SUMMARY OF MAJOR DECISIONS BY THE JUDICIAL OFFICER

Fiscal Year 2007

In *In re Mitchell Stanley*, A.Q. Docket No. 06-0007, decided by the Judicial Officer on October 26, 2006, the Judicial Officer issued a decision in which he found Mitchell Stanley (Respondent) violated the Animal Health Protection Act (7 U.S.C. §§ 8301-8321 (Supp. IV 2004)), the Commercial Transportation of Equine for Slaughter Act (7 U.S.C. § 1901 note), and regulations issued under the Animal Health Protection Act and the Commercial Transportation of Equine for Slaughter Act (9 C.F.R. §§ 75.4(b), 88.4(a)(3)) and assessed Respondent a $12,800 civil penalty. The Judicial Officer rejected Respondent's contention that he filed a timely response to the Complaint. The Judicial Officer stated the record established that the Hearing Clerk served Respondent with the Complaint on January 23, 2006, and Respondent's answer was filed August 15, 2006, 6 months 2 days after Respondent's answer was due. The Judicial Officer held intent is not an element of a violation of a regulation issued under the Animal Health Protection Act or the Commercial Transportation of Equine for Slaughter Act in a disciplinary administrative proceeding for the assessment of a civil penalty.

In *In re Donald R. Beucke*, PACA-APP Docket No. 04-0014 and PACA-APP Docket No. 04-0020, decided by the Judicial Officer on November 8, 2006, the Judicial Officer affirmed Administrative Law Judge Peter M. Davenport's (ALJ) decision concluding Donald R. Beucke and Keith K. Keyeski (Petitioners) were responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated the PACA. The Judicial Officer found Bayside Produce, Inc., violated the PACA during the period November 23, 2002, through February 7, 2003. During the violation period, Petitioner Beucke was the vice president, the secretary, a director, and a holder of 33⅓ percent of the outstanding stock of Bayside Produce, Inc., and Petitioner Keyeski was a holder of 33⅓ percent of the outstanding stock of Bayside Produce, Inc. The Judicial Officer stated the burden was on Petitioner Beucke to demonstrate by a preponderance of the evidence that he was not responsibly connected with Bayside Produce, Inc., despite his being the vice president, the secretary, a director, and a major shareholder of Bayside Produce, Inc., and on Petitioner Keyeski to demonstrate by a preponderance of the evidence that he was not responsibly connected with Bayside Produce, Inc., despite his being a major shareholder of Bayside Produce, Inc. The PACA provides a two-prong test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not

an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners. The Judicial Officer concluded Petitioners failed to prove by a preponderance of the evidence that they met the first prong and second prong of the responsibly-connected test. The Judicial Officer also rejected Petitioners' contentions that the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service (Respondent), violated the Rules of Practice and the due process clause of the Fourteenth Amendment of the Constitution of the United States. Further, the Judicial Officer rejected Petitioners' contention that the bar on their employment by PACA licensees should have commenced on the day that Bayside Produce, Inc., was found to have violated the PACA. Finally, the Judicial Officer rejected Petitioner Beucke's contention that the ALJ erroneously failed to order Respondent to produce prior written and recorded statements of Respondent's witness.

In *In re Bruce Lion* (Ruling on Charles Pashayan, Jr.'s Motion for Settlement Conference and Motion for Reinstatement as Respondents' Attorney of Record), I&G Docket No. 03-0001, decided by the Judicial Officer on November 29, 2006, the Judicial Officer ruled that, as Charles Pashayan, Jr., was neither a party in the proceeding nor an attorney of record for any party in the proceeding, Charles Pashayan Jr.'s motion for settlement conference must be dismissed. The Judicial Officer also dismissed Charles Pashayan, Jr.'s motion for reinstatement as Respondents' attorney of record stating a party who desires assistance of counsel in an administrative adjudicatory proceeding before the Secretary of Agriculture bears the responsibility of obtaining counsel and the Judicial Officer cannot appoint counsel for a party.

In *In re Mitchell Stanley* (Order Denying Pet. for Recons.), A.Q. Docket No. 06-0007, decided by the Judicial Officer on December 5, 2006, the Judicial Officer denied Respondent's Petition for Reconsideration because it was not filed within 10 days after the date the Hearing Clerk served Respondent with the Decision and Order, as required by 7 C.F.R. § 1.146(a)(3).

In *In re Bruce Lion* (Ruling Dismissing Motion To Dismiss and For Summary Judgment), I&G Docket No. 03-0001, decided by the Judicial Officer on December 5, 2006, the Judicial Officer concluded Respondents' May 11, 2006, motion to dismiss and for summary judgment was a motion to dismiss on the pleading and, under the Rules of Practice (7 C.F.R. § 1.143(b)(1)), could not be entertained.

