SUMMARY OF MAJOR DECISIONS BY THE JUDICIAL OFFICER

Fiscal Years 1971-1995

Fiscal Year 1971

In *In re David G. Henner*, CEA Docket No. 161, decided by the Judicial Officer on September 15, 1971 (182 pages), the Judicial Officer reversed the Hearing Examiner's recommended decision and upheld the Government's contention that a person who intentionally bids up the price of a futures contract at the close of trading in order to have the closing quotation higher than it normally would have been is guilty of manipulating the market. The Judicial Officer suspended respondent's trading privileges and registration as a floor broker for 30 days.

Fiscal Year 1972

In *In re American Fruit Purveyors, Inc.*, PACA Docket No. 2-1574, decided by the Judicial Officer on October 29, 1971 (82 pages), the Judicial Officer reversed the Hearing Examiner's recommended decision. The Hearing Examiner suspended the respondent's license for 60 days because of failure to pay promptly for fruits and vegetables. The Judicial Officer held, however, that the regulations did not require express or written agreements for an extension of time for payment; and that the respondent had implied oral agreements for indefinite extensions of time; so payment was required to be made within a reasonable time. Some of such transactions were not paid within a reasonable time. The Judicial Officer reversed the Department's prior policy and held that, under the Administrative Procedure Act, a person must be given a second chance after a written notice unless his violations were wilful. Although respondent's violations were technically wilful, he thought he was complying with the law; he repeatedly advised the complainant of his payment practices; and, according to the record, the complainant never advised respondent that its practices were illegal. Accordingly, the Judicial Officer suspended the respondent's license for only two weeks, but held that an abeyance for a period of four years conditioned upon the respondent's paying promptly during such period. The Judicial Officer stated in a footnote that it would be helpful in determining the sanction in future cases, if the record contained testimony as to how serious or detrimental the particular violation involved in the case is to the regulated industry, and testimony as to the nature of the respondent's business.

In *In re Louis Romoff*, CEA Docket No. 166, decided by the Judicial Officer on February 11, 1972 (65 pages), the Judicial Officer reversed the Hearing Examiner's recommendation that the respondent be suspended for only 45 days and that the suspension order should not apply to a partnership in which the respondent was a partner. The Judicial Officer suspended the respondent's trading privileges for three years and held that the suspension also applied to the respondent's partnership activities; but he exempted bona fide hedging transactions by the partnership. The respondent failed to file required trading reports on 22 occasions after 11 written notices and two oral notices from the CEA. The Hearing Examiner held that the statute did not permit a denial of trading privileges as to respondent's partnership; but the Judicial Officer held that the Act requires such a result. (Order was reduced to one year when Romoff dropped appeal.)

In *In re Sy B. Gaiber & Co.*, CEA Docket No. 165, decided by the Judicial Officer on April 12, 1972 (51 pages), the Hearing Examiner recommended that the respondents' trading privileges be suspended for only 60 days and "only for the account of others." The respondents had failed to meet minimum financial requirements as a futures commission merchant and filed false reports with CEA as to their financial condition. The Judicial Officer increased the suspension to two years applicable both for their own accounts and for the accounts of others. The Judicial Officer stated in a footnote that in future cases evidence in support of the sanction recommended by the complainant would aid the Hearing Examiners and the Judicial Officer in determining the sanction to be imposed. In a ruling on petition for reconsideration filed July 20, 1972, the Judicial Officer explained why little weight was given to the Hearing Examiner's recommended sanction in the case and explained in detail the type of evidence that should be introduced in future cases relating to the sanction.

Fiscal Year 1973

In *In re Heber Valley Milk Company*, AMA Docket No. M 136-3, decided by the Judicial Officer on November 21, 1972 (45 pages), the Judicial Officer reversed the Hearing Examiner's recommended decision and held that the Market Administrator properly disallowed the unreasonable portion of a hauling charge imposed against the producers by the handler inasmuch as it undercut the uniform minimum price required to be paid under the Order. Although the handler paid the entire hauling charge to a third person, the Judicial Officer found, contrary to the Hearing Examiner's finding, that there was a kickback by the third person to the handler. Appeal pending. Affd. D.

In *In re Fitchett Bros., Inc.*, AMA Docket No. M 2-37, decided by the Judicial Officer on December 27, 1972 (44 pages), the Judicial Officer upheld the Market Administrator's determination and dismissed the complaint. The case was referred to the Judicial Officer without a Hearing Examiner's report since the Hearing Examiner left the Agency. The Judicial Officer upheld putting part of the petitioner's shrinkage in Class I-A; upheld the determination that where lactose is added to a product, the "swell" portion of the volume of lactose added is classified as Class I-A; upheld the application of the Connecticut Order differential; and upheld the classification of fluid use cream and half-and-half in Class I-A. Appeal pending.

In In re Bush Dairy, Inc., et al., AMA Docket No. M MM-1, decided by the Judicial Officer on December 13, 1972 (70 pages), the Judicial Officer upheld the action of the Secretary in suspending without a hearing the seasonal price decline provisions affecting about 454 milk marketing orders. The Secretary had determined that due to emergency conditions of declining supplies, suspension of the seasonal price decline provisions without a hearing was necessary. During the prior 30 years, the Secretary had suspended without hearing provisions of milk orders affecting prices on about 475 occasions. Such action was supported by a 1945 Solicitor's opinion. Nonetheless, the Hearing Examiner held that the Department's practice was not authorized by the statute. The Judicial Officer reversed the Hearing Examiner, holding that although the issue is a close question, statutory authority does exist in emergency situations for suspending pricing provisions of milk orders without a hearing. The case is now on appeal to the District Court. (Reversed)

In *In re Arthur N. Economou and Arthur N. Economou & Co., Inc.*, CEA Docket No. 167, decided on January 15, 1973 (200 pages), the Judicial Officer suspended the respondents' trading privileges on contract markets for 90 days because they engaged in business as a futures commission merchant without meeting the financial requirements of the Act. The opinion contains a lengthy analysis of the financial requirements of the regulations, explaining what assets qualify as "current assets" and explaining "current liabilities." Mr. Economou has a $32 million damage suit pending against nine of the Department's officials based on this case, and an appeal is pending from the Judicial Officer's decision to the Court of Appeals. (Reversed)

In *In re George Steinberg & Son, Inc.*, PACA Docket Nos. 2-1757 and 2-2107, decided on January 18, 1973 (52 pages), the Judicial Officer upheld the Department's position that the respondent had violated the Perishable Agricultural Commodities Act by failing to pay 19 sellers $57,000 in 283 transactions. He reversed the Hearing Examiner, who had held that the violations were not wilful. The Judicial Officer explained at length that the respondent's inability to pay because of bankruptcy was irrelevant in the disciplinary proceeding and that the violation was "wilful" within the meaning of the Administrative Procedure Act's suspension provisions notwithstanding the respondent's bankruptcy. The case is on appeal to the Court of Appeals. (Affirmed)

In *In re Abbotts Dairies*, AMA Docket No. M 4-13, Tom Flavin issued a six-page decision in 1971 holding that the Secretary acted within his discretion in determining that the

evidence adduced at a public hearing was not persuasive enough to warrant the prescribing of bracketed pricing under the Delaware Valley Marketing Order. The complainant had wanted the Secretary to establish a Class I pricing system under which the Class I price moved in 20¢ increments rather than penny-for-penny increases based on the Minnesota-Wisconsin manufacturing price for milk. On appeal to the District Court, the Court reversed Tom Flavin's decision, but remanded the case to the Judicial Officer for further consideration. Tom Flavin retired, and the present Judicial Officer issued a 128-page decision on February 21, 1973, upholding the action of the Secretary. The Judicial Officer explained at great length the error of the Court's reasoning in its prior opinion. The Judicial Officer analyzed eight prior actions of the Secretary which had a direct bearing on the action in controversy and which had been completely overlooked previously in the case by the Court. The Judicial Officer explained that the Secretary's action was adequately supported by the evidence and the findings, but that in any event, the Secretary's decision *not to include* a provision in a milk order is nonreviewable and does not have to be based on evidence. The case is again on appeal to the District Court.

