

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) P & S Docket No. D-10-0296
)
H.D. Edwards,)
)
Respondent) **Order Denying Petition to Reconsider**

PROCEDURAL HISTORY

On March 23, 2012, Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], filed Complainant's Petition for Reconsideration of Order Denying Late Appeal [hereinafter Petition to Reconsider] requesting that I reconsider *In re H.D. Edwards* (Order Denying Late Appeal), __ Agric. Dec. __ (Mar. 15, 2012). On April 17, 2012, H.D. Edwards filed a response to the Deputy Administrator's Petition to Reconsider, and on April 23, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, the Deputy Administrator's Petition to Reconsider.

DISCUSSION

In *In re H.D. Edwards* (Order Denying Late Appeal), __ Agric. Dec. ____ (Mar. 15, 2012), I found Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued an oral decision at the close of the December 5, 2011, hearing. This finding resulted in my concluding that, under the rules of practice applicable to this proceeding,¹ the ALJ's oral decision was issued on December 5, 2011, any appeal of the ALJ's oral decision was required to be filed no later than January 4, 2012, and the ALJ's oral decision became effective on January 9, 2012.² As the Deputy Administrator filed an appeal petition with the Hearing Clerk on January 31, 2012, I denied the Deputy Administrator's appeal petition because it was late-filed.

The Deputy Administrator contends the ALJ's December 5, 2011, oral decision was a tentative oral decision; thus, time for filing an appeal petition with the Hearing Clerk did not begin to run on December 5, 2011. Instead, the Deputy Administrator asserts the ALJ's final decision was the ALJ's written Decision and Order filed with the Hearing Clerk and served on

¹The 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-.151) [hereinafter the Rules of Practice].

²The Rules of Practice provide that the issuance date of an oral decision is the date the oral decision is announced, any appeal of an oral decision to the Judicial Officer must be filed with the Hearing Clerk within 30 days after the date the oral decision is issued, and the effective date of an oral decision is 35 days after the date the oral decision is issued. (See 7 C.F.R. §§ 1.142(c)(2), (c)(4), .145(a).)

the Deputy Administrator on January 6, 2012; thus, the Deputy Administrator's appeal petition was timely filed.³ (Pet. to Reconsider at 1-5.)

The record establishes that, at the close of the December 5, 2011, hearing, the ALJ asked the parties if they had any objection to her issuing an oral decision from the bench and both parties agreed to the issuance of an oral decision (Tr. 299). The ALJ then issued an oral decision (Tr. 299-310). As Mr. Edwards correctly points out in his response to the Deputy Administrator's Petition to Reconsider, the ALJ did not state that the oral decision was a "tentative" oral decision. While the ALJ stated the oral decision was not binding on Mr. Edwards until he received the written confirmation of the oral decision (Tr. 300), the ALJ did not state the oral decision was not binding on the Deputy Administrator (Tr. 299-310). Moreover, I find nothing in the record indicating that the ALJ vacated the December 5, 2011, oral decision. Instead, the ALJ states she "ruled from the bench (oral decision)," and the ALJ characterizes the January 6, 2012, Decision and Order as a "written confirmation" of the December 5, 2011, oral decision (ALJ's January 6, 2012, Decision and Order at 2 ¶ 6). Therefore, I reject the Deputy Administrator's contention that the ALJ's statement at the close of the December 5, 2011, hearing (Tr. 299-310) was not an oral decision.

³The Rules of Practice provide a party must file an appeal of a written decision with the Hearing Clerk within 30 days after receiving service of the administrative law judge's written decision. (See 7 C.F.R. § 1.145(a).)

However, the record is not without ambiguity. The ALJ states that each party has 30 days from the date of service of the written Decision and Order within which to appeal to the Judicial Officer, as follows:

This Decision and Order shall be final and effective without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see Appendix A).

ALJ's January 6, 2012, Decision and Order at 7 ¶ 24.

In *In re PMD Produce Brokerage Corp.* (Order Denying Pet. for Recons.), 59 Agric. Dec. 351 (2000), I held that a statement by an administrative law judge indicating that an appeal petition may be filed within 30 days after service of a written excerpt of an oral decision does not modify the time in the Rules of Practice for filing an appeal of an oral decision. In *PMD Produce Brokerage Corp. v. U.S. Dep't of Agric.*, 234 F.3d 48 (D.C. Cir. 2000), the Court concluded that neither the Rules of Practice nor any other action by the Secretary of Agriculture provided fair notice of the time within which an appeal of an oral decision must be filed with the Hearing Clerk, and the Court set aside *In re PMD Produce Brokerage Corp.* (Order Denying Pet. for Recons.), 59 Agric. Dec. 351 (2000), and *In re PMD Produce Brokerage Corp.* (Order Denying Late Appeal), 59 Agric. Dec. 344 (2000). At the time, 7 C.F.R. § 1.145(a) did not specifically state that an appeal of an administrative law judge's oral decision must be filed within 30 days after the administrative law judge issues the oral decision:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a) (2000).