In *In re Bruce Lion* (Ruling Granting Complainant's Motion Not To Consider Reply to Complainant's Appeal Petition; and Order Vacating the Administrative Law Judge's Initial Decision and Remanding Proceeding to the Administrative Law Judge), I&G Docket No. 03-0001, decided by the Judicial Officer on December 5, 2006, the

Judicial Officer vacated Administrative Law Judge Peter M. Davenport's (ALJ) Initial Decision and remanded the proceeding to the ALJ for further proceedings in accordance with the Rules of Practice. The Judicial Officer concluded Respondents' December 20, 2002, and October 28, 2003, motions to dismiss the Complaint were rendered moot by Complainant's filing the Amended Complaint. The Judicial Officer stated, even if the December 20, 2002, and October 28, 2003, motions to dismiss had not been rendered moot, they were motions to dismiss on the pleading and, under the Rules of Practice (7 C.F.R. § 1.143(b)(1)), could not be entertained. The Judicial Officer further found Respondents' reply to Complainant's appeal petition was late-filed and ruled Respondents' reply could not be considered.

In *In re Mark McDowell* (Ruling Granting U.S. EPA's Motion For Leave To File An Amicus Brief), PPRCIA Docket No. 05-0001, decided by the Judicial Officer on December 5, 2006, the Judicial Officer found U.S. EPA had shown a substantial interest in the outcome of the proceeding and granted U.S. EPA leave to file an amicus brief, in accordance with 7 C.F.R. § 900.57.

In *In re Mark McDowell* (Order Denying Interim Relief), AMA PPRCIA Docket No. 05-0001, decided by the Judicial Officer on December 7, 2006, the Judicial Officer denied Petitioners' motion for injunction pending appeal. The Judicial Officer found Petitioners' motion for injunction pending appeal was an application for interim relief. The Judicial Officer held, under the applicable rules of practice (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52), a person who has filed a petition pursuant to 7 C.F.R. § 900.52 may apply to the Secretary of Agriculture for interim relief, pending final determination of the proceeding (7 C.F.R. § 900.70(a)). The Judicial Officer found Petitioners filed the petition pursuant to 7 C.F.R. § 1200.52, not 7 C.F.R. § 900.52; therefore, interim relief was not available to Petitioners

In *In re Mark McDowell* (Ruling Denying NPPC's Motion for Leave to File an Amicus Brief Responding to Petitioners' Motion for Injunction Pending Appeal), AMA PPRCIA Docket No. 05-0001, decided by the Judicial Officer on December 14, 2006, the Judicial Officer denied the National Pork Producers Council's December 7, 2006, motion for leave to file an amicus brief responding to Petitioners' December 1, 2006, motion for injunction pending appeal. The Judicial Officer stated that he had previously denied Petitioners' December 1, 2006, motion for injunction pending appeal and the National Pork Producers Council did not articulate any basis for revisiting the issue raised in Petitioners' motion for injunction pending appeal.

In *In re Mark McDowell* (Ruling Granting NPPC's Motion for Leave to File an Amicus Brief), AMA PPRCIA Docket No. 05-0001, decided by the Judicial Officer on

December 14, 2006, the Judicial Officer found the National Pork Producers Council had shown a substantial interest in the outcome of the proceeding and granted the National Pork Producers Council's December 8, 2006, motion for leave to file an amicus brief, in accordance with 7 C.F.R. § 900.57.

In *In re Judith's Fine Foods International, Inc.*, PACA Docket No. D-06-0012, decided by the Judicial Officer on January 31, 2007, the Judicial Officer affirmed Administrative Law Judge Peter M. Davenport's (ALJ) Decision Without Hearing by Reason of Admissions publishing the finding 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. The Judicial Officer stated documents filed in bankruptcy proceedings that have a direct relation to matters at issue in PACA disciplinary proceedings have long been officially noticed in PACA disciplinary proceedings and held the ALJ's taking official notice of documents Respondent filed in a bankruptcy proceeding is 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 Judicial Officer found that Respondent had admitted the material allegations of the Complaint; therefore, there were no material issues of fact on which a meaningful hearing could be held and the ALJ properly issued a decision under the default provisions of the Rules of Practice (7 C.F.R. § 1.139). The Judicial Officer held the application of the default provisions in the Rules of Practice (7 C.F.R. § 1.139) did not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the Constitution of the United States. The Judicial Officer rejected Respondent's contention that a hearing should be conducted to allow it to present evidence that Respondent was not paid by one of its customers and to present evidence concerning the motive for, and circumstances surrounding, Respondent's voluntary petition in bankruptcy.

