

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) Docket Nos. 11-0256 and 11-0257  
)  
Jack L. Rader and )  
Barbara L. Rader, individuals, )  
and d/b/a Rader Stables, )  
)  
Respondents ) **Order Denying Petition to Reconsider**

**PROCEDURAL HISTORY**

On January 10, 2012, Jack L. Rader and Barbara L. Rader filed a petition requesting that I reconsider *In re Jack L. Rader*, \_\_\_ Agric. Dec. \_\_\_ (Nov. 17, 2011) [hereinafter Petition to Reconsider]. On January 26, 2012, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed a response to Mr. Rader and Mrs. Rader's Petition to Reconsider. On January 30, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, Mr. Rader and Mrs. Rader's Petition to Reconsider.

The purpose of a petition to reconsider is to seek correction of manifest errors of law or fact. Petitions to reconsider are not to be used as vehicles merely for registering disagreement with the Judicial Officer's decision. A petition to reconsider is only

granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in controlling law.<sup>1</sup> Based upon my review of the record, in light of the issue raised in Mr. Rader and Mrs. Rader's Petition to Reconsider, I find no error of law or fact necessitating modification of *In re Jack L. Rader*, \_\_\_ Agric. Dec. \_\_\_ (Nov. 17, 2011). Moreover, Mr. Rader and Mrs. Rader do not assert an intervening change in controlling law, and I find no highly unusual circumstances necessitating modification of *In re Jack L. Rader*, \_\_\_ Agric. Dec. \_\_\_ (Nov. 17, 2011). Therefore, I deny Mr. Rader and Mrs. Rader's Petition to Reconsider *In re Jack L. Rader*, \_\_\_ Agric. Dec. \_\_\_ (Nov. 17, 2011).

#### **DISCUSSION ON RECONSIDERATION**

In *In re Jack L. Rader*, \_\_\_ Agric. Dec. \_\_\_ (Nov. 17, 2011), I found that Mr. Rader and Mrs. Rader failed to file a timely answer to the Complaint and, in accordance with the rules of practice applicable to this proceeding,<sup>2</sup> Mr. Rader and Mrs. Rader were deemed to have admitted the allegations in the Complaint<sup>3</sup> and waived the opportunity for

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<sup>1</sup>*In re Sam Mazzola* (Order Denying Pet. for Recons. and Ruling Denying Mot. for Oral Argument), \_\_\_ Agric. Dec. \_\_\_, slip op. at 2 (Mar. 29, 2010).

<sup>2</sup>The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-1.151) [hereinafter the Rules of Practice].

<sup>3</sup>7 C.F.R. § 1.136(c).

hearing.<sup>4</sup> Mr. Rader and Mrs. Rader contend my finding that they failed to file a timely answer to the Complaint is error. Mr. Rader and Mrs. Rader request that I set aside Administrative Law Judge Janice K. Bullard's [hereinafter the ALJ] Decision and Order Entering Default Judgment and provide them an opportunity to be heard. (Pet. to Reconsider at second and third unnumbered pages.)

The Hearing Clerk served Mr. Rader and Mrs. Rader with the Complaint on June 9, 2011.<sup>5</sup> Mr. Rader and Mrs. Rader were required by the Rules of Practice to file a response to the Complaint with the Hearing Clerk within 20 days after the Hearing Clerk served them with the Complaint;<sup>6</sup> namely, no later than June 29, 2011. Instead, Mr. Rader and Mrs. Rader filed their responses to the Complaint with the Hearing Clerk on July 5, 2011, 6 days after Mr. Rader and Mrs. Rader were required to file a response.<sup>7</sup>

Moreover, I note Mr. Rader and Mrs. Rader's position in the Petition to Reconsider is contrary to their position earlier in the proceeding wherein they concede

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<sup>4</sup>7 C.F.R. § 1.139.

<sup>5</sup>Domestic Return Receipt for article number 7009 1680 0001 9851 7509 and Domestic Return Receipt for article number 7009 1680 0001 9851 7493.

<sup>6</sup>See 7 C.F.R. § 1.136(a).

