalty. Respondent failed to produce any documentation supporting his assertion that he lacked the ability to pay a $3,000 civil penalty. Moreover, Respondent previously violated the animal quarantine regulations, *In re Jerry Stokes*, 54 Agric. Dec. 1103 (1995), and civil penalties are not reduced for repeat violators.

In *In re Richard Lawson*, AWA Docket No. 96-0047, decided by the Judicial Officer on October 15, 1998 (76 pages), the Judicial Officer affirmed the decision by Judge Hunt (ALJ) that Respondents failed to comply with the Regulations by failing to allow APHIS to inspect Respondents' animals, facilities, and records (9 C.F.R. § 2.126); by failing to provide and maintain programs for disease control and prevention, euthanasia, and adequate veterinary care supervised by a veterinarian, and by failing to provide veterinary care to animals in need of care (9 C.F.R. § 2.40); by failing to maintain complete records showing the acquisition and disposition of animals (9 C.F.R. § 2.75); by failing to properly identify animals (9 C.F.R. § 2.50); and by failing to comply with the Regulations and Standards relating to the care and housing of animals: that Respondents failed to remove animal and food wastes (9 C.F.R. § 3.125(d)); that Respondents

failed to properly store food (9 C.F.R. §§ 3.1(e), .125(c)); that Respondents failed to adequately ventilate indoor housing facilities (9 C.F.R. § 3.126(b)); that Respondents failed to rapidly eliminate excess water from housing facilities for animals (9 C.F.R. § 3.127(c)); that Respondents failed to provide polar bears with primary enclosures that were clean and had adequate space and water (9 C.F.R. §§ 3.104(a), (e), .107(a)(1)); that Respondents failed to keep the premises clean and in good repair, free of accumulations of trash (9 C.F.R. § 3.131(c)); and that Respondents failed to keep primary enclosures clean of animal waste (9 C.F.R. § 3.131(a)). However, since the ALJ erroneously found no willfulness and did not impose a disqualification period, the Judicial Officer found willfulness and imposed a 2-year disqualification period. 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 Department's sanction policy places great weight upon the recommendations of administrative officials, who recommended a $22,500 civil penalty, a 2-year disqualification, and (implicitly) a cease and desist order. 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 $13,500, and (3) Respondents are disqualified from becoming licensed under the Animal Welfare Act for 2 years.

In *In re Severin Peterson*, EAJA-FSA Docket No. 99-0002, decided by the Judicial Officer on November 9, 1998 (14 pages), the Judicial Officer denied Applicants' late-filed appeal. The Judicial Officer has no jurisdiction to consider Applicants' appeal filed after Hearing Officer Michael W. Shea's Equal Access to Justice Act Application Determination became final. The Rules of Practice require that within 30 days after receiving service, a party may appeal by filing an appeal petition with the Hearing Clerk (7 C.F.R. § 1.145(a)) and 7 C.F.R. § 1.147(g) provides that any document authorized under the Rules of Practice to be filed, shall be deemed to be filed at the time it reaches the Hearing Clerk. Neither Applicants' act of mailing their appeal petition to the Regional Director, National Appeals Division, nor the receipt of Applicants' appeal petition by the National Appeals Division, Eastern Regional Office, constitutes filing with the Hearing Clerk.

In *In re Michael J. Mendenhall*, PACA-APP Docket No. 97-0008, decided by the Judicial Officer on November 10, 1998 (66 pages), the Judicial Officer affirmed Judge Baker's (ALJ) decision that Petitioner was responsibly connected with Mendenhall Produce, Inc., during the time that Mendenhall Produce, Inc., violated the PACA. The Judicial Officer rejected Petitioner's contention that a proceeding instituted by a petition for review is limited to review of the Chief of the PACA Branch's responsibly connected determination and held that a petition for review filed pursuant to 7 C.F.R. § 1.133(b) commences a *de novo* proceeding. The Judicial Officer found that Petitioner was a holder of 100 per centum of the outstanding stock of Mendenhall Produce, Inc., during the period that Mendenhall Produce, Inc., violated the PACA, that Petitioner was not a nominal stockholder, and that Petitioner actively participated in activities resulting in Mendenhall Produce, Inc.'s violations. The Judicial Officer rejected Petitioner's argument that he was not a

stockholder because no stock certificates had been transferred to him and there was no change of ownership on the corporation's records indicating that Petitioner was a stockholder. The Judicial Officer held that a stock certificate is only evidence of stock ownership and stock ownership is determined by an examination of all the facts relevant to ownership. The Judicial Officer also held that while a corporate stock record book is evidence that the person identified as a stockholder is in fact a stockholder, that evidence may be rebutted and generally the failure to register a transfer on the records of a corporation does not affect the validity of the transfer as between the transferor and transferee, even if corporate bylaws require recordation of transfers on the books of the corporation.

In *In re David M. Zimmerman*, AWA Docket No. 98-0005, decided by the Judicial Officer on November 18, 1998 (47 pages), the Judicial Officer affirmed Chief Administrative Law Judge Palmer's (Chief ALJ) decision. The Judicial Officer found that Complainant proved by a preponderance of the evidence that Respondent operated as a dealer without a license, in violation of 7 U.S.C. § 2134 and 9 C.F.R. § 2.1. The Judicial Officer found that Respondent's violations were willful because, at the very least, Respondent carelessly disregarded statutory and regulatory requirements. The Judicial Officer stated that he is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility. 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 there was no basis for finding that the Chief ALJ's credibility determinations were error. The Judicial Officer found that even if Respondent understood a USDA employee's statements in breeder meetings to mean that a person could sell dogs without a license, Respondent relies on the representations of federal employees at Respondent's peril because it is well-settled that individuals are bound by federal statutes and regulations, irrespective of the advice, findings, or compliance determinations of federal employees. The Judicial Officer held that hearsay evidence was properly admitted into evidence. The Judicial Officer found that the $20,000 civil penalty assessed by the Chief ALJ was in accord with the Animal Welfare Act, the Department's sanction policy, and consistent with the sanctions imposed in other Animal Welfare Act cases. The Judicial Officer held that, while there is no provision in the Animal Welfare Act that explicitly states that the Secretary of Agriculture is authorized to disqualify a person from becoming licensed, 7 U.S.C. § 2151 authorizes orders disqualifying unlicensed persons from becoming licensed because of violations of the Animal Welfare Act, the Regulations, or the Standards.

In *In re Stew Leonard's*, 98 AMA Docket No. M 1-1, decided by the Judicial Officer on December 4, 1998 (8 pages), the Judicial Officer denied interlocutory appeals from a ruling by Administrative Law Judge Dorothea A. Baker (ALJ) denying motions to consolidate and striking answers, on the ground that interlocutory appeals are not permitted under the Rules of Practice.