In *In re Derwood Stewart*, HPA Docket No. 06-0001, decided by the Judicial Officer on February 6, 2007, the Judicial Officer affirmed Administrative Law Judge Jill S. Clifton's (ALJ) decision in which she concluded Respondent knowingly failed to obey an order of disqualification in violation of 15 U.S.C. § 1825(c). However, the Judicial Officer increased the amount of the civil penalty assessed by the ALJ against Respondent from $500 to $3,300. The Judicial Officer based the $3,300 civil penalty on the factors required under the Horse Protection Act (15 U.S.C. § 1825(b)(1)) to be considered when determining the amount of the civil penalty and the United States Department of Agriculture's sanction policy. The Judicial Officer rejected Respondent's contention that Complainant's Appeal Petition was late-filed because an extension of time could not be granted ex parte. The Judicial Officer stated the Rules of Practice prohibits the Judicial Officer from discussing ex parte the merits of a proceeding with Complainant's counsel (7 C.F.R. § 1.151(a)), but that ex parte discussions as to

procedural matters, such as extensions of time, fall outside the prohibition on ex parte discussions.

In *In re Frank Craig*, FMIA Docket No. 05-0002 and PPIA Docket No. 05-0003, decided by the Judicial Officer on February 21, 2007, the Judicial Officer affirmed the decision of Chief Administrative Law Judge Marc R. Hillson (Chief ALJ) indefinitely suspending inspection services under title I of the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA) from Respondents and Frank's Wholesale Meats based upon Respondent Frank Craig's intimidation of and interference with Food Safety and Inspection Service employees while they were performing duties under the FMIA and the PPIA. The Judicial Officer held, under 7 C.F.R. § 1.141(e), Respondents' failure to appear at the hearing constituted a waiver of the right to an oral hearing, an admission of the allegations of fact contained in the Complaint, and an admission of the facts presented at the hearing. The Judicial Officer rejected: (1) Respondents' request that the Judicial Officer convene a grand jury stating the Judicial Officer has no authority to convene a grand jury; (2) Respondents' request that the United States Department of Agriculture provide an attorney to represent them stating a respondent who desires assistance of counsel in an administrative proceeding bears the responsibility of obtaining counsel and there is no right under the Constitution of the United States, the Administrative Procedure Act, or the Rules of Practice to have counsel provided in an administrative proceeding; and (3) Respondents' request for $33,000,000 in monetary damages stating the proceeding was an administrative proceeding to determine whether an order should be issued indefinitely suspending inspection services under the FMIA and the PPIA and the proceeding was not the proper proceeding in which to seek money damages. The Judicial Officer concluded Respondents had adequate time to prepare an appeal petition as evidenced by their timely-filed appeal petition. The Judicial Officer also rejected Respondents' contentions that Complainant instituted the proceeding to cover up slander, sexual harassment, bribery, and witness intimidation and that the Chief ALJ ignored Respondents' witnesses and Respondents' filings. The Judicial Officer stated, in the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties; therefore, barring clear evidence to the contrary, which Respondents did not introduce, Complainant is presumed to have instituted the proceeding in order to carry out the purposes of the FMIA and the PPIA and the Chief ALJ is presumed to have considered the record prior to the issuance of his decision. The Judicial Officer further stated no witnesses appeared on behalf of Respondents; therefore, Respondents' contention that the Chief ALJ erroneously ignored Respondents' witnesses must be rejected.

In *In re Judith's Fine Foods International, Inc.* (Order Denying Petition to Reconsider), PACA Docket No. D-06-0012, decided by the Judicial Officer on March 19,

2007, the Judicial Officer denied Respondent's petition to reconsider *In re Judith's Fine Foods International, Inc.*, __ Agric. Dec. ___ (Jan. 31, 2007). The Judicial Officer rejected Respondent's contention that it was deprived of a right to a hearing, stating the application of the default provisions in the Rules of Practice (7 C.F.R. § 1.139), based on Respondent's admissions, did not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the Constitution of the United States.