In *In re George Rex Andrews*, CEA Docket No. 195, the Judicial Officer issued a decision on March 8, 1973 (51 pages), suspending the respondent from trading on contract markets for five years because the respondent, who was a salesman for a brokerage firm, transferred money from a customer's account without authorization to another account and made unauthorized trades with the money. The Judicial Officer announced a new policy of severe sanctions for serious violations under the Commodity Exchange Act. The new policy was supported by 37 quotations from leading criminologists and sociologists in the United States and from other countries.

In *In re Professional Commodity Service, Inc., et al.*, CEA Docket No. 193, the Judicial Officer issued an order on March 30, 1973, remanding the proceeding to the Administrative Law Judge with instructions to reopen the hearing to receive additional evidence relating to the appropriate sanction. The administrative officials had recommended that the respondents' trading privileges be suspended for one year. The Administrative Law Judge recommended that no suspension order be issued, but he refused to permit the administrative officials to introduce evidence which would have justified a suspension order, *e.g.*, evidence as to the seriousness of the violation. The Administrative Law Judge has not yet set the date for the hearing on remand.

In *In re Andrew W. Leonberg*, AMA Docket No. M 36-3, the Judicial Officer issued a decision on April 11, 1973 (82 pages), upholding the Department's position that the petitioner was a pool handler rather than a producer handler under the Eastern Ohio-Western Pennsylvania Marketing Order. A significant issue related to what evidence should be considered as relevant. Tom Flavin had repeatedly held that an administrative proceeding filed by a handler challenging the Market Administrator's determination was not a *de novo* proceeding, and only evidence first initially presented to the Market Administrator should be considered by the Judicial Officer in determining whether the Market Administrator's action was in accordance with law. However, Tom Flavin always went on to consider evidence not previously adduced before the Market Administrator, and he explained that such newly presented evidence would not change the result of the case even if it were considered. The present Judicial Officer announced a new policy in this case that evidence not presented initially to the Market Administrator should not be admitted, would be completely disregarded). This will improve the administration of the Act by requiring handlers to present all of their evidence initially to the Market Administrator, thereby enabling him to make a more reasoned decision based on all of the relevant evidence. The case is now on appeal to the District Court.

In *In re Weisglass Gold Seal Dairy Corporation, et al.*, AMA Docket No. M 2-34, the Judicial Officer issued a decision on May 15, 1973 (73 pages), upholding the Department's position that the market Administrator properly applied the New York Milk Order provisions applicable to the petitioners' milk held in inventory on June 30, 1968. The Order was subject to a

number of fundamental amendments effective July 1, 1968, so that milk-in inventory in June but utilized in July--was in a transition period for one month. Under petitioners' contention, this transition period was extraordinary and unique, giving them a one-month "windfall." That is, they contended that the old and new Order provisions together gave them the absolute discretion to finally classify (and therefore be charged for) their June closing inventory of milk as Class II under the "old" Order, while disposing of it in a use in July that was Class I (under the "old" Order's provisions), with no additional charge. The Judicial Officer rejected such contention and held that the Market Administrator properly determined that milk in inventory on June 30, 1968, must be finally classified in accordance with the June Order provisions notwithstanding the fact that the milk was used in July, when new amendments were in effect. The case is now on appeal to the District Court. (Aff'd)

Fiscal Year 1974

In *In re American Commodity Brokers, Inc.*, CEA Docket No. 185, decided by the Judicial Officer on November 19, 1973 (90 pages), the Judicial Officer reversed the decision of the Administrative Law Judge, and found that the respondent Whelan, Vice-President of the respondent corporation, was liable as a principal for the firm's violations under the aiding and abetting provisions of § 13(a) of the Act. The Judicial Officer suspended the respondent Whelan's trading privileges for three years.

In *In re James J. Miller*, P&S Docket No. 4700, decided by the Judicial Officer on January 14, 1974 (57 pages), the Judicial Officer adopted the initial decision of the Administrative Law Judge, finding that the respondent failed to maintain his custodial account properly and failed to remit to consignors the increase in the selling prices of certain livestock purchased by consignors and resold on the same day. The Judicial Officer spelled out in detail the sanction policy to be followed under the Act, *i.e.*, sanctions sufficiently severe to deter future violations; held that since press releases are no part of the sanction, complaints as to the Department's press release policy should be addressed to the administrative officials; and held that a violation is wilful if a person carelessly or negligently fails to comply with the Act. A 21-day suspension order was issued. Appeal pending.

In *In re Central Coast Meats*, P&S Docket No. 4618, decided January 23, 1974 (90 pages), the Judicial Officer held that it is an unfair practice in violation of §§ 202(a) and 312(a) of the Act for a packer to engage in business as a livestock dealer, or vice versa. The Administrative Law Judge did not consider the evidence because he found that a violation existed since the regulations were violated; but the Judicial Officer held that inasmuch as it is uncertain whether the regulations have the force and effect of law, the case should be decided on the basis of the evidence. The Judicial Officer held that the corporate veil must be pierced inasmuch as the corporate fiction was merely an *alter ego* or business conduit of the individual respondents. A cease and desist order was issued.

In *In re Greenville Stockyards*, P&S Docket No. 4686, decided February 15, 1974 (83 pages), the Judicial Officer adopted most of the initial decision of the Administrative Law Judge, finding that the respondents wilfully, falsely weighed livestock. The Judicial Officer reversed the Administrative Law Judge's exclusion of evidence relating to the sanction to be imposed in the case. Instead of remanding the proceeding, the Judicial Officer took official notice of the false weighing problem in the country, including the number of livestock markets at which false weighing was found in investigations conducted on a routine, spot check basis during the last five years. A 30-day suspension was imposed.

In *In re Yasgur Farms, Inc.*, AMA Docket No. M 2-43, the Judicial Officer issued a decision on March 6, 1974 (50 pages), upholding the Department's position that the petitioner was a handler with own farm milk rather than a producer-handler under the New York-New Jersey marketing order. The Judicial Officer held that the Administrative Law Judge erred in excluding a copy of a letter from the petitioner's secretary advising the Market Administrator that the petitioner was not a producer-handler after January 1, 1970. The Judicial Officer took official notice of the letter and decided the case on the basis of the letter. The Judicial Officer added, however, that even in the absence of such notice from the petitioner in the letter, the petitioner was not a producer-handler since, piercing the corporate veil, the corporations which distributed the petitioner's milk and which were principally owned by the same person who was the principal owner of the petitioner, received large quantities of milk from other sources.

In *In re Trenton Livestock, Inc.*, P&S Docket No. 4678, decided by the Judicial Officer on April 12, 1974 (77 pages), the Judicial Officer affirmed the Administrative Law Judge's decision and order suspending respondent's registration for 30 days for false weighing violations. The

Judicial Officer incorporated provisions for the *Speight* decision as to the meaning of wilfulness, as to the seriousness of false weighing in the livestock industry, and as to the severe sanction policy followed in disciplinary proceedings.

In *In re Associated Milk Producers, Inc.*, AMA Docket No. M 131-8, the Judicial Officer issued a decision on August 14, 1974 (35 pages), reversing the Administrative Law Judge's decision. The Judicial Officer held that the petitioner lost its producer-handler status during a month in which it stored milk at its plant as a gratuitous bailee for another dairy, inasmuch as such milk was "received" at its plant.

In *In re Borden, Inc.*, AMA Docket No. 63-2, the Judicial Officer issued a decision on August 15, 1974 (99 pages), sustaining the decision by the Administrative Law Judge and expanding on the principle that provisions of a milk order affecting class prices may be suspended or terminated without opportunity for an oral hearing. The decision held that a location differential, increasing the price at a location, could be justified where the purpose is to assure an adequate supply of milk at such location.

In *In re Patrick C. Donovan*, CEA Docket No. 204, the Judicial Officer issued a decision on September 13, 1974 (45 pages), sustaining the order by the Administrative Law Judge, which suspended respondent's trading privileges for 20 years because he embezzled customers' money. In an appendix, the Department's sanction (rest of para. missing from copy).