<sup>7</sup>See letter from Mrs. Barbara Rader to To Whom It May Concern, dated June 19, 2011, and stamped by the Office of the Hearing Clerk as having been received by the Office of the Hearing Clerk on July 5, 2011, at 4:03 p.m. See letter from Jack L. Rader to USDA, dated June 20, 2011, and stamped by the Office of the Hearing Clerk as having been received by the Office of the Hearing Clerk on July 5, 2011, at 4:03 p.m.

their responses to the Complaint were late-filed.<sup>8</sup> Generally, a party is not allowed to argue a position in a petition to reconsider that is contrary to the position taken earlier in the proceeding.<sup>9</sup>

Therefore, I reject Mr. Rader and Mrs. Rader's contention in the Petition to Reconsider that their responses to the Complaint were timely filed with the Hearing Clerk. The Rules of Practice (7 C.F.R. § 1.136(c)) provide that the failure to file an

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<sup>8</sup>See Mr. Rader and Mrs. Rader's appeal petition filed with the Hearing Clerk on October 19, 2011, in which they advance reasons for the timing of their responses to the Complaint but concede "[t]his made for a late response."

<sup>9</sup>See generally *Maryland Casualty Co. v. W.R. Grace & Co.*, 23 F.3d 617, 624 (2d Cir. 1993) (stating, where a party to litigation repeatedly represented that it would be bound by one interpretation of its insurance contracts, the party could not on appeal attempt to change course and rely on another interpretation of the contracts), *cert. denied*, 513 U.S. 1052 (1994); *EF Operating Corp. v. American Buildings*, 993 F.2d 1046, 1050 (3d Cir.) (stating one cannot cast aside representations, oral or written, in the course of litigation simply because it is convenient to do so and a reviewing court may properly consider the representations made in the appellate brief to be binding and decline to address a new legal argument based on a later repudiation of those representations), *cert. denied*, 510 U.S. 868 (1993); *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 116 (3d Cir. 1992) (stating, when a litigant takes an unequivocal position at trial, that litigant cannot on appeal assume a contrary position simply because the position was a tactical mistake or a regretted concession), *cert. denied sub nom., Doughboy Recreational, Inc. v. Fleck*, 507 U.S. 1005 (1993); *Crenshaw v. Quarles Drilling Corp.*, 798 F.2d 1345, 1347 (10th Cir. 1986) (stating the general rule is that a party is not allowed to argue a legal position on appeal contrary to that argued at trial); *Richardson v. Turner*, 716 F.2d 1059, 1061 n.2 (4th Cir. 1983) (stating appellate courts generally should not decide a case on a legal theory directly contrary to that advanced by appellants at trial); *Burst v. Adolph Coors Co.*, 650 F.2d 930, 932 n.1 (8th Cir. 1981) (per curiam) (stating an appellate court will not consider an issue on which counsel took a contrary position before the trial court); *Alexander v. Town and Country Estates, Inc.*, 535 F.2d 1081, 1082 (8th Cir. 1976) (holding the court would not consider an issue on appeal where the litigant took a contrary position in district court).

answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file a timely answer constitutes a waiver of hearing. Accordingly, I deny Mr. Rader and Mrs. Rader's requests that I set aside the ALJ's Decision and Order Entering Default Judgment and that I remand the proceeding to the ALJ to provide Mr. Rader and Mrs. Rader an opportunity for hearing.

For the foregoing reasons and the reasons set forth in *In re Jack L. Rader*, \_\_\_ Agric. Dec. \_\_\_ (Nov. 17, 2011), Mr. Rader and Mrs. Rader's Petition to Reconsider is denied. The Rules of Practice provide that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition to reconsider (7 C.F.R. § 1.146(b)). Mr. Rader and Mrs. Rader's Petition to Reconsider was timely filed and automatically stayed *In re Jack L. Rader*, \_\_\_ Agric. Dec. \_\_\_ (Nov. 17, 2011). Therefore, since Mr. Rader and Mrs. Rader's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Jack L. Rader*, \_\_\_ Agric. Dec. \_\_\_ (Nov. 17, 2011), is reinstated.

For the foregoing reasons, the following Order is issued.

**ORDER**

Jack L. Rader and Barbara L. Rader's Petition to Reconsider, filed January 10, 2012, is denied. This Order shall become effective upon service on Jack L. Rader and Barbara L. Rader.

Done at Washington, DC

January 30, 2012

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William G. Jenson  
Judicial Officer