In response to *PMD Produce Brokerage Corp. v. U.S. Dep't of Agric.*, 234 F.3d 48 (D.C. Cir. 2000), the Secretary of Agriculture, in an effort to eliminate the ambiguity found by the United States Court of Appeals for the District of Columbia Circuit, issued a final rule amending 7 C.F.R. § 1.145(a) to read, as follows:

§ 1.145 Appeal to Judicial Officer

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

68 Fed. Reg. 6339, 6341 (Feb. 7, 2003). The Secretary of Agriculture explained the need for the amendment to 7 C.F.R. § 1.145(a), as follows:

Appeal to the Judicial Officer

The rules of practice governing formal adjudicatory proceedings instituted by the Secretary under various statutes (7 CFR 1.130 through 1.151) (referred to as the "uniform rules" below) provide that an administrative law judge may issue an oral or written decision. Current 7 CFR 1.142(c)(2) provides that if an

administrative law judge orally announces a decision, a copy of the decision shall be furnished to the parties by the Hearing Clerk. Irrespective of the date a copy of the decision is mailed, the issuance date of the oral decision is the date the decision is orally announced. Current 7 CFR 1.145(a) provides that a party who disagrees with an administrative law judge's decision may appeal to the Judicial Officer within 30 days after receiving service of the administrative law judge's decision.

The Judicial Officer has held that an appeal from an oral decision must be filed within 30 days after the date the administrative law judge orally announces the decision. *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (order denying late appeal); *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 351 (2000) (order denying petition for reconsideration). On appeal, the United States Court of Appeals for the District of Columbia Circuit held that current 7 CFR 1.142(c)(2) and 7 CFR 1.145(a) are ambiguous because the Secretary of Agriculture did not give fair notice that the uniform rules require an appeal to be filed within 30 days after the administrative law judge orally announces a decision. *PMD Produce Brokerage Corp. v. U.S. Department of Agriculture*, 234 F.3d 48 (D.C. Cir. 2000).

The Office of the Secretary is amending 7 CFR 1.145(a) to eliminate the ambiguity found by the United States Court of Appeals for the District of Columbia Circuit. Specifically, the Office of the Secretary is amending 7 CFR 1.145(a) to provide that any appeal to the Judicial Officer from an oral decision issued by an administrative law judge must be filed within 30 days after the administrative law judge issues the oral decision.

68 Fed. Reg. 6339 (Feb. 7, 2003). Thus, I conclude the ALJ's January 6, 2012, written Decision and Order providing the parties 30 days from the date of service of the written decision to file an appeal petition with the Hearing Clerk does not modify the requirement in 7 C.F.R. § 1.145(a) that an appeal from an oral decision must be filed with the Hearing Clerk within 30 days after the administrative law judge issues the oral decision.

Finally, the Deputy Administrator expresses concern that *In re H.D. Edwards* (Order Denying Late Appeal), __ Agric. Dec. ____ (Mar. 15, 2012), will have the effect of forcing parties to appeal oral decisions without benefit of the administrative law judges' subsequent written decision (Pet. to Reconsider at 4). While I share the Deputy Administrator's concern, I am bound by the Rules of Practice which require filing of any appeal from an administrative law judge's oral decision within 30 days after the issuance of the oral decision.⁴ I note, however, that under the Rules of Practice any party may request that the time for filing an appeal of an oral decision be extended to a point in time after service of the subsequent written decision.⁵

For the foregoing reasons, the following Order is issued.

⁴Generally, the Rules of Practice are binding on administrative law judges and the Judicial Officer. See *In re William J. Reinhart*, 59 Agric. Dec. 721, 740-41 (2000), *aff'd per curiam*, 39 F. App'x 954 (6th Cir. 2002), *cert. denied*, 538 U.S. 979 (2003); *In re Jack Stepp* (Ruling Denying Respondents' Pet. for Recons. of Order Lifting Stay), 59 Agric. Dec. 265, 269 n.2 (2000); *In re Far West Meats* (Ruling on Certified Question), 55 Agric. Dec. 1033, 1036 n.4 (1996); *In re Hermiston Livestock Co.* (Ruling on Certified Question), 48 Agric. Dec. 434 (1989).