Fiscal Year 1975

In *In re Harry C. Hardy*, P&S Docket No. 4615, the Judicial Officer issued a decision on October 18, 1974 (39 pages), reversing the Administrative Law Judge's decision. The Administrative Law Judge found that the respondents engaged in various trade practice violations, and he issued an order suspending their registration for seven days. But he held that even though they violated the custodial account regulations, in view of their available line of bank credit, their failure to comply with the custodial account regulations was not a violation of the Act. The Judicial Officer held, however, that it is a violation of the Act to use the "float" in the custodial accounts to extend credit to buyers notwithstanding the existence of an available line of bank credit. The Judicial Officer suspended the respondents' registration for 14 days, as requested by the complainant. The Judicial Officer also held that the Administrative Law Judge erred in not taking official notice of the P&S files showing that, after the hearing in this case, the respondents formed a corporation. The Judicial Officer suspended the registration of the new corporation, as well as the respondents' prior partnership registration. (Regulations are advisory.)

In *In re Braxton McLinden Worsley*, P&S Docket No. 4716, the Judicial Officer issued a decision on November 12, 1974 (67 pages), reversing the Administrative Law Judge's decision. The Administrative Law Judge had suspended the respondent for only 30 days for falsely weighing livestock, and the complainant appealed the sanction. The Judicial Officer determined that in view of the seriousness of false weighing in the livestock industry, and the seriousness of the respondent's violations, the complainant's 60-day suspension recommendation should be followed.

In *In re Henry Christ*, LAWA Docket No. 24, the Judicial Officer issued an Order on November 12, 1974 (5 pages), setting aside an Order by Judge Campbell which denied a motion to set hearing, and remanding the case for further proceedings. Judge Campbell had attempted to overrule a prior Order of the Judicial Officer remanding the case for further proceedings. The Judicial Officer explained the subordinate role of the Administrative Law Judges to the Judicial Officer and again remanded the proceeding to Judge Campbell with directions to decide the case on the merits after affording the parties an opportunity for oral hearing.

In *In re Michaels Dairies, Inc.*, AMA Docket No. M-4-16, the Judicial Officer issued a decision on December 20, 1974 (134 pages), sustaining the Administrative Law Judge's decision. The decision holds that the 10-day diversion limit in Order 4 is not arbitrary or discriminatory (in favor of cooperatives) or in conflict with § 8c(5)(A) of the Act. It is authorized by § 8c(7)(D) of the Act. The Judicial Officer held that the Secretary's decision not to adopt a proposed amendment (to increase the 10-day diversion limit to 15 days) need not be supported by any evidence, but, in any event, substantial evidence supports the Secretary's decision not to increase the 10-day diversion limit. The decision also holds that the Department's refusal to suspend the diversion limit for January and February 1972 was not arbitrary or capricious. Affirmed (D.C.D.C.).

In *In re Marvin Tragash Co., Inc.*, PACA Docket No. 2-2770, the Judicial Officer issued a decision on December 24, 1974 (79 pages), affirming the Administrative Law Judge's decision. The order publishes the facts and circumstances with respect to the wilful, flagrant and repeated violations by respondent involving failure to make full payment promptly. The Judicial Officer added a lengthy explanation that bankruptcy proceedings are irrelevant to disciplinary proceedings under the Perishable Agricultural Commodities Act, and that *Zwick v. Freeman* is still sound notwithstanding the fact that two decisions relied upon by the Court in *Zwick* were overruled by the Supreme Court. The Judicial Officer added as an appendix the USDA sanction policy. (Affirmed)

In *In re Southwest Produce, Inc.*, PACA Docket No. 2-2997, decided by the Judicial Officer on January 16, 1975 (53 pages), the Judicial Officer reversed the Administrative Law Judge's Initial Decision and suspended the respondent's license for 70 days for wilful, flagrant and repeated violations of § 2 of the Act, involving the respondent's failure to pay promptly for produce in 65 transactions. The Administrative Law Judge had suspended respondent's license for 14 days and suspended the suspension on condition that respondent is not found to have violated the payment provisions for four years. (Affirmed)

In *In re J. Acevedo & Sons*, PACA Docket Nos. 2-2717 and 2-2889, decided by the Judicial Officer on January 16, 1975 (64 pages), the Judicial Officer reversed the Administrative Law Judge's Initial Decision and suspended the respondents' licenses for 70 days for wilful, flagrant and repeated violations of § 2 of the Act, involving respondents' failure to pay promptly for produce in 115 transactions. The Administrative Law Judge had suspended respondent corporation's license for 14 days and suspended the suspension on condition that the respondents were not found to have violated the payment provisions of the Act for four years. The Judicial Officer held that, in addition to suspending the corporation's license, the respondent partnership's expired license should be suspended in order to serve notice on the industry that an expired license can be suspended. The Judicial Officer held that the fact that respondents are members of a minority group which received substantial Federal and private financial assistance is immaterial. The Judicial Officer also held that the Judge erred in refusing to permit a witness for the complainant to express his opinion as to the exact sanction needed to effectuate the purposes of the Act. (Affirmed)

In *In re Henry S. Shatkin*, CEA Docket No. 211, the Judicial Officer issued an Order granting complainant's motion to withdraw its appeal on February 14, 1975 (31 pages). The Judicial Officer stated, however, that the Initial Decision should not be regarded as a precedent in future proceedings because the Judicial Officer disagreed with Judge Baker's conclusions as to the meaning of wilfulness. The Judicial Officer also stated that Initial Decisions which are not appealed will not necessarily be regarded as persuasive precedents by the Judicial Officer, citing an example where an unappealed Initial Decision erroneously concluded that rulemaking is necessary where the Government has not previously considered a particular action to be a violation of a statute. The Judicial Officer also stated that the 30-day appeal time is not jurisdictional.

In *In re Smith Waller and C.R. "Bob" Young*, P&S Docket No. 4961, the Judicial Officer issued an Order granting complainant's Motion to Withdraw its Appeal on February 24, 1975 (3 pages). The Judicial Officer stated that the withdrawal of an appeal is not a matter of right and that since important, relevant evidence was erroneously excluded by Chief Judge McAlpin, the motion to withdraw the appeal is granted on condition that the case is not to be regarded as a precedent in any future proceeding. [The Judicial Officer had previously prepared a draft of a Decision and Order in which he would have increased the sanction materially because of the respondent's recordkeeping violations which caused a hog cholera outbreak].

In *In re George Townsend and Mrs. J.A. Townsend*, P&S Docket No. 4858, the Judicial Officer issued an Order vacating Initial Decision and remanding case for further proceedings on February 24, 1975 (4 pages). The Order stated that the Chief Judge had erroneously denied complainant's Motion to Reopen the Hearing to join a newly-created corporation as a respondent. The complainant sought to introduce evidence to establish that the corporation is merely a sham device initiated to circumvent the anticipated disciplinary Order. The Judicial Officer stated that the corporate veil could be pierced in appropriate circumstances. The Judicial Officer also stated that in all future P&S suspension orders, the orders should contain a proviso to prevent a suspended registrant from evading the suspension order.

In *In re M & H Produce Co., Inc.* PACA Docket No. 2-2757, the Judicial Officer issued a Decision and Order on April 8, 1975 (121 pages), reversing the Initial Decision by Chief Judge McAlpin. The Judicial Officer ruled that the acceptance by creditors of partial payment because of respondent's bankruptcy was no defense in the disciplinary proceedings; that respondent failed to pay promptly; that respondent's violations were repeated; that respondent's violations were flagrant; that the corporate veil should be pierced; that failure to pay is a serious violation and, therefore, publication of the finding that the respondent has committed flagrant and repeated violations is the appropriate sanction; and that equitable estoppel should not apply inasmuch as Mr. Dimond did not tell respondent's officers that a disciplinary proceeding would not be brought if 25 percent payments were made and, moreover, equitable estoppel does not lie against the Government. On May 1, 1975, the Judicial Officer denied petitions for reconsideration and to reopen (5 pages). The Judicial Officer discussed his prior statements with respect to Chief Judge McAlpin's lack of experience and the Judicial Officer's experience in this field. *Appeal pending*.

In *In re Maine Potato Growers, Inc.*, PACA Docket No. 2-2981, the Judicial Officer issued a Decision and Order on April 23, 1975 (71 pages), affirming the decision by Chief Judge Campbell suspending the respondent's license for 60 days for misbranding potatoes. The Judicial Officer held that copies of inspection certificates are sufficient evidence to support a finding of misbranding; that copies of inspection certificates are not required to be signed by the inspectors; that intent to misbrand is not an element of the violations; that the Judicial Officer has no authority to impose a civil penalty in lieu of a license suspension; and that in view of repeated warnings by complainant, and the serious violations in this case, the respondent's license should be suspended for 60 days. *Appeal pending*.