In *In re Jerome Schmidt*, AWA Docket No. 05-0019, decided by the Judicial Officer on March 26, 2007, the Judicial Officer reversed Administrative Law Judge Peter M. Davenport's (ALJ) decision dismissing the Complaint. The Judicial Officer concluded the Administrator proved by a preponderance of the evidence that Dr. Schmidt committed 30 violations of the regulations and standards issued under the Animal Welfare Act (Regulations and Standards), assessed a $6,800 civil penalty against Dr. Schmidt, and ordered Dr. Schmidt to cease and desist from violations of the Regulations and Standards. The Judicial Officer concluded Dr. Schmidt was not the subject of selective enforcement; held there were no limits under the Animal Welfare Act on the frequency with which the Secretary of Agriculture could inspect an Animal Welfare Act dealer's place of business, facilities, and animals; held, prior to August 13, 2004, there was no requirement that an Animal Welfare Act dealer make a responsible adult available to accompany USDA inspectors during the inspection process; held USDA inspectors were not required by the *Animal Care Resource Guide, Dealer Inspection Guide* to conduct post-inspection exit briefings with Animal Welfare Act dealers or their designated representatives; and held, absent clear evidence to the contrary, USDA inspectors are presumed to have properly discharged their duty to accurately document violations of the Animal Welfare Act. The Judicial Officer also held the ALJ did not have authority to direct the Administrator to take corrective action with respect to future inspections conducted under the Animal Welfare Act.

In *In re Frank Craig* (Order Denying Pet. to Reconsider), FMIA Docket No. 05-0002 and PPIA Docket No. 05-0003, decided by the Judicial Officer on March 29, 2007, the Judicial Officer denied Respondents' petition to reconsider *In re Frank Craig*, __ Agric. Dec. ___ (Feb. 21, 2007). The Judicial Officer stated: the Rules of Practice provide a petition to reconsider must state specifically the matters claimed to be erroneously decided and briefly state the alleged errors (7 C.F.R. § 1.146(a)(3)); Respondents' Petition to Reconsider did not state the matters claimed to be erroneously decided or the alleged errors in *In re Frank Craig*, __ Agric. Dec. ___ (Feb. 21, 2007); and Respondents' Petition to Reconsider must be denied because it did not meet the requisites of a petition to reconsider set forth in the Rules of Practice.

In *In re Tung Wan Company, Inc.* (Order Denying Late Appeal), PACA Docket No. D-06-0019, decided by the Judicial Officer on April 25, 2007, the Judicial Officer denied Respondent's Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing stating the Judicial Officer has no jurisdiction to hear Respondent's Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing filed 41 days after Chief Administrative Law Judge Marc R. Hillson's decision had become final.

In *In re B.T. Produce Co., Inc.*, PACA Docket No. D-02-0023, PACA Docket No. APP-03-0009, and PACA Docket No. APP 03-0011, decided by the Judicial Officer on May 4, 2007, the Judicial Officer affirmed Chief Administrative Law Judge Marc R. Hillson's (the Chief ALJ) decision that B.T. Produce Co., Inc. (B.T.), willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) as a consequence of William Taubenfeld's (B.T.'s secretary and director) paying bribes to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities. The Judicial Officer also affirmed the Chief ALJ's decision that Louis R. Bonino, the vice president, a director, and holder of 30 percent of the outstanding stock of B.T., and Nat Taubenfeld, the president and a director of B.T., were responsibly connected with B.T. when B.T. violated the PACA. Based on these conclusions, the Judicial Officer revoked B.T.'s PACA license and Louis R. Bonino and Nat Taubenfeld became subject to licensing restrictions and employment restrictions under the PACA (7 U.S.C. §§ 499d(b), 499h(b)). The Judicial Officer held that B.T. was liable for William Taubenfeld's violations of the PACA under 7 U.S.C. § 499p. The Judicial Officer rejected B.T.'s contention that the Agricultural Marketing Service violated the Administrative Procedure Act because it failed to provide B.T. with notice and an opportunity to achieve compliance with the PACA prior to instituting the disciplinary action against B.T., stating, since B.T.'s violations of the PACA were willful, the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) was inapposite. The Judicial Officer also rejected B.T.'s unsupported contention that the PACA (7 U.S.C. § 499p) unconstitutionally makes B.T. liable for William Taubenfeld's bribery, stating the PACA provides that the act of any person employed by a commission merchant, dealer, or broker, within the scope of employment, shall, in every case, be deemed the act of the commission merchant, dealer, or broker. Liability under the PACA (7 U.S.C. § 499p) attaches even where the corporate PACA licensee did not condone or even know of the PACA violations of its agents, officers, or employees. The Judicial Officer further rejected B.T.'s contention that the Agricultural Marketing Service's construction of the PACA (7 U.S.C. § 499p) creates an unconstitutional irrebuttable presumption that B.T. is liable for William Taubenfeld's bribery, stating B.T. could avoid liability under the PACA for William Taubenfeld's bribery either by showing William Taubenfeld was not acting for or employed by B.T. or