In *In re Conrad Payne*, A.Q. Docket No. 98-0004, decided by the Judicial Officer on December 8, 1998 (27 pages), the Judicial Officer affirmed the default decision by Administrative Law Judge Dorothea A. Baker (ALJ) assessing a civil penalty of $750 against Respondent for importing approximately 4 pounds of pork sausage from The Netherlands into the United States, in violation of 9 C.F.R. §§ 94.11 and 94.13. The default decision was properly issued because Respondent failed to file an answer to the Complaint in accordance with 7 C.F.R. § 1.136(c). Therefore, Respondent is deemed to have admitted the allegations in the Complaint and waived his right to a hearing. 7 C.F.R. § 1.139. The Judicial Officer rejected Respondent's contentions that his rights under the Fifth, Sixth, and Seventh Amendments to the United States Constitution were violated. Respondent did not indicate the manner in which the proceeding violated his rights under the Fifth, Sixth, and Seventh Amendments. However the Judicial Officer: (1) reviewed the record and found nothing to indicate that Respondent's Fifth Amendment rights had been violated; (2) noted that the proceeding was not a criminal prosecution and that it is well settled that the Sixth Amendment is only applicable to criminal proceedings and is not applicable to administrative proceedings; and (3) noted that Congress may create statutory public rights, as it did with the enactment of the Act of February 2, 1903, as amended, and assign their adjudication to an administrative agency before which a litigant has no right to a jury trial, without violating the Seventh Amendment, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Tull v. United States*, 481 U.S. 412 (1987); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977). Respondent contended that Complainant failed to prove its case beyond a reasonable doubt. The Judicial Officer stated that the standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard, *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983); *Steadman v. SEC*, 450 U.S. 91 (1981), and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the Act of February 2, 1903, as amended, is preponderance of the evidence. The Judicial Officer further stated that Complainant is not required to prove that Respondent violated 9 C.F.R. §§ 94.11 and 94.13, as alleged in the Complaint, because Respondent is deemed, for the purposes of the proceeding, to have admitted the allegations in the Complaint and waived his right to a hearing, based on Respondent's failure to file an answer within 20 days after he was served with the Complaint. Respondent contended that Complainant did not prove that the pork sausage carried animal diseases. The Judicial Officer found that the disease status of the pork sausage, which is the subject of the Complaint, is not relevant to Respondent's violation of 9 C.F.R. §§ 94.11 and 94.13.

In *In re Judie Hansen*, AWA Docket No. 96-0048, decided by the Judicial Officer on December 14, 1998 (101 pages), the Judicial Officer affirmed the decision by Judge Hunt (ALJ) that Respondent failed to comply with the Regulations by failing to allow an APHIS inspector access to her facility and records (9 C.F.R. § 2.126); that Respondent failed to comply with the Standards of care for animals: that Respondent failed to ensure that primary enclosures for kittens had an elevated resting surface (9 C.F.R. § 3.6(b)); that Respondent failed to keep the premises clean in

order to protect animals from injury and to facilitate the required husbandry practices (9 C.F.R. § 3.131(c)); that Respondent failed to provide for the removal and disposal of animal waste, so as to minimize vermin infestation, odors, and disease hazards (9 C.F.R. §§ 3.1(f), .125(d)); that Respondent failed to construct and maintain primary enclosures for rabbits so as to provide sufficient space for the animals to make normal postural adjustments with adequate freedom of movement (9 C.F.R. § 3.53(c)); that Respondent failed to keep the premises where housing facilities for dogs are located clean and to control weeds (9 C.F.R. § 3.11(c)); that Respondent failed to store supplies of food in a manner that protects the supplies from spoilage, contamination, and vermin infestation (9 C.F.R. § 3.1(e)); that Respondent failed to ensure that animal areas were free of clutter, including equipment, furniture, and stored material (9 C.F.R. § 3.1(b)); that Respondent failed to design and construct housing facilities for dogs so as to be structurally sound and to maintain the facilities in good repair, to protect animals from injury (9 C.F.R. § 3.1(a)); that Respondent failed to remove excreta from primary enclosures for ferrets as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors (9 C.F.R. § 3.131(a)); and that Respondent failed to construct indoor and outdoor housing facilities so as to be structurally sound, and to maintain them in good repair, to protect animals from injury and to contain them (9 C.F.R. § 3.125(a)). The Judicial Officer affirmed the ALJ's finding that the violations were willful. 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 held that reliable hearsay evidence is admissible. *Richardson v. Perales*, 402 U.S. 389, 409-10 (1971). Due process requires an impartial administrative law judge, *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); however, the fact that the ALJ is an employee of the Department neither disqualifies the ALJ nor renders the hearing unfair. Further, the Judicial Officer held that the Department may combine investigative, adversarial, and adjudicative functions, as long as an agency employee engaged in the performance of investigative or prosecuting functions in the case does not participate in, or advise in, the decision (5 U.S.C. § 554(d)). The Judicial Officer also rejected Respondent's contention that she was entitled to a jury trial in the county in which the violations occurred under Article III, § 2 of the United States Constitution or the Sixth or Seventh Amendments. Instead, the Judicial Officer found that the place of the hearing was to be conducted with due regard for the convenience and necessity of the parties or their representatives (5 U.S.C. § 554(b)). The Department's sanction policy places great weight upon the recommendations of administrative officials who recommended an $8,000 civil penalty, a 30-day suspension, and a cease and desist order. However, the Judicial Officer modified the recommended sanction, as follows: the Judicial Officer issued a cease and desist order, assessed Respondent a civil penalty of $4,300, and suspended Respondent's license for 30 days.

In *In re Ronald L. Wieczorek*, EAJA-FSA Docket No. 99-0001, decided by the Judicial Officer on December 17, 1998 (21 pages), the Judicial Officer affirmed Hearing Officer Paul Handley's award of $1,755 to Equal Access to Justice Act (EAJA) Applicants. The EAJA Applicants were

prevailing parties in an adversary adjudication captioned *In re Ronald Wieczorek*, Case No. 97000990W. The Judicial Officer held that fees and other expenses may be awarded under the EAJA, unless, *inter alia*, the agency's position in the adversary adjudication is substantially justified. A position is substantially justified under the EAJA, if the position is reasonable in law and fact. *Pierce v. Underwood*, 487 U.S. 552 (1988). The Judicial Officer found that the Farm Service Agency's position in *In re Ronald Wieczorek*, Case No. 97000990W, was not substantially justified because the agency's position in the adversary adjudication was based upon the method it used to establish proposed rent under the preservation loan service program, which method was not in accordance with 7 C.F.R. § 1951.911(a)(6)(iii) (1997). The Judicial Officer also held that the term *business days* in the National Appeals Division Rules of Procedure (7 C.F.R. § 11.9(a)(2)) includes all days, except legal public holidays, as listed in 5 U.S.C. § 6103, Saturdays, and Sundays; therefore, the Hearing Officer's Appeal Determination did not become a final disposition in *In re Ronald Wieczorek*, Case No. 97000990W, until November 19, 1997, and the EAJA Applicants' December 18, 1997, filing was a timely EAJA application under the Department's Procedures Relating to Awards Under the EAJA (7 C.F.R. § 1.193(a)).

