

## SUMMARY OF MAJOR DECISION BY THE JUDICIAL OFFICER

### Fiscal Year 2011

In *In re American Dried Fruit Co.* (Order Denying Petition for Reconsideration), AMA Docket No. FV-10-0170, decided by the Judicial Officer on October 7, 2010, the Judicial Officer rejected American Dried Fruit Co.'s argument that the term "applicant," as defined in 7 C.F.R. § 52.2, supported its contention that interested persons may apply for, and obtain, inspection and certification of raisins under 7 C.F.R. §§ 989.58(d)(1) and 989.59(d). The Judicial Officer concluded that the term "applicant," as defined in 7 C.F.R. § 52.2, had no applicability to 7 C.F.R. §§ 989.58(d)(1) and 989.59(d).

In *In re Promiseland Livestock, LLC*, OFPA Docket No. 08-0134, decided by the Judicial Officer on October 19, 2010, the Judicial Officer concluded that the respondents violated the Organic Foods Production Act and the Regulations (7 U.S.C. § 6506(b)(1)(B); 7 C.F.R. §§ 205.103(c), .400(d)) by failing to make records available for inspection and copying by authorized representatives of the Secretary of Agriculture. The Judicial Officer rejected respondents' contentions that their violations were not willful and that their violations did not raise questions regarding the organic integrity of their operation. Respondents, citing *In re Craig Lesser*, 52 Agric. Dec. 155 (1993), contended that the Chief Administrative Law Judge erroneously failed to consider the gravity of their offenses and their good faith. The Judicial Officer found *In re Craig Lesser* inapposite as it relates to the factors to be considered in determining the civil penalty to be assessed for violations of the Animal Welfare Act. The Judicial Officer also rejected respondents' contention that a 5-year period of disqualification would require Promiseland to close, stating disqualification does not require closure; it requires only that respondents cease selling, labeling, or representing Promiseland produce as 100 percent organic, organic, or made with organic ingredients or food groups.

In *In re William Richardson* (Order Denying Petition to Reconsider), AWA Docket No. 05-0012, decided by the Judicial Officer on October 28, 2010, the Judicial Officer rejected Mr. Richardson's contention that the Administrator failed to prove violations of the regulations issued under the Commercial Transportation of Equine for Slaughter Act (9 C.F.R. pt. 88). The Judicial Office also rejected Mr. Richardson's reasons for his failure to apply USDA backtags to horses in accordance with 9 C.F.R. § 88.4(a)(2), stating the regulation provides no exception for equines loaded during storms or for situations in which plans for shipment are altered. The Judicial Officer further rejected Mr. Richardson allegations of inspector bias and selective enforcement. The Judicial Officer held that a violator's ability to pay a civil penalty and the effect of a civil penalty on the violator's ability to continue doing business are not factors that must be considered when determining the amount of a civil penalty to be assessed for violations of the Commercial Transportation of Equine for Slaughter Act and the Regulations.

In *In re Vanishing Species Wildlife, Inc.*, AWA Docket No. 10-0194, decided by the Judicial Officer on November 3, 2010, the Judicial Officer disqualified the respondents from becoming licensed under the Animal Welfare Act for a period of 2 years. The Judicial Officer found the respondents unfit to be licensed under the Animal Welfare Act because they violated *In*

*re Jeffrey Harrod* (Consent Decision), 68 Agric. Dec. 435 (2009), in which they had agreed to dispose of the big cats housed at their facility, but failed to do so. The Judicial Officer found no genuine issues of material fact to be heard, as the respondents admitted they violated the terms of *In re Jeffrey Harrod*. The Judicial Officer rejected the respondents' contention that *In re Jeffrey Harrod* should not be enforced because extraordinary circumstances prevented them from complying with *In re Jeffrey Harrod*. The Judicial Officer held that consent decisions are enforced absent extraordinary circumstances, but the term "extraordinary circumstances" refers to genuine assent. The respondents admit they agreed to entry of *In re Jeffrey Harrod*; therefore, the Judicial Officer concluded there was no genuine issue of fact regarding the existence or absence of extraordinary circumstances warranting setting aside *In re Jeffrey Harrod*.