Fiscal Year 1976

In *In re Cream-O-Land Dairy*, AMA Docket No. M2-55, decided by the Judicial Officer on October 21, 1975 (20 pages), the Judicial Officer adopted Judge McAlpin's decision holding that the Market Administrator correctly determined that petitioner had an overage of milk. Petitioner's "guesstimate" that the overage resulted from his failure to include in his inventory at the end of the month milk on trucks at the close of business was rejected. As to the second issue in the case, the Market Administrator properly held that milk in transit on September 30, 1971, should be reported as a September receipt rather than an October receipt.

In *In re Central Citrus Company*, AMA Docket No. F&V 907-3, the Judicial Officer issued a Decision and Order on October 24, 1975 (122 pages), reversing Judge Baker's Decision. The Decision holds that the Navel Orange Administrative Committee administering Marketing Order No. 907 discriminated against handlers in Arizona in the granting of early maturity allotments for the week ending November 9, 1972, by granting 77% of the requests by the California handlers for early maturity allotments and only 34% of such requests by Arizona handlers. Petition to reconsider denied.

In *In re Lamers Dairy*, AMA Docket No. M 30-2, the Judicial Officer issued a ruling on November 4, 1975 (23 pages), reversing proposed rulings which had been certified by Judge Baker. The Judicial Officer ruled that practically all of the evidence proposed to be received by Judge Baker relating to the wisdom of efficacy of the Class I price or the pool plant qualification standards under Federal Milk Order No. 30 was inadmissible since the validity of the Order provisions must be challenged, from an evidentiary standpoint, on the basis of the promulgation hearing records. The Judicial Officer ruled that subpoenas duces tecum should not be issued to Cooperative officers to assist petitioners in proving that the cooperatives engaged in block voting since the sanctity of the ballot must be preserved in producer referenda. The Judicial Officer also ruled that all of the evidence in the promulgation hearings relating to challenged Order provisions must be officially noticed, irrespective of the number of pages thereof. The Judicial Officer stated in the ruling that it is not an appealable Order.

In *In re King Midas Packing Company, Inc.*, PACA Docket No. 2-3449, decided by the Judicial Officer on December 1, 1975 (57 pages), the Judicial Officer affirmed Judge Campbell's decision publishing the finding that respondent committed wilful, repeated and flagrant violations of the Act by failing to pay in full for produce. Respondent paid about 35% in bankruptcy proceedings. The Judicial Officer held that bankruptcy is no defense and that the collateral consequences of respondent's violations are mandated by Congress. Appendix A consisted of excerpts from *Tragash* as to *Zwick v. Freeman*; Appendix B, from *Steinberg*; and Appendix C from *Worsley* (sanction policy).

In *In re Ludwig Casca*, PACA Docket No. 2-3734, decided by the Judicial Officer on December 15, 1975 (32 pages), the Judicial Officer reversed Judge Campbell's Initial Decision that a license should be issued to respondent, who had been responsible for prior fraudulent payment violations by a corporation. The corporation's violations were settled by suspending its license for 45 days after restitution in full). The respondent had deliberately and intentionally caused the corporation to underpay the shippers and therefore, respondent was not fit to be a licensee. Judge Campbell pierced the corporate veil and held respondent had already been sanctioned; but the Judicial Officer held that it should not be pierced to shield the respondent from his prior conduct. Equitable estoppel does not apply against the Government acting in its sovereign capacity.

In *In re Overland Stockyards, Inc., and Pete Belezzuoli*, P&S Docket no. 4883, decided by the Judicial Officer on December 23, 1975 (118 pages), the Judicial Officer adopted Judge Campbell's findings and conclusions, but reduced the penalty for false weighing from 90 days to

49 days in view of the large size of the respondent stockyard. The *Speight*, *Trenton* and *Worlsey* sanctions were distinguished. The cease and desist order properly applies to respondent Belezzuoli both as an individual and as an officer of the respondent stockyard. Appendix A contained *Worlsey* table of prior suspensions from 1950 to 1974; and Appendix B the wilfulness section from *Shatkin*. Order to reconsider denied. Leasing the facility for 49 days would be an obvious attempt to circumvent the suspension order.

In *In re Sam Leo Catanzaro*, PACA Docket No. 2-3444, decided by the Judicial Officer on January 21, 1976 (16 pages), the Judicial Officer reversed Judge Weber's decision suspending respondent's license for 70 days for failure to pay joint account shippers and sellers. The Judicial Officer revoked respondent's license. Respondent's license would be revoked even if it just involved 16 fiduciary transactions or 31 failure-to-pay transactions. Laches does not apply to the United States. The Department's interest is different from that of the injured sellers and joint account shippers. Other cases (*Southwest*, *Acevedo*, *King Midas*, *Casca*, and *American Fruit Purveyors*) were distinguished.

In *In re Penn-Valley Farms, Inc.*, AMA Docket No. M 4-14, decided by the Judicial Officer on February 3, 1976 (47 pages), the Judicial Officer adopted Judge Liebert's decision holding that compensatory payments as to filled milk are valid.

In *In re Tommy J. Hines and Bobby T. Tindel*, P&S Docket No. 4959, decided by the Judicial Officer on February 23, 1976 (21 pages), the Judicial Officer reversed Judge Baker's decision and held that respondent Tindel engaged in an unfair practice by purchasing livestock at an auction market controlled by Mr. Hines in a manner to permit Hines to speculate out of consignments. The evidence established that the livestock purchased by Tindel for Hines were to be used by Hines in his dealer business. Whether regulations have force of law is an open question. Hines "laundered" transactions by having Tindel purchase livestock for him. Proof of injury is not required since the Act is designed to prevent potential injury by stopping unlawful practices in their incipiency. Intent and wilfulness are not relevant since only a cease and desist order is being issued. No effort should be made to follow common law rules of evidence.

In *In re Hygrade Food Products Corp.*, P&S Docket No. 5010, decided by the Judicial Officer on February 25, 1976 (5 pages), the Judicial Officer reversed Judge Baker's decision and held that the evidence does not support her conclusion that Hygrade engaged in an unfair practice by selling pork trimmings which did not meet specified leanness, inasmuch as the evidence shows a trade practice under which shipments of pork trimmings not meeting specifications are settled by compensatory payments. Hygrade offered to make such payments or to substitute a new shipment of the product, as permitted by Uniform Commercial Code. The purchaser refused both offers by Hygrade. The Uniform Commercial Code serves as a guide to Federal law. This decision does not undermine the policy statement that a seller has the responsibility of making certain that meat is in accordance with contract specifications.

In *In re Giles Lowery Stockyards*, P&S Doc. No. 4782, the Judicial Officer issued a Decision on March 26, 1976 (92 pages), affirming Judge Campbell's Decision holding unreasonable respondent's rates and charges and setting forth the maximum rates and charges hereafter to be observed by respondent. The Decision sets forth the policy to be followed with respect to auction market rates.

In *In re Henry Christ*, LAWA Doc. No. 24, the Judicial Officer issued a Decision on March 30, 1976 (14 pages), reversing Judge Campbell's Decision which had suspended respondent's license for only 90 days for a second offense involving enclosures for cats which were too small and had improper flooring. Respondent also failed to keep proper records. The Judicial Officer revoked respondent's license.

In *In re The Babcock Dairy Company of Ohio*, AMA Doc. No. M MM-3, the Judicial Officer issued a Decision and Order on April 29, 1976 (25 pages), sustaining Judge Liebert's Initial Decision holding that the provisions of milk orders providing for past notice of the Class II price were not supported by adequate findings or substantial evidence. Jurisdiction was retained to issue a final decision after the Secretary takes corrective action. The Judicial Officer also held that the past notice provisions were authorized by the Act, were not arbitrary and capricious, and did not violate the Due Process Clause.