In *In re David M. Zimmerman*, AWA Docket No. 98-0005, decided by the Judicial Officer on January 6, 1999 (6 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 Anna Mae Noell*, AWA Docket No. 98-0033, decided by the Judicial Officer on January 6, 1999 (26 pages), the Judicial Officer affirmed the Default Decision by Administrative Law Judge Edwin S. Bernstein assessing a civil penalty of $25,000 against Respondents, revoking Respondents' Animal Welfare Act (Act) license, and directing Respondents to cease and desist from violating the Act and the Regulations and Standards issued under the Act. Respondents' failure to file a timely answer is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. The record clearly establishes that Respondents were 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 Respondents due process. The Judicial Officer held that the age, ill health, and hospitalization of one of the Respondents and the lack of legal representation at the time the Complaint was served on Respondents are not bases for setting aside the Default Decision. Moreover, the Judicial Officer held that even if he found that Complainant would not be prejudiced by allowing Respondents to file a late answer and Respondents would be irreparably harmed by the denial of their request to set aside the Default Decision, those findings would not constitute bases for setting aside the Default Decision. The Federal Rules of Civil Procedure (FRCP) are not applicable to administrative proceedings conducted before the Secretary of Agriculture under the Act, in accordance with the Rules of Practice (7 C.F.R. §§ 1.130-.151); therefore Rule 60(b) of the FRCP, under which a court may relieve a party from judgment for, *inter alia*, excusable neglect, is not

applicable to administrative proceedings conducted in accordance with the Rules of Practice.

In *In re Jim Aron*, P.&S. Docket No. D-98-0030, decided by the Judicial Officer on January 20, 1999 (17 pages), the Judicial Officer affirmed the decision by Chief Administrative Law Judge Palmer ordering Respondent to cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act (Act) and the Regulations issued under the Act without maintaining an adequate bond or its equivalent and assessing Respondent a civil penalty of $1,000. Respondent's failure to file an 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 Judicial Officer held that Respondent's automobile accident, loss of memory, status as a United States citizen, status as a veteran of the United States Army, and payment of taxes are not bases for setting aside the Default Decision. Moreover, the Judicial Officer rejected Respondent's contention that he was being punished for being in an automobile accident. The Judicial Officer stated that he was imposing the sanction because of Respondent's violations of the Act and the Regulations issued under the Act. Further, the Judicial Officer stated that the sanction was not imposed for any punitive reasons, but rather, the sanction was imposed to accomplish the remedial purposes of the Act by deterring future similar violations of the Act and the Regulations by Respondent and other livestock dealers.

In *In re Daniel E. Murray*, A.Q. Docket No. 98-0003, decided by the Judicial Officer on January 22, 1999 (16 pages), the Judicial Officer affirmed Chief Administrative Law Judge Palmer's (Chief ALJ) decision assessing a civil penalty of $500 against Respondent. The Judicial Officer held that Respondent's failure to file a timely answer to the Complaint 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.

In *In re Produce Distributors, Inc.* (Decision as to Irene T. Russo, d/b/a Jay Brokers), PACA Docket No. D-97-0013, decided by the Judicial Officer on January 25, 1999 (42 pages), the Judicial Officer affirmed the Decision by Judge Bernstein (ALJ) concluding that Irene T. Russo, d/b/a Jay Brokers (Respondent), violated 7 U.S.C. § 499b(4) by making false and misleading statements to produce consignors for a fraudulent purpose in connection with the handling of produce on a consignment basis. The Judicial Officer found that consignees owed consignors a high degree of care, honesty, and loyalty. *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 145-46, 170 (1987). The Judicial Officer found that Respondent participated in a joint venture

with Produce Distributors, Inc., in connection with the fraudulent transactions, and that a joint venture may exist even though the joint venture is not made known to third persons or the general public. The Judicial Officer found that Respondent's violations were willful, repeated, and flagrant. 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(4) and the number of Respondent's violations. Respondent's violations were "repeated" because repeated means more than one. Respondent's violations were flagrant because of the number of violations, the amount of money involved, and the length of time during which they occurred. The Judicial Officer stated that, while he is not bound by the ALJ's credibility determinations (5 U.S.C. § 557(b)), he gives great weight to an administrative law judge's credibility determinations because the administrative law judge has the opportunity to see and hear witnesses testify and the Judicial Officer found that the record supported the ALJ's credibility determinations. The Judicial Officer rejected Respondent's contention that her motive for violating 7 U.S.C. § 499b(4) was relevant to the issue of Respondent's violations. The Judicial Officer concluded that Complainant proved Respondent's violations by a preponderance of the evidence and revoked Respondent's PACA license.

In *In re Kevin Ackerman* (Decision as to Kevin Ackerman), AWA Docket No. 97-0039, decided by the Judicial Officer on February 3, 1999 (11 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 Dorothea A. Baker's Decision and Order became final.

In *In re Sunland Packing House Company*, PACA Docket No. D-96-0532, decided by the Judicial Officer on February 17, 1999 (84 pages), the Judicial Officer affirmed the Decision by Judge Baker (ALJ) concluding that the evidence was not sufficient to find that Respondent made 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 approximately 10,622 cartons of hybrid grapefruit, in violation of 7 U.S.C. § 499b(5). 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. 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 the number of Respondent's violations. Respondent's violations are "repeated" because repeated means more than one. Each misrepresented carton of hybrid grapefruit constitutes a separate violation of 7 U.S.C. § 499b(5). 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 negligence, inadvertence, or carelessness with respect to distinguishing between the Oroblanco variety and the Melogold variety of hybrid grapefruit. The Judicial Officer concluded that a 30-day suspension of Respondent's PACA license or, in lieu of a 30-day suspension, a $120,000 civil penalty would be appropriate for Respondent's violations of 7 U.S.C § 499b(5). The Judicial Officer rejected Respondent's request that Respondent be given credit for the time that Respondent closed its business based upon erroneous advice from the Hearing Clerk's office that Complainant had not filed an appeal. Respondent is bound by federal statutes and regulations, irrespective of erroneous advice of federal employees, and Respondent did not demonstrate that the Secretary was estopped from imposing a sanction against Respondent because of Respondent's closure of its business based on erroneous advice.