by showing that William Taubenfeld's bribes were not made within the scope of his employment. The Judicial Officer stated the PACA (7 U.S.C. § 499a(b)(9)) provides a two-prong test which a petitioner must meet in order to demonstrate he was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee; or (2) the petitioner was not an owner of the violating PACA licensee, which was the alter ego of its owners. The Judicial Officer held Louis R. Bonino and Nat Taubenfeld failed to prove by a preponderance of the evidence that they were only nominal officers and directors of B.T. The Judicial Officer rejected Louis R. Bonino's and Nat Taubenfeld's contention that the imposition of employment restrictions based on finding them responsibly connected with B.T. would violate their right under the Administrative Procedure Act (5 U.S.C. § 558(c)) to notice and opportunity to demonstrate or achieve compliance. The Judicial Officer stated the Administrative Procedure Act provides, before institution of agency proceedings for revocation of a license, the licensee must be given notice of facts warranting revocation and an opportunity to demonstrate or achieve compliance with all lawful requirements and, as neither Louis R. Bonino nor Nat Taubenfeld were PACA licensees, the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) was inapposite. The Judicial Officer also rejected Louis R. Bonino's and Nat Taubenfeld's contention that the imposition of employment restrictions based on finding them responsibly connected with B.T. violated their rights under the due process clause of the Fifth Amendment to the Constitution of the United States. The Judicial Officer stated, under the rational basis test, a statute is presumed to be valid and will be sustained if the statute is rationally related to a legitimate state interest and, since the restriction on the employment of responsibly connected individuals is rationally related to the purpose of the PACA, 7 U.S.C. § 499h(b)) does not unconstitutionally encroach on Louis R. Bonino's or Nat Taubenfeld's due process rights by arbitrarily interfering with their chosen occupations. The Judicial Officer rejected Louis R. Bonino's and Nat Taubenfeld's assertion that they had been irrebuttably presumed to be responsibly connected with B.T., stating, under the PACA, an individual who is connected with a commission merchant, dealer, or broker as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation is presumed to be responsibly connected with that commission merchant, dealer, or broker. However, the PACA (7 U.S.C. § 499a(b)(9)) provides that an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation may rebut the presumption that he is responsibly connected. The Judicial Officer agreed with the Agricultural Marketing Service's and the Chief's contention that the civil penalty assessed by the Chief ALJ

against B.T. was not in accord with the United States Department of Agriculture's sanction policy or United States Department of Agriculture precedent and the Chief ALJ erroneously took collateral effects of the revocation of B.T.'s PACA license into account when determining the sanction to be imposed upon B.T.

In *In re Jerome Schmidt* (Order Denying Petition to Reconsider), AWA Docket No. 05-0019, decided by the Judicial Officer on May 9, 2007, the Judicial Officer denied Dr. Schmidt's petition to reconsider *In re Jerome Schmidt*, __ Agric. Dec. ___ (Mar. 26, 2007). The Judicial Officer held United States Department of Agriculture inspectors were not required to conduct inspections only when accompanied by the owner of the facility licensed under the Animal Welfare Act. The Judicial Officer rejected Dr. Schmidt's Fourth Amendment and Sixth Amendment arguments stating it is well settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer. The Judicial Officer also rejected Dr. Schmidt's assertion that United States Department of Agriculture inspection reports were inaccurate stating, in the absence of clear evidence to the contrary, United States Department of Agriculture inspectors are presumed to be motivated only by a desire to properly discharge their official duties and to have properly discharged their duty to document violations of the Animal Welfare Act accurately. The Judicial Officer rejected Dr. Schmidt's contention that the Judicial Officer ignored the testimony of his witnesses stating, contrary to Dr. Schmidt's assertion, the Judicial Officer read and carefully considered all of the testimony given by Dr. Schmidt's witnesses and, in the March 26, 2007, Decision and Order, addressed the testimony given by each of Dr. Schmidt's witnesses. Finally, the Judicial Officer rejected Dr. Schmidt's assertion that he was the subject of selective enforcement.

In *In re Joseph T. Cerniglia*, PACA-APP Docket No. 04-0012, decided by the Judicial Officer on June 6, 2007, the Judicial Officer affirmed Administrative Law Judge Victor W. Palmer's decision concluding Joseph T. Cerniglia [hereinafter Petitioner] was responsibly connected with Fresh Solutions, Inc., when Fresh Solutions, Inc., violated the PACA. In a default decision, Fresh Solutions, Inc., was found to have violated the PACA during the period August 16, 2002, through April 29, 2003. The Judicial Officer found that during the violation period, Mr. Cerniglia was a *de facto* officer of Fresh Solutions, Inc. In addition, the Judicial Officer found that it was reasonable for the PACA Branch to treat Mr. Cerniglia as an officer, a director, and a holder of more than 10 percent of the outstanding stock of Fresh Solutions, Inc., as the company's PACA license indicated, because neither the company nor Mr. Cerniglia provided the PACA Branch with notice of the corporate changes. The PACA provides a two-prong test which an individual must meet in order to demonstrate that he or she was not responsibly connected. Mr. Cerniglia failed to address either prong of the test. The Judicial Officer, after examining the

evidence, found Mr. Cerniglia was actively involved in the activities resulting in Fresh Solutions' violations of the PACA and he was not a nominal officer.