In *In re Dr. Joe Davis*, HPA Docket No. 15, decided by the Judicial Officer on May 28, 1976 (6 pages), the Judicial Officer issued a decision sustaining Chief Judge Campbell's Initial Decision finding that respondent's horse was not sored; and that the irritation probably was caused by sand or dirt resulting from a heavy rainfall, together with legal bell boots. The decision holds that the Chief Judge's findings are of particular weight because he saw and heard the witnesses testify as to a testimonial or primary inference. Soreness caused by legal bell boots is not a violation (under the old regulations), the specific boot regulation prevailing over the general soring regulation. Doubt was expressed as to complainant's position that a horse once sored is always sored under the Act.

In *In re Hugh E. Allen*, HPA Docket No. 34, decided by the Judicial Officer on June 10, 1976 (14 pages), the Judicial Officer adopted Judge Palmer's decision holding that respondent exhibited two sored horses. Particular weight was given to Judge Palmer's findings inasmuch as he saw and heard the witnesses testify. Judge Palmer correctly excluded from consideration evidence that part of the soreness was caused by a legal boot (under the old regulations). Respondent's request for oral argument was denied since it would not serve any useful purpose. Material attached to respondent's brief, consisting of a photograph of a man on a horse and photocopies of a textbook on horses, was not considered.

In *In re Maure Solt*, PACA Doc. No. 2-3952, decided by the Judicial Officer on July 1, 1976 (8 pages), the Judicial Officer adopted Judge Baker's decision revoking respondent's license for failure to pay for produce. The Judicial Officer refused to reopen the proceeding (which had resulted in a default order) inasmuch as respondent Donald Solt had received timely notice of the administrative complaint against his partnership. The advice given by his attorney, that he need take no action with respect to the administrative complaint because of the firm's voluntary bankruptcy proceeding, was erroneous. However, even if a hearing were to be held, his proposed defense--that financial difficulties prevented payment--would not have been a defense to a violation of the Act or negated wilfulness.

In *In re R & D Investments, Inc.*, P&S Doc. No. 5208, decided by the Judicial Officer on July 2, 1976 (12 pages) the Judicial Officer adopted Judge Palmer's decision ordered respondent to cease and desist from failing to pay promptly for livestock. Respondent had contended that it had implied agreements for deferred payment based on a course of conduct of slow pay with the auction markets continuing to do business with respondent. The Judicial Officer stated that Judge Palmer erroneously excluded evidence showing that failure to pay promptly is an unfair practice, and modified Judge Palmer's decision to indicate that whether the P&S regulations had the force and effect of law is not settled. Oral argument was not granted notwithstanding respondent's request therefor.

In *In re A. S. Holcomb*, HPA Docket No. 18, decided by the Judicial Officer on July 26, 1976 (14 pages) the Judicial Officer adopted Judge Palmer's decision assessing $500 penalty because respondent exhibited a sored horse. However, the Judicial Officer disagreed with Judge Palmer's conclusion that the specific soring device or agent must be proven by complainant. It was suggested that wedges might be included under the broad phrase "any other cruel or inhumane method or device." Respondent's contention that he is not responsible under the doctrine of respondeat (rest of sentence missing). Moreover, respondent admitted that he showed

the horse, and it is unlawful to show a sored horse irrespective of whether the owner knew that it was sored. The complaint was not fatally defective because of lack of specificity. Only $500 was assessed because there is no evidence that respondent had actual knowledge that he exhibited a sored horse.

In *In re Vine City Dairy, Inc.*, AMA Docket No. M 36-5, decided by the Judicial Officer on August 27, 1976 (17 pages), the Judicial Officer adopted Judge Palmer's Decision dismissing a milk handler's petition. Oral argument was denied. Petitioner was regulated as a partially regulated distributing plant; a fully regulated supply plant; and as a fully regulated distributing plant. Milk deliveries by petitioner to a distributing point of a pool handler were not received at such handler's processing plant and, therefore, were properly treated by the Market Administrator as route disposition in the marketing area (and not delivered to a processing plant). The location adjustment differentials in the Order are valid.

In *In re A. S. Holcomb*, HPA Docket No. 18, the Judicial Officer denied a petition for reconsideration, on September 17, 1976 (5 pages). The Judicial Officer stated that he did not take official notice of any facts with respect to wedges but merely refused to take official notice of the facts noticed by judge Palmer; but that if he had taken such official notice, it would have been proper. The affidavits and information submitted by the parties pursuant to leave granted by the Judicial Officer show that the proper use of wedges does not cause symptoms caused by improper use of wedges can be readily distinguished from soring from chemical or mechanical means. The 1976 amendments do not provide any insight relevant to this case.

In *In re Sterling Colorado Beef Company*, P&S Docket No. 5201, decided by the Judicial Officer on September 20, 1976 (5 pages), the Judicial Officer ruled on a certified question from Judge Baker that discovery is not provided for under the P&S Act and that the Hearing Clerk is neither required nor authorized to serve applications for subpoenas or copies of subpoenas on the parties.

The Judicial Officer reversed Judge Baker's initial ruling and held that the complaint adequately apprised the respondents of complainant's legal theory that dual ownership of a packer by a custom feedlot is an unfair practice, and that it is not necessary for complainant to allege the specific evidence that will be introduced to prove that such dual ownership is unlawful. Since the Department's regulation is advisory only, it is immaterial that the proof relates to activities occurring prior to the promulgation of the regulation. The Court decision in *Central Coast Meats* does not reflect the view of this Department.

In *In re Richard Wall*, HPA Docket No. 44, decided by the Judicial Officer on September 20, 1976 (4 pages), the Judicial Officer reversed Judge Weber's Order in a default proceeding reducing the requested sanction from $1,000 to $650. It is necessary that consideration as to the risk involved in breaking the law should outweigh consideration of the advantages to breaking the law. Complainant need not prove aggravating circumstances to warrant a $1,000 civil penalty--respondent must prove mitigating circumstances.

In *In re Edward Whaley and Wink Groover*, HPA Docket Nos. 25 and 28, decided by the Judicial Officer on September 22, 1976 (13 pages), the Judicial Officer affirmed Judge Baker's Decision that a horse was not sored on June 8, and that Delight's Grand Slam was sored on August 30 and September 23. It was not necessary to use a swab test, photographs or thermographs. Groover was not singled out for selective enforcement. The Judicial Officer reversed Judge Baker's Decision and held that Whaley would be responsible as owner, but that the issue could not properly be raised in view of Whaley's stipulation at the pre-hearing conference that the only issue was whether the horse was sored. In this case and future cases, the owner will be assessed the same penalty as the trainer.

In *In re George Townsend (Madison Stockyards, Inc.*), P&S Docket No. 4858, decided by the Judicial Officer on September 30, 1976 (6 pages), the Judicial Officer adopted Judge Weber's Decision and held that the order should apply to Madison Stockyards, Inc., which was formed during the pendency of the administrative proceeding against Townsend, and that the 30-day suspension order is not unduly severe. It is appropriate to pierce the corporate veil and apply the sanction to a new corporation not in existence at the time of the violations. False weighing is a serious violation warranting a severe sanction. The order was strengthened by making the cease and desist order applicable to "successors and assigns" and by including a proviso to insure that the suspension order will be effectively served.

Fiscal Year 1977

In *In re Atlantic Produce Company*, PACA Docket No. 2-3303, decided by the Judicial Officer on October 5, 1976 (3 pages), the Judicial Officer adopted Judge Liebert's Decision finding that respondent committed willful, repeated and flagrant violations of § 2 of the Act by failing to pay promptly and in full for produce. Judge Liebert did not interfere in the conduct of the hearing by questioning the witnesses. The inability to make payment promptly because of financial difficulties does not negate wilfulness or a violation of the Act. A plan of arrangement in which part-payment is accepted in full satisfaction of claims does not negate a violation. The license of a firm can be suspended for a past violation even though the license terminates before the order is issued. Similarly, a finding can be made and published that a firm violated the Act even though its license terminates before the order is issued. The argument that the only effect of publishing a finding that respondent violated the Act will be to prevent one individual from engaging in business was rejected.