In *In re New England Dairies, Inc.*, 98 AMA Docket No. M 1-3, decided by the Judicial Officer on February 23, 1999 (10 pages), the Judicial Officer affirmed the Decision and Order by Administrative Law Judge Baker (ALJ) under 7 U.S.C. § 608c(15)(A), which dismissed a petition filed by a handler subject to the New England Milk Marketing Order (7 C.F.R. pt. 1001). The Judicial Officer held that an administrative law judge is not prohibited by 7 C.F.R. § 900.52(c)(2) from referring to other documents for the administrative law judge's reasons for a decision upon a motion to dismiss and that an administrative law judge is not prohibited by 7 C.F.R. § 900.52(c)(2) from adopting reasons from other documents, as the administrative law judge's reasons for a decision upon a motion to dismiss. The Judicial Officer held that the petition contains neither a request for modification of the New England Milk Marketing Order nor a request to be exempted from the New England Milk Marketing Order; thus, dismissal of the petition was not error. Moreover, the Judicial Officer found that the petition was premature because it challenged an order that the Secretary of Agriculture had not issued; but was based solely on petitioner's expectation that the Secretary of Agriculture will issue an order in *In re Stew Leonard's*, 98 AMA Docket No. M 1-1, which petitioner contends will violate the Agricultural Marketing Agreement Act of 1937, as amended, and the equal protection guarantees of the United States Constitution.

In *In re Daniel E. Murray*, A.Q. Docket No. 98-0003, decided by the Judicial Officer on March 9, 1999 (9 pages), the Judicial Officer denied Respondent's Petition for Reconsideration. The Judicial Officer stated that 7 C.F.R. § 1.136(a) requires that a respondent file an answer with the

Hearing Clerk within 20 days after service of the complaint and 7 C.F.R. § 1.147(g) provides that the effective date of filing is the date a document reaches the Hearing Clerk. Therefore, even if Respondent mailed his Answer within 20 days after he was served with the Complaint, his Answer would not be timely because Respondent's Answer was not filed with the Hearing Clerk within 20 days after service of the Complaint on Respondent.

In *In re Fresh Prep, Inc.*, PACA Docket No. D-98-0014, PACA- APP Docket No. 99-0001, and PACA-APP Docket No. 99-0002, decided by the Judicial Officer on March 11, 1999 (12 pages), the Judicial Officer ruled, in response to a question certified by Administrative Law Judge Baker, that Complainant's motion to withdraw its complaint without prejudice should be granted. The Judicial Officer stated that while reference to the Federal Rules of Civil Procedure may provide some guidance with respect to the Rules of Practice, the Federal Rules of Civil Procedure are not applicable to administrative proceedings that are conducted before the Secretary of Agriculture, under the PACA, in accordance with the Rules of Practice. The Judicial Officer concluded that while the circumstances of each case must be examined to determine the proper disposition of a motion to withdraw a complaint, generally, a complainant's motion to withdraw a complaint in a proceeding instituted under the Rules of Practice should not result in dismissal with prejudice, unless: (1) the complainant moves to withdraw the complaint with prejudice; (2) error is apparent on the face of the complaint such that the complainant should be precluded from refiling essentially the same flawed complaint; (3) allowing the complainant to reinstitute the same proceeding would result in substantial legal prejudice to the other litigants; or (4) the complainant has filed multiple motions to withdraw, followed in each case by the refiling of essentially the same complaint.

In *In re Nkiambi Jean Lema*, P.Q. Docket No. 99-0002, decided by the Judicial Officer on March 15, 1999 (15 pages), the Judicial Officer affirmed the Default Decision by Administrative Law Judge Edwin S. Bernstein, assessing Respondent a $500 civil penalty because he imported 12 limes and 6 passion fruit into the United States from Zaire, in violation of 7 C.F.R. § 319.56. Respondent's failure to deny the material allegations of the Complaint 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 Judicial Officer stated that agencies may dispense with a hearing in a proceeding in which there is no material issue of fact on which a meaningful hearing may be held. Accordingly, the Default Decision did not violate Respondent's right to due process. The Judicial Officer also stated that a sanction imposed by an agency will be overturned only if it is unwarranted in law or without justification in fact. The Judicial Officer held the civil penalty assessed against Respondent was authorized by the Federal Plant Pest Act (7 U.S.C. §§ 150gg) and the Plant Quarantine Act (7 U.S.C. § 163) and therefore, warranted in law. Moreover, the Judicial Officer found that, while there is no requirement that sanctions imposed by an agency be uniform, the civil penalty assessed against Respondent was consistent with sanctions imposed for similar violations of 7 C.F.R. § 319.56 and that the facts in the proceeding justify assessment of a

$500 civil penalty against Respondent. The Judicial Officer also rejected Respondent's contention that the Commodities Exchange Act (7 U.S.C. §§ 1-25) was applicable to the proceeding.

In *In re Judie Hansen*, AWA Docket No. 96-0048, decided by the Judicial Officer on March 15, 1999 (28 pages), the Judicial Officer denied Respondent's Petition for Reconsideration. The Judicial Officer rejected Respondent's contentions that the evidence was not sufficient to conclude that Respondent violated 7 U.S.C. § 2146 and 9 C.F.R. §§ 2.126, 3.1(a)-(b), (e)-(f), 3.53(c), 3.125(d), and 3.131(a), (c). The Judicial Officer held that: (1) 9 C.F.R. § 3.131(c) is not unconstitutionally vague because it requires that buildings and grounds be kept clean, but does not specify how much dirt or dust would constitute a violation; (2) the Animal and Plant Health Inspection Service inspector's alleged failures to follow Department rules and supervisor demands are not relevant to the proceeding; (3) the failure of the Judicial Officer to find the proceeding humorous is not error and is not relevant to the proceeding; (4) neither the Administrative Procedure Act nor the Rules of Practice prohibit the admission of hearsay evidence and responsible hearsay has long been admitted in the Department's administrative proceedings; (5) testimonials of Respondent's customers are not relevant to Respondent's compliance with the Animal Welfare Act and the Regulations and Standards; and (6) the Excessive Fines Clause of the Eighth Amendment to the United States Constitution is not applicable to civil administrative enforcement proceedings in which civil penalties are assessed to deter violations, rather than to punish violators.

In *In re Sweck's, Inc.*, EAJA-FSA Docket No. 99-0003, decided by the Judicial Officer on March 22, 1999 (14 pages), the Judicial Officer affirmed Hearing Officer James R. Holman's denial of an award of fees and other expenses sought by Applicant under the Equal Access to Justice Act (EAJA). The Judicial Officer held that the National Appeals Division's Director Review Determination in *In re Sweck's, Inc.*, Case No. 98000135E, which was not issued within the time limits provided in 7 U.S.C. § 6998(b)(1) and 7 C.F.R. § 11.9(d)(2), was, nonetheless, the final National Appeals Division determination in *In re Sweck's, Inc.*, Case No. 98000135E, and effective. See generally *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993). Based on the Director Review Determination, the Judicial Officer concluded that Applicant did not succeed on any significant issue or achieve any benefit which Applicant sought in *In re Sweck's, Inc.*, Case No. 98000135E; therefore, Applicant was not the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E, and Applicant's request for fees and other expenses allegedly incurred in connection with *In re Sweck's, Inc.*, Case No. 98000135E, must be denied.