In *In re William Richardson*, A.Q. Docket No. 05-0012, decided by the Judicial Officer on June 13, 2007, the Judicial Officer found William Richardson (Respondent) committed 408 violations of the regulations issued under the Commercial Transportation of Equine for Slaughter Act (9 C.F.R. pt. 88) and assessed Respondent a $77,825 civil penalty. The Judicial Officer construed 9 C.F.R. § 88.6 as allowing the Secretary of Agriculture to assess up to a $5,000 civil penalty for each violation of 9 C.F.R. pt. 88. The Judicial Officer found that 9 C.F.R. pt. 88 requires the Secretary of Agriculture to base the amount of the civil penalty on the severity of the violations and the history of the violator's compliance with 9 C.F.R. pt. 88. The Judicial Officer concluded an ongoing pattern of violations over a period of time establishes a violator's history of compliance with 9 C.F.R. pt. 88, even if the violator has not been previously found to have violated 9 C.F.R. pt. 88. The Judicial Officer also stated the decision of whether and when an agency must exercise its enforcement powers is left to agency discretion, except to the extent determined by Congress. The Judicial Officer held Congress has not mandated the timing of enforcement actions under Commercial Transportation of Equine for Slaughter Act and neither the Commercial Transportation of Equine for Slaughter Act nor 9 C.F.R. pt. 88 makes relevant the timing of the filing of a complaint to the determination of the appropriate civil penalty.

In *In re Idaho Department of Health and Welfare, Statewide Self Reliance Programs*, FSP Docket No. 06-0001, decided by the Judicial Officer on June 27, 2007, the Judicial Officer granted the Administrator's Motion to Dismiss. The Judicial Officer concluded the Idaho Department of Health and Welfare (Idaho) filed its appeal petition with the Hearing Clerk 14 days after the time expired for filing the appeal petition. The Judicial Officer found Idaho had no reasonable basis for confusing the Hearing Clerk's informational letter with "a notice of the claim" which triggered the running of the 60-day time limit in 7 U.S.C. § 2025(c)(8)(D)(ii) (2000 & Supp. IV 2004) and 7 C.F.R. § 283.4(e)(1)(iii) for filing an appeal petition. The Judicial Officer rejected Idaho's contention that an administrative law judge could extend the time for filing an appeal petition under the "good cause" provision in 7 U.S.C. § 2025(c)(9)(E) (2000). The Judicial Officer stated the only basis provided in the Food Stamp Act for not meeting the 60-day deadline for filing an appeal petition is an extension of time granted by an administrative law judge for cause shown (7 U.S.C. § 2025(c)(8)(I) (2000)) and a request for an extension of time to file an appeal petition must be submitted to the administrative law judge prior to the expiration of the original time for filing the appeal petition (7 C.F.R. § 283.22(f)). The Judicial Officer further found Idaho's argument that its request for hearing constituted "a notice of the claim" without merit. The Judicial Officer

stated the regulations detailing the procedures for state agency appeal of quality control claims provide no basis for Idaho's confusing its request for hearing with a notice of the claim. The regulations (7 C.F.R. § 283.4(g)(3)) explicitly state the appeal petition shall contain a request for oral hearing, if desired by the state agency. As the request for oral hearing is required to be included in the appeal petition, the Judicial Officer found the request for hearing could not also constitute the beginning of the 60-day period for filing the appeal petition. The Judicial Officer further stated 7 C.F.R. § 283.4(e)(1)(iii) provides that a state agency must file its appeal petition not later than 60 days after receiving a notice of the claim and Idaho cannot be said to have "received" its own request for hearing.

In *In re Perry Lacy,* HPA Docket No. 06-0004, decided by the Judicial Officer on June 29, 2007, the Judicial Officer reversed the initial decision by Administrative Law Judge Peter M. Davenport and concluded Respondent entered a horse known as "Mark of Buck" in a horse show while the horse was sore, in violation of 15 U.S.C. § 1824(2)(B). The Judicial Officer found the agency proved by a preponderance of the evidence that Mark of Buck was "sore" as that term is defined in the Horse Protection Act and Mark of Buck manifested abnormal sensitivity in both of his forelimbs triggering the statutory presumption that he was a horse which was sore (15 U.S.C. § 1825(d)(5)). The Judicial Officer found Mr. Lacy did not rebut the statutory presumption and found Mr. Lacy's evidence that Mark of Buck was diagnosed with West Nile virus 11 days after the horse showed pain reactions to palpation during an inspection at a horse show did not outweigh the agency's evidence that Mark of Buck was sore. The Judicial Officer assessed Mr. Lacy a $2,200 civil penalty and disqualified Mr. Lacy for 1 year.