In *In re Livestock Marketers, Inc.*, P&S Doc. No. 5141, decided by the Judicial Officer on October 12, 1976 (19 pages), the Judicial Officer reversed Judge Baker's Decision and suspended respondent for 30 days for false weighing instead of 7 days as proposed by Judge Baker. The Judicial Officer affirmed Judge Baker's order applying the sanction to Paulk and Batten as well as Livestock Marketers, even though only Livestock Marketers falsely weighed, inasmuch as the same individuals owned both corporate entities, and it was necessary to pierce the corporate veil to prevent possible evasion of the suspension order. Judge Baker erred in excluding evidence showing that the two corporations were treated as a single profit center by their owners.

In *In re Schepps' Dairy, Inc.*, AMA Doc. No. M 126-3, decided by the Judicial Officer on October 19, 1976 (50 pages), the Judicial Officer adopted Judge Campbell's Decision holding that location adjustments do not have to fully compensate producers for the cost of transporting their milk, and that a current marketing period of one month is authorized by the Act.

In *In re Murleen Williams*, P&S Doc. No. 5285, decided by the Judicial Officer on November 2, 1976 (8 pages), the Judicial Officer adopted Judge Liebert's Decision and Order suspending respondent for 30 days and thereafter until bonding requirements are met. Respondent failed to file an answer within the time limit and did not object to complainant's motion for a default order. Accordingly, there is no basis for setting aside the default order. But in any event, the Judicial Officer permitted respondent to file a statement of what evidence would have been adduced, and respondent admitted operating without bond and issuing NSF checks.

In *In re Edward Radzilowski*, LAWA Doc. No. 47, decided by the Judicial Officer on November 11, 1976 (20 pages), the Judicial Officer adopted Judge Baker's Initial Decision suspending respondent for 45 days and issuing a cease and desist order for failing to hold cats for five days after acquisition; failing to provide appropriate waste disposal facilities; failing to provide a suitable method for eliminating water at outdoor facilities; and failing to maintain an effective program for control of insects and pests. The Judicial Officer held that Judge Baker's findings of fact are adequate since there are no complex factual issues; that there is no requirement that subsidiary facts be included under the heading findings; that it is implicit in Judge Baker's Decision that she agreed with complainant's arguments; and that the violations were wilful. If there is error in sanction, the error is that the sanction is not severe enough.

In *In re Corona Livestock Auction, Inc.*, P&S Doc. No. 5030, decided by the Judicial Officer on November 24, 1976 (7 pages), the Judicial Officer remanded the proceeding to Judge Liebert because he erroneously excluded expert evidence indicating that respondent's turn system was unfair. Expert opinions as to the ultimate question are admissible. It is within complainant's discretion to proceed in an adjudicatory proceeding rather than a rulemaking proceeding. Evidence as to the unlawfulness of respondent's turn system is perhaps necessary. Judge Liebert

was directed on remand not to exclude any evidence and not to write a subsequent Initial Decision. Judge Liebert erred in numerous other rulings as to the evidence. The evidentiary rules applicable in court proceedings are not applicable in administrative proceedings. Evidence of observations at a market are not inadmissible merely because the witness did not know the exact date of his observations. A question is not objectionable merely because the answer calls for a conclusion by the witness.

In *In re Indiana Slaughtering Co., Inc.*, FMIA Doc. No. 3, decided by the Judicial Officer on November 30, 1976 (17 pages), the Judicial Officer reversed Chief Judge Campbell and held that a consent agreement consummated at the oral hearing should be enforced. The consent order was entered requiring respondent's president to divest himself from ownership or contact with respondent as a condition for not withdrawing respondent's meat inspection service. Personal circumstances relating to a violator's health, need to work or prior tragic experiences are not relevant considerations under the Department's sanction policy.

In *In re J. Reid Hoggan*, AMA Doc. No. M 136-7, decided by the Judicial Officer on December 10, 1976 (12 pages), the Judicial Officer reversed Judge Liebert's Decision and held that a producer-handler which received milk directly from other dairy farms lost its producer-handler exemption for the month. Neither the Administrative Law Judges nor the Judicial Officer has authority to grant equitable relief. Milk orders must be interpreted as written irrespective of harsh and inequitable results.

In *In re Robert J. Wilkinson*, PACA No. 2-4337, the Judicial Officer issued a Decision and Order on January 11, 1977 (5 pages), adopting Judge Weber's Default Order suspending respondent's license for 15 days for shipping misbranded potatoes. Respondent failed to file an answer to the complaint or to the complainant's recommendation to adopt a proposed decision. However, even if respondent had filed a timely answer, he admitted shipping misbranded potatoes, contending only that he did not know that the inspection certificate stated that they were not U.S. No. 1. That would have been no defense to the violation of shipping misbranded potatoes.

In *In re Gene Thorp and Gary Dahlby*, P&S Doc. No. 5197, decided by the Judicial Officer on January 18, 1977 (2 pages), the Judicial Officer reversed Judge Baker's initial decision and dismissed the complaint. The Judicial Officer held that the evidence indicates that respondents had an express agreement for deferred payments and, therefore, they did not violate the prompt payment regulation.

In *In re The Zeitzer Food Corporation*, PACA Doc. No. 2-3548, decided by the Judicial Officer on February 11, 1977 (3 pages), the Judicial Officer vacated Judge Weber's initial decision and remanded the case for further proceedings. Judge Weber had revoked respondent's license for failing to pay promptly but the Judicial Officer indicated in the notice of oral argument that a 70-day suspension order might be more appropriate. The notice of oral argument referred to respondent's bankruptcy proceeding, and inquired as to whether a remand was appropriate with respect to subsequent violations. It was held that the proceeding should be remanded to consider a supplemental complaint relating to subsequent failures to pay for produce.

In *In re Mid-States Livestock*, P&S Doc. No. 4906, decided by the Judicial Officer on February 11, 1977 (66 pages), the Judicial Officer suspended respondents' registration for 60 days for failing to pay for over half a million dollars worth of livestock. Judge Campbell had recommended 30 days, but on appeal, complainant increased its recommendation to 60 days for Dale Van Wyk. The Judicial Officer stated that he would have suspended Van Wyk for 5 years. The Judicial Officer can increase the sanction even though only respondents appeal. Resolving disputed issues against respondents was no proof of bias by ALJ. Since ALJ did not believe a

witness, his findings are entitled to particular weight. The seriousness of failure to pay is emphasized. Van's Livestock, a successor to respondent Mid-States, is also suspended. Failure to pay is a violation of the Act.

In *In re Lamers Dairy, Inc.*, AMA Docket No. M 30-2, decided by the Judicial Officer on March 9, 1977 (31 pages), the Judicial Officer affirmed--but completely rewrote--Judge Baker's decision dismissing the complaint. The market-wide pool established for the Chicago area is constitutional. Petitioners' contentions that the Class I price is too high, that the pool plant qualification standards are too low, and that they are not "in commerce" must be tested on the basis of the evidence adduced at the promulgation hearings. Cooperatives properly play a leading role under the Order and achieve benefits from the Order. Subpoenas were denied which would have shown how cooperatives vote and relating to evidence as to the wisdom of the Order provisions. Petitioners cannot raise for the first time on appeal an issue as to whether an individual handler pool hearing should have been held. But, in any event, the decision not to hold such a hearing was not arbitrary. Similarly, petitioners cannot contend for the first time on appeal that the Act does not authorize establishing minimum pool plant shipping requirements.

In *In re Pappas Produce, Inc.*, PACA Doc. No. 2-4146, decided by the Judicial Officer on April 4, 1977 (19 pages), the Judicial Officer affirmed in part and reversed in part Judge Campbell's decision. The Judicial Officer affirmed Judge Campbell's decision that respondent's application for a license should be denied because of his prior failures to pay. It is of no consequence that only two of many of respondent's creditor complained to the Department. The Judicial Officer reversed Judge Campbell by holding that a finding should be published that respondent has engaged in repeated and flagrant violations of the Act. Judge Campbell erroneously held that such a finding could only be made as to "licensees."

In *In re The Moore Dairy, Inc.*, AMA Doc. No. M 4-18, decided by the Judicial Officer on April 7, 1977 (32 pages), the Judicial Officer affirmed Judge Weber's decision denying the relief requested by petitioners. Petitioners contended there was not substantial evidence to support inclusion of 10 counties under the Milk Order and the Minnesota-Wisconsin pricing formula; and that the M-W pricing formula involves an illegal delegation of the Secretary's authority. It was not necessary at the amendment hearing as to the 10 counties to revalidate all of the provisions of the original Order.