In *In re Produce Distributors, Inc.* (Order Denying Petition for Reconsideration as to Irene T. Russo, d/b/a Jay Brokers), PACA Docket No. D-97-0013, decided by the Judicial Officer on March 23, 1999 (9 pages), the Judicial Officer denied a Petition for Reconsideration filed by Irene T. Russo, d/b/a Jay Brokers. The Judicial Officer stated that the evidence supported a conclusion that Irene T. Russo, d/b/a Jay Brokers, participated in a joint venture with Produce Distributors,

Inc., in which Irene T. Russo, d/b/a Jay Brokers, shared profits with Produce Distributors, Inc., resulting from their violations of 7 U.S.C. § 499(b)(4). The Judicial Officer stated that the requirement for notification of the expansion of an investigation under the PACA (7 U.S.C. § 499f(c)) did not apply to the investigation at issue in the proceeding because the PACA was not amended to require notification until November 15, 1995, after the investigation of Produce Distributors, Inc., and Irene T. Russo, d/b/a Jay Brokers, had begun.

In *In re Michael Norinsberg*, PACA-APP Docket No. 96-0009, decided by the Judicial Officer on April 5, 1999 (21 pages), the Judicial Officer, on remand, reversed the Chief of the PACA Branch's decision that Petitioner was *responsibly connected*, as that term is defined in the PACA (7 U.S.C. § 499a(b)(9) (Supp. III 1997)), with The Norinsberg Corporation during the time that The Norinsberg Corporation violated the PACA. The Judicial Officer had previously affirmed the Chief of the PACA Branch, based on the Judicial Officer's conclusion that Petitioner was actively involved in activities resulting in The Norinsberg Corporation's violations of the PACA. *In re Michael Norinsberg*, 56 Agric. Dec. 1840 (1997). Petitioner filed a petition for review of the Judicial Officer's determination, and the United States Court of Appeals for the District of Columbia Circuit remanded the case instructing the Judicial Officer to articulate a standard to determine whether Petitioner was actively involved in the activities resulting in The Norinsberg Corporation's violations of the PACA. *Norinsberg v. United States Dep't of Agric.*, 162 F.3d 1194 (1998). The Judicial Officer held that a petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA. Applying this standard to Petitioner, the Judicial Officer found that Petitioner participated in activities resulting in The Norinsberg Corporation's violations of the PACA; however, Petitioner demonstrated by a preponderance of the evidence that he performed a ministerial function only and thus, was not actively involved in activities resulting in The Norinsberg Corporation's violations of the PACA.

In *In re Harold P. Kafka*, AWA Docket No. 98-0028, decided by the Judicial Officer on April 5, 1999 (15 pages), the Judicial Officer denied Respondent's late-filed appeal petition. The Judicial Officer found that Respondent filed an Answer 33 days after he was served with the Complaint; therefore, Respondent is deemed to have admitted the allegations in the Complaint and waived his opportunity for a hearing. 7 C.F.R. §§ 1.136(a), (c), .139, .141(a). The Judicial Officer stated that appeal petitions must be filed with the Hearing Clerk and that the effective date of filing an appeal petition is the date the appeal petition reaches the Hearing Clerk. 7 C.F.R. §§ 1.145(a), .147(g). Therefore, Respondent's alleged continued unsuccessful efforts to file his Appeal Petition do not constitute filing the Appeal Petition with the Hearing Clerk. Respondent's Appeal Petition was not

filed within 35 days after service of the Default Decision on Respondent; therefore, the Judicial Officer did not have jurisdiction to consider Respondent's appeal.

In *In re Kevin Ackerman*, AWA Docket No. 97-0039, decided by the Judicial Officer on April 14, 1999 (5 pages), the Judicial Officer denied Respondent's petition for reconsideration because Respondent did not file the petition for reconsideration within 10 days after the date the Hearing Clerk served the Order Denying Late Appeal as to Kevin Ackerman, as required by 7 C.F.R. § 1.146(a)(3).

In *In re James E. Stephens*, AWA Docket No. 98-0019, decided by the Judicial Officer on May 5, 1999 (70 pages), the Judicial Officer affirmed the decision by Administrative Law Judge Edwin S. Bernstein that Respondents: (1) failed to provide veterinary care to animals in need of care (9 C.F.R. § 2.40); (2) failed to maintain complete records (7 U.S.C. § 2140; 9 C.F.R. § 2.75(b)(1)); (3) failed to permit APHIS officials to conduct a complete inspection of the facility (7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a)); (4) failed to provide housing facilities for animals that were structurally sound and maintain housing facilities for animals in good repair (9 C.F.R. § 3.125(a)); (5) failed to store supplies of food so as to adequately protect the supplies of food against deterioration, molding, or contamination by vermin (9 C.F.R. § 3.125(c)); (6) failed to provide for the removal and disposal of animal and food wastes (9 C.F.R. § 3.125(d)); (7) failed to adequately ventilate indoor housing facilities (9 C.F.R. § 3.126(b)); (8) failed to provide adequate lighting in indoor housing facilities (9 C.F.R. § 3.126(c)); (9) failed to provide a suitable method to rapidly eliminate excess water from outdoor facilities for animals (9 C.F.R. § 3.127(c)); (10) failed to construct and maintain enclosures so as to provide sufficient space for each animal (9 C.F.R. § 3.128); (11) failed to provide animals with wholesome and uncontaminated food (9 C.F.R. § 3.129(a)); (12) failed to keep primary enclosures clean (9 C.F.R. § 3.131(a)); and (13) failed to establish and maintain an effective program for the control of pests (9 C.F.R. § 3.131(d)). The Judicial Officer reduced the civil penalty assessed by the ALJ based on the Judicial Officer's finding that Complainant failed to prove five of the alleged violations by a preponderance of the evidence. Respondents' violations were serious in that they exposed Respondents' animals to a risk of serious illness and death. Respondents' violations were also willful in that Respondents displayed a careless disregard of statutory and regulatory requirements over a 4-month period. The Judicial Officer held that the permanent disqualification of Respondents from obtaining an Animal Welfare Act license is not unfair or unjust and the civil penalty assessed was not excessive. The Judicial Officer held that the ALJ did not err when he allowed an expert in the field of care, handling, feeding, and nutritional requirements of exhibition animals to testify about conditions at Respondents' facility based upon observation of pictures of the conditions at Respondents' facility.