⁵*Compare In re Jennifer Caudill* (Order Extending Time for Filing Appeal Pet.), AWA Docket No. 10-0416 (extending the time for filing an appeal petition with respect to the initial Decision and Order as to Mitchell Kalmanson to 30 days after service of an initial decision as to Jennifer Caudill) (Appendix 1); *In re Kathy Jo Bauck* (Order Extending Time for Filing Appeal Pet.), AWA Docket No. 11-0088 (extending the time for filing an appeal petition to 30 days after the administrative law judge files a ruling on the complainant's motion for reconsideration) (Appendix 2).

ORDER

The Deputy Administrator's Petition to Reconsider, filed March 23, 2012, is denied.

Done at Washington, DC

November 5, 2012

William G. Jenson
Judicial Officer

APPENDIX 1

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:)	AWA Docket No. 10-0416
)	
Jennifer Caudill, a/k/a Jennifer)	
Walker, a/k/a Jennifer Herriott)	
Walker, an individual; Brent))	
Taylor and William Bedford,))	
individuals d/b/a Allen Brothers)	
Circus; and Mitchell Kalmanson,)	
)	Order Extending Time for
Respondents)	Filing Appeal Petition

On October 4, 2012, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], requested an extension of time within which to appeal the initial Decision and Order as to Mitchell Kalmanson issued on September 24, 2012, by Chief Administrative Law Judge Peter M. Davenport. The Administrator requests that I extend the time for filing an appeal petition with respect to the initial Decision and Order as to Mitchell Kalmanson to 30 days after service of an initial decision and order as to Jennifer Caudill on the Administrator's counsel. For good reason shown, the Administrator's time for filing an appeal petition with respect to the initial Decision and Order as to Mitchell Kalmanson is extended to 30 days after the

Administrator's counsel is served with an initial decision and order as to Jennifer Caudill.

Should this extended time for filing an appeal petition with respect to the initial Decision and Order as to Mitchell Kalmanson expire on a

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Saturday, Sunday, or Federal holiday, the time for filing an appeal petition pursuant to this Order Extending Time for Filing Appeal Petition shall be extended to include the following business day.¹

Done at Washington, DC

October 10, 2012

William G. Jenson
Judicial Officer

¹The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, any appeal petition filed pursuant to this Order Extending Time for Filing Appeal Petition must be received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, on the date due.

APPENDIX 2

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:) Docket No. 11-0088
)
Kathy Jo Bauck (a/k/a “Kathy Cole”)
a/k/a “K.J. Cole”), Allan R. Bauck)
(a/k/a “A.R. Back” a/k/a)
“A.R. Bauk”), Corinne A. Peters,)
Janet Jesuit, and Peggy Weise,)
individuals, d/b/a Puppy’s on)
Wheels, a/k/a “Puppies on Wheels”)
and “Pick of the Litter,” also d/b/a)
“Pine Lake Enterprises,” “KJ’s Pets,”)
“New York Kennel Club,” and “New)
York Kennel Club, Inc.,” and “Pine)
Lake Enterprises, Inc., a Minnesota)
domestic corporation,)
)
Respondents) **Order Extending Time for**
Filing Appeal Petition

On October 21, 2011, Kevin Shea, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], requested an extension of time within which to appeal an “Order Dismissing Respondent Peggy Weise” issued on September 27, 2011, by Administrative Law Judge Janice K. Bullard [hereinafter the ALJ]. The Administrator requests that I extend the time for filing an appeal petition for such period as necessary for the ALJ to rule on the Administrator’s October 20,

2011, motion for reconsideration of the “Order Dismissing Respondent Peggy Weise.” In the alternative, the Administrator requests that

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I rescind the ALJ’s “Order Dismissing Respondent Peggy Weise” pending the ALJ’s ruling on the Administrator’s October 20, 2011, motion for reconsideration. (APHIS’s Mot. for Extension of Time for Filing an Appeal at 2 n.2.) Ms. Weise neither consents to nor opposes the Administrator’s motion to extend the time for filing an appeal petition (APHIS’s Mot. for Extension of Time for Filing an Appeal at 1).

The Administrator’s request that I rescind the ALJ’s September 27, 2011, “Order Dismissing Respondent Peggy Weise” is denied. For good reason shown, the Administrator’s time for filing an appeal petition is extended to 30 days after the ALJ files a ruling on the Administrator’s October 20, 2011, motion for reconsideration. Should this extended time for filing an appeal petition expire on a Saturday, Sunday, or Federal holiday, the time for filing an appeal petition pursuant to this Order Extending Time for Filing Appeal Petition shall be extended to include the following business day.¹

Done at Washington, DC

¹The Hearing Clerk’s office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, any appeal petition filed pursuant to this Order Extending Time for Filing Appeal Petition must be received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, on the date due.

October 24, 2011

William G. Jenson
Judicial Officer