In *In re Benny Davila*, PACA Doc. No. 2-4420, decided by the Judicial Officer on April 11, 1977 (11 pages), the Judicial Officer affirmed Judge Palmer's decision denying respondent's application for a license inasmuch as he is unfit to engage in business because of his own prior failures to pay for produce and because of similar failures by a produce company, of which he was president, director and 70% owner.

In *In re Sechrist Sales Company, Inc.*, P&S Doc. No. 5242, decided by the Judicial Officer on April 11, 1977 (15 pages), the Judicial Officer affirmed Judge Campbell's decision suspending respondent for seven days for custodial account violations. Respondent's line of credit is not a substitute for cash in the custodial account.

In *In re Central Arkansas Auction Sale, Inc.*, et al., P&S Doc. Nos. 5249-5252, decided by the Judicial Officer on May 6, 1977 (123 pages), the Judicial Officer reversed Judge Palmer's decision and established rates in accordance with complainant's recommendations. The Judicial Officer upheld in all respects complainant's rate procedures.

In *In re Red River Livestock Auction, Inc.*, P&S Doc. No. 5312, decided by the Judicial Officer on June 3, 1977 (64 pages), the Judicial Officer affirmed Judge Palmer's decision suspending respondent for 45 days for false weighing. Additional conclusions added by the Judicial Officer explained why hardship to the community is not a relevant factor. Lengthy

excerpts from *Overland* were set forth in the Appendix, setting forth U.S.D.A.'s sanction policy and the seriousness of false weighing.

In *In re DeJong Packing Company*, P&S Doc. No. 5087, decided by the Judicial Officer on June 30, 1977 (64 pages), the Judicial Officer reversed Judge Palmer's decision in part. The Judicial Officer held that the respondents other than Hygrade entered into an unlawful conspiracy in 1972; that Hygrade joined the conspiracy in 1974; that all conspirators are liable for DeJong's failures to pay; that respondents violated § 201.69 of the regulations in addition to others; that the cease and desist order should apply nationwide, and at all marketing outlets (rather than merely at auctions); that the order for failing to pay should not be limited to failing to pay for cattle later condemned or to failure to pay used in connection with attempting to coerce someone into changing selling practices. The ALJ's were again reminded that the rules of practice should be interpreted to let as much evidence in as possible and that the exclusionary rules of evidence and procedure are not applicable in the Department's hearings.

In *In re Eric Loretz*, P&S Doc. No. 5145, decided by the Judicial Officer on July 7, 1977 (55 pages), the Judicial Officer affirmed in part and reversed in part Judge Baker's decision. Respondent was suspended for 45 days for marking up prices on cattle bought on order for the University of California, and charging buying commissions in excess of tariff. Although no issue was raised on appeal, it appears that perhaps only the University and not the consignors were defrauded (when respondent failed to remit to consignors the money fraudulently obtained from the University). The fraud was similar to false weighing. The Judicial Officer reversed Judge Baker and found that the respondent had permitted ringmen to purchase livestock from consignments. He inferred from the ringmen's silence that their testimony would have been adverse. A ringman has comparable responsibilities to an auctioneer or weighmaster.

In *In re Cordele Livestock Co. and Fred Kight*, P&S Doc. No. 5099, decided by the Judicial Officer on July 15, 1977 (42 pages), the Judicial Officer adopted Judge Weber's decision suspending respondent for 45 days for false weighing. In additional conclusions, the Judicial Officer held that the P&S truck gives accurate weights even though jacks are not placed under the front end; that shrinkage is eliminated from practical consideration; that no standards of shrinkage need be published; and that false weighing gives a competitive advantage to the market. The reasons for the 45-day suspension order were spelled out in great detail, comparing this case with all other cases.

In *In re Corona Livestock Auction, Inc.*, P&S Doc. No. 5030, decided by the Judicial Officer on August 5, 1977 (48 pages), the Judicial Officer reversed Judge Liebert's decision and held that respondent's turn system, which gives no bidder an opportunity to negotiate as to price, is unlawful. "In-house experts" are permitted to give expert testimony, and as to the ultimate question at issue. Expert testimony based on hypothetical questions and studying the record is admissible and adequate. Testimony by witnesses who participated in the decision to institute the formal proceeding is admissible. It was within complainant's discretion to proceed in an adjudicatory rather than a rulemaking proceeding. A suspension order was not issued because no need to deter others, respondent believed practice to be lawful and ALJ so held, respondent was never warned, violations occurred five years ago, and a major point of law is involved. The fact complaints were not received is irrelevant. ALJ's are not to exclude evidence not required to be excluded under the rules of practice. The same rules of practice apply in rulemaking or adjudicatory proceedings.

In *In re Breckenridge Auction*, P&S Doc. No. 5114, decided by the Judicial Officer on August 29, 1977 (18 pages), the Judicial Officer reversed Judge Baker, who had suspended the auction for 7 days for failing to properly use its custodial account, employing a dealer (Lytle) who engages in business at the market, permitting the market manager (Lytle) to purchase as a dealer, and issuing accounts of sale to consignors failing to disclose the identity of Lytle and his

relationship with respondent. Judge Baker suspended respondent Lytle for 21 days and until solvent. The Judicial Officer held that Judge Baker erred in failing to find that Lytle failed to keep adequate records; in failing to issue a broader recordkeeping order against Breckenridge; and in the reasons given for reducing complainant's 21-day recommendation to 7 days as to Breckenridge. Judge Baker's erroneous reasons were that the shortage in the custodial account was eliminated; complainant did not prove one of the violations as to Lytle; there was a considerable lapse of time from the violations to the hearing; and there was no evidence of evil intent or motive.

In *In re Golden West Wholesale Fruit Distributors, Inc.*, PACA Doc. No. 2-4421, decided by the Judicial Officer on September 22, 1977 (14 pages), the Judicial Officer affirmed Judge Campbell's Decision denying respondent's application for a license, because of prior violations by Paul Gitmed, president and 50% owner of respondent. Gitmed had been manager of another firm and caused violations by the other firm. There was no unequal treatment afforded respondent and the other violating firm even though PACA did not proceed against the other firm and issued a license to the other firm after Paul Gitmed no longer worked for it.

Fiscal Year 1978

In *In re C.D. Burrus and Donald L. Troutman*, P&S Doc. No. 5131, decided by the Judicial Officer on October 3, 1977 (32 pages), the Judicial Officer adopted Liebert's Decision suspending respondents for 30 days for adding (by pencil) arbitrary weight in sales to packers. Inference drawn because respondents did not testify. Cease and desist order issued because of back-balanced scale.

In *In re National Beef Packing Company*, P&S Doc. No. 4953, decided by the Judicial Officer on October 14, 1977 (32 pages), the Judicial Officer adopted Judge Weber's Decision ordering respondent to cease and desist from engaging in commercial bribery of meat buyers. Circumstantial evidence gives rise to the inference that respondent's officers knowingly bribed the meat buyers. Great weight given to hearing examiner's evaluation of the credibility of the witnesses. Judge Weber's delay of a year and a half after final brief, although regrettable, is not cause for dismissing the complaint.

In *In re Aldovin Dairy, Inc.*, AMA Doc. No. M 2-71, decided by the Judicial Officer on November 2, 1977 (4 pages), the Judicial Officer denied a petition for interim relief filed by a Pennsylvania milk handler who challenged the conversion factor of 11 used by the Market Administrator when petitioner failed to keep records showing how much skim milk was used to make skim milk powder.

In *In re John E. Hoth*, P&S Doc. No. 5258, decided by the Judicial Officer on November 3, 1977 (11 pages), the Judicial Officer adopted Judge Baker's decision suspending respondent until he complies with the bonding requirements under the Act. The record demonstrates that respondent was a market agency buying on commission for a packer and, therefore, was required to maintain a bond even though the packer paid directly for the livestock purchased by respondent on its behalf. The purpose of respondent's bond would be to provide additional protection if the packer went bankrupt.