In *In re Robert Houriet*, P.Q. Docket No. 98-0016, decided by the Judicial Officer on May 6, 1999 (15 pages), the Judicial Officer affirmed the Default Decision by Administrative Law Judge James

W. Hunt, assessing Respondent a $1,000 civil penalty because he imported peppers and tomatoes into the United States from Mexico and onions into the United States from the Netherlands, without the required permit, in violation of 7 C.F.R. § 319.56-2. 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. Application of the default provisions of the Rules of Practice does not deny Respondent due process. The Judicial Officer held that agency officials have broad discretion in deciding against whom to institute disciplinary proceedings and found nothing in the record to indicate that Complainant's filing of the Complaint was an abuse of administrative discretion.

In *In re Sweck's, Inc.*, EAJA-FSA Docket No. 99-0003, decided by the Judicial Officer on May 6, 1999 (9 pages), the Judicial Officer denied Applicant's Petition for Reconsideration. The Judicial Officer held that the Director of the National Appeals Division had jurisdiction to issue a Director Review Determination in *In re Sweck's, Inc.*, Case No. 98000135E, even though the Director did not issue the Director Review Determination within the time limit provided in 7 U.S.C. § 6998(b)(1) and 7 C.F.R. § 11.9(d)(2)(i).

In *In re Judie Hansen*, AWA Docket No. 96-0048, decided by the Judicial Officer on May 12, 1999 (5 pages), the Judicial Officer denied Respondent's petition to reopen hearing, which was filed 4 months and 1 week after the Judicial Officer issued the Decision and Order in *In re Judie Hansen*, 57 Agric. Dec. 1072 (1998). The Judicial Officer held that the Rules of Practice (7 C.F.R. § 1.146(a)(2)) require that a petition to reopen hearing must be filed prior to the issuance of the Judicial Officer's decision, and Respondent's petition to reopen hearing was untimely.

In *In re Nkiambi Jean Lema*, P.Q. Docket No. 99-0002, decided by the Judicial Officer on May 14, 1999 (6 pages), the Judicial Officer denied Respondent's petition for reconsideration because Respondent did not file the petition for reconsideration within 10 days after the date the Hearing Clerk served the Decision and Order on Respondent, as required by 7 C.F.R. § 1.146(a)(3). The Judicial Officer also denied Respondent's Motion to Transfer Venue to the United States District Court for the District of Maryland, holding that the Judicial Officer has no authority under the Rules of Practice to transfer the proceeding to a United States district court.

In consolidated proceeding *In re Fresh Prep, Inc.*, PACA Docket No. D-98-0014, PACA-APP Docket No. 99-0001, and PACA-APP Docket No. 99-0002, decided by the Judicial Officer on May 17, 1999 (15 pages), the Judicial Officer affirmed the dismissal without prejudice by Administrative Law Judge Dorothea A. Baker. The Judicial Officer rejected Respondent's and Petitioners' contention that an administrative law judge who grants a litigant's motion to withdraw a complaint without prejudice allows the movant to control the hearing date; rejected Respondents and Petitioners contention that dismissal of the Complaint without prejudice will necessarily deprive them of an adjudication on the merits; and rejected Respondents and Petitioners

contention that they will suffer legal prejudice if Complainant is allowed to re-file the Complaint.

In *In re Leadermar (USA) Corporation*, P.Q. Docket No. 99-0004, decided by the Judicial Officer on May 19, 1999 (15 pages), the Judicial Officer affirmed the Default Decision by Acting Chief Administrative Law Judge Edwin S. Bernstein, assessing Respondent a $3,750 civil penalty because Respondent violated 7 C.F.R. § 330.111(a) by failing to give the appropriate advance notification of intent to arrive to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, and violated 7 C.F.R. § 330.111(d) by failing to give immediate notification of the changed estimated time of arrival of vessels to the Plant Protection and Quarantine office at the port of Jacksonville, Florida. The Judicial Officer stated that 7 C.F.R. § 1.136(a) requires that a respondent file an answer with the Hearing Clerk within 20 days after service of the complaint and 7 C.F.R. § 1.147(g) provides that the effective date of filing is the date a document reaches the Hearing Clerk. Therefore, even if Respondent mailed its Answer within 20 days after Respondent was served with the Complaint, Respondents Answer would not be timely because Respondents Answer was not filed with the Hearing Clerk within 20 days after service of the Complaint on Respondent. The Judicial Officer held that Respondents failure to file a timely answer is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. Application of the default provisions of the Rules of Practice does not deny Respondent due process under the Fifth Amendment to the United States Constitution.

In *In re Michael Norinsberg*, PACA-APP Docket No. 96-0009, decided by the Judicial Officer on May 25, 1999 (10 pages), the Judicial Officer denied Respondents petition for reconsideration on remand. The Judicial Officer held that the standard in *In re Michael Norinsberg*, 58 Agric. Dec. ___ (Apr. 5, 1999) (Decision and Order on Remand), to determine whether a petitioner was actively involved in the activities resulting in a violation of the PACA, does not conflict with the two-pronged test in 7 U.S.C. § 499a(b)(9) (Supp. III 1997) or render the determination of whether a person was actively involved in the activities resulting in a violation of the PACA, superfluous. The Judicial Officer also rejected Respondents contention that Petitioner exercised informed judgment when he participated in activities (signing checks made payable to persons who were not produce sellers) resulting in violations of the PACA by The Norinsberg Corporation.

In *In re Paul W. Thomas*, EAJA-FSA Docket No. 99-0004, decided by the Judicial Officer on June 15, 1999 (27 pages), the Judicial Officer reversed Hearing Officer Byron Bennes award of $2,392.50 to Equal Access to Justice Act (EAJA) Applicants. The EAJA Applicants were prevailing parties in an adversary adjudication captioned *In re Paul W. Thomas*, Case No. 98000848W. The Judicial Officer held that Respondents position in *In re Paul W. Thomas*, Case No. 98000848W, was not substantially justified, but that Applicants failed to file a complete and timely Equal Access to Justice Act application. Further, the Judicial Officer found that Applicants failed to adequately document fees that they allegedly incurred in connection with *In re Paul W.*

Thomas, Case No. 98000848W, and that no award could be made under the Equal Access to Justice Act for interest payments, lost spring wheat, lost income from calves, and the loss of a down payment for, and discount on, a drill.

In *In re Stephen Douglas Bolton* (Decision as to Stephen Douglas Bolton), HPA Docket No. 99-0010, decided by the Judicial Officer on June 18, 1999 (14 pages), the Judicial Officer affirmed the Default Decision by Administrative Law Judge James W. Hunt assessing Respondent a $2,000 civil penalty and disqualifying Respondent for 1 year because he entered, for the purpose of showing or exhibiting in a horse show, a horse which was sore. The Judicial Officer held that prohibition on entering in 15 U.S.C. § 1824(2)(B) applies to all persons, including any person who does not own the horse which he or she enters. Respondents failure to file a timely answer is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. Application of the default provisions of the Rules of Practice does not deny Respondent due process.