In *In re Idaho Research Foundation* (Remand Order), PVPA Docket No. 07-0138, decided by the Judicial Officer on July 18, 2007, the Judicial Officer remanded the proceeding to the Commissioner, Plant Variety Protection Office, in order to provide the Commissioner with an opportunity to weigh all the facts that may be relevant to the proceeding.

In *In re Tracey Harrington*, AWA Docket No. 07-0036, decided by the Judicial Officer on August 28, 2007, the Judicial Officer affirmed Administrative Law Judge Jill S. Clifton's (ALJ) decision concluding Tracey Harrington violated the regulations and standards issued under the Animal Welfare Act. The Judicial Officer found Ms. Harrington failed to file a timely answer to the Complaint and held, under the Rules of Practice (7 C.F.R. §§ 1.136(c), .139), Ms. Harrington was deemed to have admitted the allegations in the Complaint and waived the opportunity for hearing. Ms. Harrington asserted a number of events made difficult her compliance with the Animal Welfare Act. The Judicial Officer held these events are neither defenses to her violations of the Animal

Welfare Act nor mitigating circumstances to be considered when determining the sanction to be imposed for her violations. The Judicial Officer also held the Hearing Clerk served Ms. Harrington with the Complaint on December 9, 2006, in accordance with the Rules of Practice. The Judicial Officer rejected Ms. Harrington's assertion that she received an extension of time from the Office of the Hearing Clerk stating the Rules of Practice provide extensions of time may only be granted by an administrative law judge or the Judicial Officer (7 C.F.R. § 1.147(f)) and none of the employees of the Office of the Hearing Clerk are administrative law judges or judicial officers. The Judicial Officer rejected Ms. Harrington's request for a reduction of the civil penalty assessed by the ALJ based on Ms. Harrington's inability to pay the civil penalty. The Judicial Officer stated the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth the factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and a respondent's ability to pay the civil penalty is not one of those factors. The Administrator alleged Ms. Harrington failed to take adequate measures to prevent molding, contamination, and deterioration of *food containers*, in violation of 9 C.F.R. § 3.129(b) and, by reason of her failure to file a timely answer, Ms. Harrington was deemed to have admitted the allegations in the Complaint. Based upon this deemed admission, the ALJ found Ms. Harrington failed to take adequate measures to prevent molding, contamination, and deterioration of *food containers*, in violation of 9 C.F.R. § 3.129(b). However, 9 C.F.R. § 3.129(b) provides "[i]f self-feeders are used, adequate measures shall be taken to prevent molding, contamination, and deterioration or caking of *food*." (Emphasis added.) The Judicial Officer held Ms. Harrington's admission that she failed to take adequate measures to prevent molding, contamination, and deterioration of *food containers* is not a basis for concluding that she violated 9 C.F.R. § 3.129(b). Therefore, the Judicial Officer declined to conclude Ms. Harrington violated 9 C.F.R. § 3.129(b). The Judicial Officer imposed a cease and desist order against Ms. Harrington, revoked Ms. Harrington's Animal Welfare Act license, disqualified Ms. Harrington from becoming licensed under the Animal Welfare Act, and assessed Ms. Harrington a $6,200 civil penalty.

In *In re Robert Raymond Black, II*, HPA Docket No. 04-0003, decided by the Judicial Officer on August 30, 2007, the Judicial Officer concluded that, on March 21, 2002: (1) Christopher B. Warley, Herbert Derickson, and Jill Derickson, entered a horse named "Just American Magic" in the 34th Annual National Walking Horse Trainers Show, in Shelbyville, Tennessee, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(B); (2) Robbie J. Warley and Black Gold Farm, Inc., allowed the entry of Just American Magic in the 34th Annual National Walking Horse Trainers Show, in Shelbyville, Tennessee, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(D); and (3) Herbert Derickson and Jill Derickson transported Just American Magic to the 34th Annual National Walking Horse Trainers Show, in Shelbyville, Tennessee, while the