In *In re Todd Syverson* (Decision on Remand), P&S Docket No. D-05-0005, decided by the Judicial Officer on November 16, 2010, the Judicial Officer suspended Mr. Syverson as a registrant under the Packers and Stockyards Act for a period of 16 months. The Judicial Officer concluded Mr. Syverson's violation of 7 U.S.C. § 213(a) related directly to the primary purpose of the Packers and Stockyards Act to assure fair trade practices in livestock marketing and Mr. Syverson thwarted the Secretary of Agriculture's ability to enforce the Packers and Stockyards Act when he failed to produce records, in violation of 7 U.S.C. § 221. The Judicial Officer considered, as mitigating, that Mr. Syverson's violations only harmed one individual and only involved a small number of cattle. The Judicial Officer also considered the fact that a lengthy suspension would bankrupt Mr. Syverson or put him out of business. The Judicial Officer did not give any weight to the sanctions imposed in three previously issued consent decisions, stating he has long held that sanctions in consent decisions, which involve parties other than the party before him, are given no weight in determining the sanction in a litigated case.

In *In re Karl Mitchell*, AWA Docket No. 09-0084, decided by the Judicial Officer on December 21, 2010, the Judicial Officer concluded that the respondents: (1) exhibited tigers without holding an Animal Welfare Act license, in violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a)(1) and 2.10(c); (2) failed to handle tigers so there was minimal risk of harm to the animals and to the public, in violation of 9 C.F.R. § 2.131(c)(1); and (3) did not allow Animal and Plant Health Inspection Service officials access to facilities, records, and animals, in violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a). In addition, the Judicial Officer concluded Mr. Mitchell failed to obey cease and desist orders entered by the Secretary of Agriculture in *In re Karl Mitchell*, 57 Agric. Dec. 972 (1998), and *In re Karl Mitchell* (Order Granting Complainant's Pet. for Recons.), 60 Agric. Dec. 647 (2001). The Judicial Officer rejected the respondents' contention that Mr. Mitchell's status as a retired disabled veteran on a disability pension is relevant to the determination of the amount of the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations. The Judicial Officer rejected the respondents' contention that a comparison of the amount of the fine assessed by the Occupational Safety and Health Administration for violations of the Occupational Safety and Health Act of 1970 with the amount of the civil penalties assessed by the Administrative Law Judge in the proceeding demonstrates that the civil penalties assessed by the ALJ are "disproportionate,

punitive and therefore excessive.” The Judicial Officer rejected the respondents’ contention that because they do not have an Animal Welfare Act license, the United States Department of Agriculture had no right to inspect their facilities without a warrant or without the assistance of police. The Judicial Officer concluded that the Animal Welfare Act leaves no room for discretion regarding the amount of a civil penalty to be assessed for a knowing failure to obey a cease and desist order; therefore, the civil penalty the ALJ was required to assess for Mr. Mitchell’s 12 failures to obey previously issued cease and desist orders was \$19,800. The Judicial Officer noted that the instant proceeding is the third administrative proceeding brought under the Animal Welfare Act against Mr. Mitchell and suggested that the Administrator consider referring any future case against Mr. Mitchell for criminal prosecution in accordance with 7 U.S.C. § 2149(d). The Judicial Officer ordered the respondents to cease and desist from further violations of the Animal Welfare Act and the Regulations, assessed the respondents a \$67,000 civil penalty, and assessed Mr. Mitchell a \$19,800 civil penalty for his violations of previously issued cease and desist orders.

In *In re Todd Syverson* (Order Denying Petition to Reconsider on Remand), P&S Docket No. D-05-0005, decided by the Judicial Officer on December 22, 2010, the Judicial Officer denied Mr. Syverson’s petition to reconsider. The Judicial Officer rejected Mr. Syverson’s contention that the Judicial Officer only paid “lip service” to the Eighth Circuit’s direction concerning the importance of the effect of the sanction on the registrant, stating he gave considerable weight to the Court’s guidance and decreased the suspension of Mr. Syverson as a registrant under the Packers and Stockyards Act from 5 years to 16 months. The Judicial Officer rejected Mr. Syverson’s contention that the Judicial Officer erroneously concluded the period of time in which a suspension of a registrant under the Packers and Stockyards Act is likely to bankrupt that registrant and deprive that registrant of a livelihood is not dispositive in determining the period of suspension.