In *In re James E. Stephens*, AWA Docket No. 98-0019, decided by the Judicial Officer on June 18, 1999 (15 pages) the Judicial Officer denied Respondents Petition for Reconsideration. The Judicial Officer held that: (1) Dr. Lewandowskis expert testimony regarding the conditions at Respondents facility on December 10, 1997, solely based upon Dr. Lewandowskis observation of pictures which were taken of conditions at Respondents facility during the December 10, 1997, inspection was proper; (2) that the permanent disqualification of Respondents from obtaining an Animal Welfare Act license is warranted in law (7 U.S.C. § 2151) and justified by the facts in the proceeding; and (3) there was no basis for modifying the Order issued in *In re James E. Stephens*, 58 Agric. Dec. ___ (May 5, 1999).

In *In re SIERRA KIWI, INC.*, 98 AMA Docket No. F&V 920-1, decided by the Judicial Officer on June 23, 1999 (7 pages), the Judicial Officer granted Petitioners motion to withdraw its petition without prejudice. The Judicial Officer concluded that while the circumstances of each case must be examined to determine the proper disposition of a motion to withdraw a petition, generally, a petitioners motion to withdraw a petition in a proceeding instituted under the Rules of Practice should not result in dismissal with prejudice, unless: (1) the petitioner moves to withdraw the petition with prejudice; (2) error is apparent on the face of the petition such that the petitioner should be precluded from refiling essentially the same flawed petition; (3) allowing the petitioner to reinstitute the same proceeding would result in substantial legal prejudice to the other litigants; or (4) the petitioner has filed multiple motions to withdraw, followed in each case by the refiling of essentially the same petition. The Judicial Officer concluded that, because the petition was dismissed, Respondents appeal and motion for expedited decision on Respondents appeal were moot, and the Judicial Officer dismissed Respondents appeal and denied Respondents motion for expedited decision on Respondents appeal.

In *In re Nancy M. Kutz* (Decision and Order as to Nancy M. Kutz), AWA Docket No. 99-0001, decided by the Judicial Officer on July 12, 1999 (25 pages), the Judicial Officer affirmed the Default Decision by Administrative Law Judge James W. Hunt assessing a civil penalty of $16,000 against Respondent, suspending Respondents Animal Welfare Act (Act) license, and directing Respondent to cease and desist from violating the Act and the Regulations and Standards issued under the Act. Respondents failure to file a timely answer is deemed an admission of the allegations in the complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. The Judicial Officer stated that even if Respondents late-filed answer had been timely filed, it would be deemed an admission of the allegations of the complaint because Respondents answer did not respond to the allegations in the complaint. The Judicial Officer also concluded that Respondents ability to pay the civil penalty is not a basis for setting aside or reducing the civil penalty assessed by the ALJ.

In *In re Kirby Produce Company, Inc.*, PACA Docket No. D-98-0002, decided by the Judicial Officer on July 12, 1999 (26 pages), the Judicial Officer affirmed Judge Hunts (ALJ) Decision Without Hearing by Reason of Admissions in which the ALJ found that Respondent committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) by failing to make full payment promptly for perishable agricultural commodities and revoked Respondents PACA license. The Judicial Officer held that the new "slow-pay/no-pay" policy articulated in *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998), applies to PACA disciplinary cases instituted after January 25, 1999, the date *In re Scamcorp, Inc., supra*, was published in *Agriculture Decisions*; therefore, the new policy was not applicable to the proceeding and if Respondent paid all of its produce sellers by the date of the hearing, the case would be a "slow-pay" case. However, the Judicial Officer held that Respondent was not entitled to a hearing because Respondents agreement to documents issued in *Browns Produce v. Kirby Produce Co.*, Case No. 3:96-CV-526 (E.D. Tenn. June 25, 1996), constituted an admission of the material allegations in the Complaint. Further, Respondents request for a continuance of the hearing to enable Respondent to make full payment to its perishable agricultural commodities sellers before the hearing constitutes an admission that Respondent would not be able to make full payment in accordance with the PACA by the date of the hearing. The Judicial Officer stated that documents filed in United States courts that have a direct relation to matters at issue in PACA disciplinary proceedings have long been officially noticed in PACA disciplinary proceedings and held that the ALJ properly took official notice of documents issued in *Browns Produce v. Kirby Produce Co.*, Case No. 3:96-CV-526 (E.D. Tenn. June 25, 1996), in accord with the Administrative Procedure Act (5 U.S.C. § 556(e)) and the Rules of Practice (7 C.F.R. § 1.141(h)(6)). The Rules of Practice (7 C.F.R. § 1.145(i)) require the Judicial Officer to rule on appeals, upon the basis of, and after due consideration of, the record and any matter of which official notice is taken. The Judicial Officer stated that a respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing when there is no material issue of fact on which a meaningful hearing can be held. The Judicial Officer also held that application of the default provisions of the

Rules of Practice did not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the United States Constitution.

In *In re Leadermar (USA) Corporation*, P.Q. Docket No. 99-0004, decided by the Judicial Officer on July 15, 1999 (4 pages) (Ruling Denying Motion to Waive Rules of Practice), the Judicial Officer denied Respondents request that the Judicial Officer waive the provision in the Rules of Practice limiting the time within which a party may file a petition for reconsideration. The Judicial Officer held that he has no authority to depart from the Rules of Practice.

In *In re Paul W. Thomas*, EAJA-FSA Docket No. 99-0004, decided by the Judicial Officer on August 4, 1999 (6 pages), the Judicial Officer denied Applicants Petition for Reconsideration because it was not timely filed (7 C.F.R. § 1.146(a)(3)).

In *In re Anna Mae Noell* (Order Denying the Chimp Farm, Inc.'s Motion to Vacate), AWA Docket No. 98-0033, decided by the Judicial Officer on August 30, 1999 (7 pages), the Judicial Officer found that the Chimp Farm, Inc.'s Motion to Vacate was a petition for reconsideration filed 6 months and 11 days after the Chimp Farm, Inc., was served with the Judicial Officer's decision. The Judicial Officer denied the Chimp Farm, Inc.'s petition for reconsideration because it was not filed within 10 days after service of the decision, as required by 7 C.F.R. § 1.146(a)(3). The Judicial Officer also stated that even if the Chimp Farm, Inc.'s petition for reconsideration had not been late-filed, it would be denied because it raised the issue of improper service of the Complaint for the first time in the proceeding and that the issue was raised too late to be considered.