horse was sore, with reason to believe the horse, while sore, may be entered for the purpose of being shown in the horse show, in violation of 15 U.S.C. § 1824(1). The Judicial Officer assessed Christopher B. Warley, Robbie J. Warley, and Black Gold Farm, Inc., each a $2,200 civil penalty and Herbert Derickson and Jill Derickson each a $4,400 civil penalty. In addition, the Judicial Officer disqualified Christopher B. Warley, Robbie J. Warley, and Black Gold Farm, Inc., for 1 year and Herbert Derickson and Jill Derickson for 2 years from showing, exhibiting, or entering any horse and from judging, managing, or participating in any horse show, horse exhibition, horse sale, or horse auction. The Judicial Officer held a decision issued against a respondent by a horse industry organization to enforce the guidelines issued in the Horse Protection Program Operating Plan does not limit the authority of the Animal and Plant Health Inspection Service to initiate a proceeding under the Horse Protection Act against that same respondent based on the same incidents as those which formed the basis for the horse industry organization decision. The Judicial Officer rejected Respondents' affirmative defenses – laches, res judicata, collateral estoppel, and double jeopardy. The Judicial Officer concluded that, under the rules of practice applicable to the proceeding (7 C.F.R. §§ 1.130-.151), remailing by regular mail to effectuate service is only allowed if a previous certified return receipt requested mailing is returned marked by the postal service as "unclaimed" or "refused" (7 C.F.R. § 1.147(c)(1)). The Judicial Officer held that entering a horse in a horse show is a continuing process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited. The Judicial Officer found, when Mr. Black became the custodian of Just American Magic, the horse had already been disqualified from showing; therefore, Mr. Black could not have been entering Just American Magic for the purpose of showing or exhibiting the horse. The Judicial Officer held Christopher B. Warley's designation as the rider of Just American Magic on the 34th Annual National Walking Horse Trainer Show entry form was sufficient evidence to find that Mr. Warley participated in the entry of Just American Magic. The Judicial Officer also found that the owners of Just American Magic, Ms. Warley and Black Gold Farm, Inc., could not avoid a violation of 15 U.S.C. § 1824(2)(D), under *Baird v. U.S. Dep't of Agric.*, 39 F.3d 131 (6th Cir. 1994), based on instructions to the trainers of Just American Magic because the instructions were merely pretext.

In *In re Country Classic Dairies, Inc.*, 2005 AMA Docket M-4-3, decided by the Judicial Officer on September 21, 2007, the Judicial Officer granted Country Classic Dairies, Inc., motion to withdraw its appeal petition. The Judicial Officer stated, while a party's motion to withdraw its own appeal petition is generally granted, a withdrawal of an appeal petition is not a matter of right. The Judicial Officer stated, based on the record before him, he found no basis for denying Country Classic Dairies, Inc.'s motion to withdraw its appeal petition. The Judicial Officer concluded Chief Administrative Law

Judge Marc R. Hillson's Decision, issued March 30, 2007, was the final decision in the proceeding. Because the Judicial Officer's Order terminated the proceeding, the Judicial Officer dismissed as moot the Administrator's June 22, 2007, Motion to Reconsider the Order Granting Petitioner's Request to Remove E-mail.

In *In re Lanco Dairy Farms Cooperative*, 2006 AMA Docket No. M-4-1, decided by the Judicial Officer September 26, 2007, the Judicial Officer affirmed Administrative Law Judge Peter M. Davenport's dismissal of Lanco's Petition. Lanco challenged the Market Administrator's determinations that Lanco is a "reporting unit," as that term is used in the Northeast Milk Marketing Order (7 C.F.R. § 1001.13(b)(2)), and that, for pooling purposes, Lanco must satisfy the shipping standards specified for a supply plant pursuant to 7 C.F.R. § 1001.7(c). The Judicial Officer stated the burden of proof in a proceeding instituted under 7 U.S.C. § 608c(15)(A) rests with the petitioner, and Lanco failed to meet its burden. The Judicial Officer stated 7 C.F.R. § 1001.13(b)(2) requires, for pooling purposes, handlers described in 7 C.F.R. § 1000.9(c), such as Lanco, to satisfy the shipping standards specified for supply plants pursuant to 7 C.F.R. § 1001.7(c). The Judicial Officer also stated he defers to the Market Administrator because the Market Administrator's construction of the Northeast Milk Marketing Order is entitled to controlling weight, unless it is plainly erroneous or inconsistent with the regulation. Finally, the Judicial Officer found that Lanco's interpretation of 7 C.F.R. § 1001.13(b) would create an economic trade barrier against milk that originates outside the Northeast marketing area because only the reporting units of 7 C.F.R. § 1000.9(c) handlers, which are located outside of the states included in the Northeast marketing area and outside Maine and West Virginia, would be required, for pooling purposes, to satisfy the shipping standards specified for a supply plant, pursuant to 7 C.F.R. § 1001.7(c). The Judicial Officer concluded 7 U.S.C. § 608c(5)(G) precludes adoption of Lanco's interpretation of 7 C.F.R. § 1001.13(b).