In *In re Karl Mitchell* (Order Denying Petition to Reconsider), AWA Docket No. 09-0084, decided by the Judicial Officer on March 8, 2011, the Judicial Officer denied the respondent’s petition to reconsider because it was not filed within 10 days after the respondent was served with the Judicial Officer’s decision, as required by 7 C.F.R. § 1.146(a)(3).

In *In re Empire Kosher Poultry, Inc.*, P&S Docket No. D-10-0109, decided by the Judicial Officer on July 20, 2011, the Judicial Officer: (1) concluded that Empire Kosher Poultry failed to pay for turkey purchases within the time period required for payment in a cash sale, in violation of 7 U.S.C. § 228b-1; (2) ordered Empire Kosher Poultry to cease and desist its violation of the Packers and Stockyards Act; and (3) assessed Empire Kosher Poultry an \$18,000 civil penalty. The Judicial Office rejected Empire Kosher Poultry’s contention that its purchases were not cash transactions but rather credit transactions. The Judicial Officer stated, under the Packers and Stockyards Act, all poultry sale transactions are deemed to be “cash sales” unless the seller expressly extends credit to the buyer and the record contained no evidence of the seller’s express extension of credit.

In *In re KDLO Enterprises, Inc.*, PACA Docket No. D-09-0038, decided by the Judicial Officer on August 3, 2011, the Judicial Officer concluded that KDLO failed to make full payment promptly to produce sellers of the agreed purchase prices for perishable agricultural commodities, in violation of 7 U.S.C. § 499b(4). The Judicial Officer ordered the publication of KDLO's violations. The Judicial Officer held that the Administrative Law Judge did not deny KDLO due process when the ALJ took official notice of documents filed by KDLO's principals in a bankruptcy proceeding which documents admitted the material allegations of the Complaint in the administrative proceeding. The Judicial Officer rejected KDLO's contention that the proceeding violated the Double Jeopardy Clause of the United States Constitution stating the Double Jeopardy Clause protects against successive punishments for the same criminal offenses and the proceeding against KDLO under the Perishable Agricultural Commodities Act was not a criminal proceeding.

In *In re Corey Lea*, Docket No. 11-0180, decided by the Judicial Officer on August 16, 2011, the Judicial Officer dismissed the Petitioners' appeal of the Administrative Law Judge's decision because the Petitioners' request for judicial review of the ALJ's decision was pending before the United States District Court for the Western District of Kentucky. The Judicial Officer stated, under those circumstances, he had no jurisdiction to review the ALJ's decision.

In *In re Corey Lea* (Order Denying Petitioners' Motion to Reconsider and Clarify), Docket No. 11-0180, decided by the Judicial Officer on August 30, 2011, the Judicial Officer dismissed the Petitioners' appeal of the Administrative Law Judge's decision because the Petitioners' request for judicial review of the ALJ's decision was pending before the United States District Court for the Western District of Kentucky. The Judicial Officer rejected the Petitioners' contention that the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620 *et seq.*) (7 C.F.R. §§ 1.410-.429) were applicable to the proceeding. The Judicial Officer also rejected the Petitioners' contention that 28 U.S.C. § 2342 provided the Judicial Officer with jurisdiction to entertain their Appeal Petition, stating 28 U.S.C. § 2342 explicitly contains a grant of jurisdiction to the court of appeals (other than the United States Court of Appeals for the Federal Circuit); it does not contain a grant of jurisdiction to the Judicial Officer.

In *In re Lion's Gate Center, LLC*, AWA Docket No. 09-0069, decided by the Judicial Officer on September 8, 2011, the Judicial Officer concluded that Lion's Gate was unfit for issuance of an Animal Welfare Act license and that denial of Lion's Gate's Animal Welfare Act license application on the basis of 9 C.F.R. §§ 2.10(b) and 2.11(a) was in accordance with the Animal Welfare Act. The Judicial Officer found that approval of Lion's Gate's Animal Welfare Act license application would result in circumvention of the Secretary of Agriculture's revocation of Prairie Wind Animal Refuge's Animal Welfare Act license. The Judicial Officer rejected Lion's Gate's contention that the Secretary of Agriculture had no authority to revoke an Animal Welfare Act license that had previously been surrendered and terminated.