In *In re La Fortuna Tienda*, P.Q. Docket No. 99-0013, decided by the Judicial Officer on September 1, 1999 (18 pages), the Judicial Officer affirmed the Default Decision by Administrative Law Judge James W. Hunt, concluding that Respondent moved 11 boxes of Mexican Hass avocados from Chicago, Illinois, to Mt. Airy, North Carolina, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff. The Judicial Officer found that the respondent's movement of 11 boxes of avocados constituted 11 violations of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff and increased the $500 civil penalty assessed by the ALJ to $1,000. The Judicial Officer also held that the sanction policy in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988), was not applicable to the proceeding because the complainant did not request a specific civil penalty in the complaint. Further, the Judicial Officer found that the assessment of a $1,000 civil penalty against the respondent was warranted in law and justified by the facts. The Judicial Officer also found that the number of plant quarantine and animal quarantine cases filed with the Hearing Clerk had declined in recent years and there was no further need for the sanction policy in *Kaplinsky*. The Judicial Officer held that sanction policy in *Kaplinsky* would not be applied to any case in which the complaint instituting the proceeding was filed after September 1, 1999.

APPENDIX 2

September 30, 1999

PENDING CASE APPEALED TO THE JUDICIAL OFFICER

1. Anthony L. Thomas, Pet.
PACA APP-98-0001 - **Ref to JO 8/6/99**
Baker, ALJ - D&O 5/12/99
R's Response to P's Appeal 8/5/99
P's Appeal 7/13/99

APPENDIX 3

JUDICIAL OFFICER'S DECISIONS APPEALED

Fiscal Year 1999

1. *In re Jerry Goetz*, 57 Agric. Dec. 1470 (1997), *appeal docketed*, No. 98-1155-JTM (D. Kan. 1998);

2. *In re Judie Hansen*, 57 Agric. Dec. 1072 (1998), *appeal docketed*, Nos. 99-2640, 99-2665 (8th Cir. June 1 and June 25, 1999);

3. *In re Harold P. Kafka*, 57 Agric. Dec. ___ (Apr. 5, 1999), *appeal docketed*, No. 99-5313 (3d Cir. May ___, 1999);

4 *In re Michael J. Mendenhall*, 57 Agric. 1607 (1998), *appeal docketed*, No. 99-70040 (9th Cir. Jan. 7, 1999); and

5. *In re Produce Distributors, Inc.* (Decision as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. ___ (Jan. 25, 1999), *appeal docketed sub nom. Irene T. Russo, d/b/a Jay Brokers v. United States Dep't of Agric.*, No. 99-4065 (2d Cir. May 12, 1999).

APPENDIX 4

COURT DISPOSITIONS

Fiscal Year 1999

A. Courts affirmed the following eight decisions issued by the Judicial Officer:

1. *In re Allred's Produce*, 56 Agric. Dec. 1884 (1997), *aff'd*, 178 F.3d 743 (5th Cir. 1999);

2. *In re Cal-Almond*, 56 Agric. Dec. 1158 (1997), *rev'd*, No. CV-98-05049-REC/SMS (E.D. Cal. _________), *aff'd*, No. 98-11921 (9th Cir. Sept. 21, 1999);

3. *In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. 805 (1995), *remanded*, No. 95-6648, 1996 WL 472414 (E.D. Pa. Aug. 15, 1996), *order denying late appeal on remand*, 57 Agric. Dec. 397 (1998), *remanded*, No. 98-0518 (E.D. Pa. Aug. 10, 1998), *aff'd*, Nos. 98-1906, 98-1982, 98-1983, 1999 WL 666985 (Aug. 27, 1999).

4. *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998), *aff'd*, No. 98-70807 (9th Cir. July 16, 1999);

5. *In re Steven J. Rodgers*, 56 Agric. Dec. 1919 (1997), *aff'd per curiam*, No. 98-1057 (D.C. Cir. Oct. 19, 1998);

6. *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, No. 98-3765, 1999 WL 646138 (6th Cir. Aug. 13, 1999);

7. *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999); and

8. *In re Samuel Zimmerman*, 56 Agric. Dec. 1419 (1997), *aff'd*, No. 98-3100 (3d Cir. Dec. 21, 1998) (unpublished).

B. Courts dismissed appeals by respondents in the following seven decisions issued by the Judicial Officer:

1. *In re C.C. Baird*, 57 Agric. Dec. 127 (1998), *appeal dismissed*, No. 98-3296 (8th Cir. Oct. 29, 1998);

2. *In re Gallo Cattle Co.*, 55 Agric. Dec. 340 (1996) (Order Denying Interim Relief), *appeal dismissed*, No. CIV S-96-1140 EJG/JFM (E.D. Cal. Nov. 13, 1996), *aff'd*, 159 F.3d 1194 (9th Cir.

1998);

3. *In re Gallo Cattle Co.*, 57 Agric. Dec. 357 (1998), *dismissed*, No. CIV S-98-1619 EJG/JFM (E.D. Cal. Oct. 1, 1998);

4. *In re Richard Lawson*, 57 Agric. Dec. 980 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999);

5. *In re Limeco, Inc.*, 57 Agric. Dec. 1548 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999);

6. *In re Queen City Farms*, 57 Agric. Dec. 813 (1998), *appeal dismissed sub nom. Litvin v. United States Dep't of Agric.*, No. 98-1991 (1st Cir. Nov. 9, 1998); and

7. *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997), *appeal dismissed*, No. 98-5456 (11th Cir. July 30, 1999).

C. Courts remanded the following four decisions issued by the Judicial Officer:

1. *In re JSG Trading Corp.*, 57 Agric. Dec. 640 (1998), *remanded*, 176 F.3d 536 (D.C. Cir. 1999);

2. *In re Midway Farms, Inc.*, 56 Agric. Dec. 102 (1997), *aff'd*, No. CV F 97-5460 (E.D. Cal. May 18, 1998), *rev'd & remanded*, No. 98-16592, 1999 WL 639128 (9th Cir. Aug. 24, 1999);

3. *In re Michael Norinsberg*, 56 Agric. Dec. 1840 (1997), *remanded*, 162 F.3d 1194 (D.C. Cir. 1998); and

4. *In re Saulsbury Enterprises*, 55 Agric. Dec. 6 (1996), *aff'd in part, rev'd in part, and remanded*, No. CV F-97-5136-REC-SMS (E.D. Cal. June 29, 1999).

D. Courts reversed the following two decisions issued by the Judicial Officer:

1. *In re IBP, Inc.*, 57 Agric. Dec. ___ (July 31, 1998), *rev'd*, No. 98-3104, 1999 WL 608625 (8th Cir. Aug. 13, 1999); and

2. *In re Tammi Longhi*, 56 Agric. Dec. 1373 (1997), *rev'd*, 165 F.3d 1057 (6th Cir. 1999).

E. The Supreme Court of the United States denied certiorari in the following decision issued by the Judicial Officer:

1. *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 119 S.Ct. 1575 (1999).