In *In re Lee Carter*, HPA Doc. No. 35, decided by the Judicial Officer on November 29, 1977 (13 pages), the Judicial Officer adopted Judge Palmer's decision assessing a civil penalty of $1,000 against respondent for owning and exhibiting a sored horse. Judge Palmer's findings are entitled to weight because he saw and heard the witnesses testify. It is sufficient that respondent exhibited the horse. The proceeding is not barred by laches.

In *In re Armour and Company*, I&G Doc. No. 62, decided by the Judicial Officer on February 6, 1978 (6 pages), the Judicial Officer reversed Judge Palmer's decision which would have suspended inspection and grading services at Armour's Hereford, Texas, plant for seven days because respondent removed yield grade stamps from wholesale beef chucks which had not been substantially trimmed. The violations were not knowingly committed. However, the Judicial Officer disagreed with respondent's arguments that the carcasses had to actually move in interstate commerce; or that its plant could not be shut down because of the damage to the livestock market and the local economy.

In *In re Willie Cook*, HPA Docket No. 36, decided by the Judicial Officer on March 14, 1978 (2 pages), the Judicial Officer dismissed the appeal because it was not timely filed.

In *In re Billy Gray*, HPA Doc. No. 48, decided by the Judicial Officer on March 17, 1978 (7 pages), the Judicial Officer remanded the case to Judge Liebert to reconsider whether a horse was sored, applying the preponderance of the evidence standard of proof rather than the standard of proof applicable in criminal law proceedings. The Order also permit further briefs in the Gray and Beech cases as to whether the failure of a horse to meet the heel-toe standard resulted from

padding, and as to the meaning of the regulation with respect to veterinarian certificates authorizing substances on the horse's foot.

In *In re Arab Stock Yard, Inc.*, P&S Doc. No. 5172, decided by the Judicial Officer on March 24, 1978 (64 pages), the Judicial Officer affirmed Judge Baker's decision suspending respondent's registration for 14 days and thereafter until it demonstrates that the deficit in its custodial account for shippers' proceeds has been eliminated and that it is no longer insolvent. The violations were wilful and, therefore, the registration may be suspended. In addition, although complainant did not allege the sending of prior warning letters, they were admissible under the allegation of wilfulness, and, once admitted, can be used as an independent basis for suspending respondent's registration. The Judicial officer inferred (i) that letters sent by regular mail were received; (ii) that Linda Tolleson, who signed for a certified letter, delivered it to Hubert Tolleson or someone else in authority at the stockyard; and (iii) (from Mr. Tolleson's silence) that Mr. Tolleson's testimony would have been adverse. Wilfulness discussed. Custodial account violation is serious notwithstanding line of credit from bank. Suspension of 14 days will not put respondent out of business. Short term considerations of temporary damage to livestock buyers and sellers is disregarded.

In *In re John H. Norman & Sons Distributing Co., Inc.*, PACA Doc. No. 2-4332, decided by the Judicial Officer on March 24, 1978 (49 pages), the Judicial Officer reversed Judge Palmer's decision which suspended respondent's license for 90 days for failing to pay $48,000 to 12 sellers, but suspended the suspension on condition that John Norman shall not within five years make application for a license or become responsibly connected with another licensee. Instead, the Judicial Officer published the finding that respondent has committed repeated, flagrant and wilful violations of the Act. There is no inconsistency between that finding and the finding that Mr. Norman conducted himself responsibly and honorably since the violations are malum prohibitum--not malum in se. The fact that the violations resulted from financial difficulties is no excuse. The Act calls for payment--not excuses. Mr. Norman knew for a long time that respondent was in precarious financial condition. Special laws are needed in the agricultural marketing system because a sound efficient system is vital to the Nation. The collateral effects of an order against respondent are not relevant.

In *In re Jake Muehlenthaler and Morris Muehlenthaler*, P&S Doc. No. 5237, decided by Judicial Officer on March 24, 1978 (135 pages), the Judicial Officer reversed Judge Weber's decision suspending respondents for 14 days for false weighing on one date. The Judicial Officer suspended for 30 days and found false weighing on two dates, but would have suspended for 30 days and found false weighing on one date. Respondents' had an economic motive for shortweighing hogs at their buying station. The scale must have been back-balanced 16 pounds on one date, and it was 8 pounds back-balanced on the other date (after the sale to respondents). Judge Weber concluded that shortweighing was not proven on second date because with a back-balanced scale of 8 pounds, respondents took 17 pounds from one draft and only 4 from each of two other drafts. But this is typical in false weighing cases. Wilfulness does not require gross negligence. Respondents printed a scale ticket while livestock was not on the scale. Allegations of complaint were sufficiently specific. The two key weighings are the weighings on the P&S scale and respondents' weighings.

In *In re Westmoreland's Dairy*, AMA Doc. No. M 126-7, decided by the Judicial Officer on April 7, 1978 (15 pages), the Judicial Officer affirmed Judge Campbell's Initial Decision denying the relief requested by petitioner. Petitioner contended that the market administrator erred in applying late payment charges under the Texas Order on a monthly basis instead of a daily basis.

In *In re Norwich Veal and Beef, Inc.*, P&S Doc. No. 5444, decided by the Judicial Officer on May 9, 1978 (13 pages), the Judicial Officer reversed Judge Palmer's Decision holding that

respondent packer was exempt from the bonding and trust requirements since it was a newly-established packing company which had not yet purchased $500,000 worth of livestock. The Judicial Officer held that a reasonable projection of the new packer's purchases was permissible. The exemption is for small packers--not new packers Remedial statutes should be liberally construed. Exceptions to regulatory requirements are to be strictly construed. The contemporaneous administrative construction is entitled to great weight.

On May 15, 1978, the Judicial Officer issued a Decision in *In re Hal Merdler Produce, Inc.*, PACA Doc. No. 2-4793 (4 pages), adopting Judge Liebert's Decision revoking respondent's license for failure to make full payment promptly for produce. A plan of arrangement under which creditors accept less than full payment in full satisfaction of their claims does not negate a violation of the Act. The collateral effects of an Order against persons responsibly connected with the respondent are not relevant here. Moreover, there is no merit to the constitutional argument as to the collateral effects.

In *In re L.R. Morris Produce Exchange, Inc.*, (20 pages), PACA Doc. No. 2-4324, decided by the Judicial Officer on May 30, 1978 the Judicial Officer reversed Judge Baker's order revoking respondent's license for failure to make full payment promptly for over $1 million worth of produce, and substituted a 90-day suspension order, since the case became slow pay rather than no pay. Prior cases cited where licenses have been revoked for failure to pay; or if the firm was not licensed, a finding has been published as to flagrant and repeated violations, which has the same effect on the firm and on those responsibly connected as revocation. The Secretary's authority to proceed by way of disciplinary action is not dependent upon the filing of complaints by creditors. Even if respondent were presently complying with regulatory requirements, an appropriate sanction is warranted based on past violations. The Act calls for payment--not excuses. Even if revocation would have adversely affected particular creditors, the Department must consider the interests of all shippers and the deterrent effect throughout the Nation. The 60-day suspension order in Mid-States was under the P&S Act and is not relevant. Respondent had burden of proving that it had express agreements for delays in payment. Respondent's license will be revoked for one more knowing violation.

In *In re J. Fleishman & Co., Inc.*, I&G Doc. No. 71, the Judicial Officer issued an Order (1 page) on June 15, 1978, remanding the proceeding to receive evidence. A default order was issued, but respondent contended that [although his wife received the complaint] he never personally received the complaint. Complainant did not object to a remand.

In *In re Steve Beech and Billy Gray*, HPA Doc. Nos. 42 and 48, decided by the Judicial Officer on June 20, 1978 (35 pages), the Judicial Officer reversed Judge Liebert's Initial Decision and held that the Government failed to prove that a horse was sored because the length of her toe did not exceed the height of her heel by 1 inch as a result of padding or other artificial devices or means. He also reversed Judge Liebert's conclusion that no violation resulted because of a black greasy substance applied to the horse's forefeet. The Judicial Officer held that the only veterinarian certificate that could be considered was that which was presented to the Department's veterinarian which was out of date; and the greasy substance was for prophylactic rather than therapeutic purposes. The Judicial Officer sustained Judge Liebert's ruling that a second horse was not sored in view of the weight that must be attached to his findings because he saw and heard the witnesses testify.

In *In re Nick A Barbaccia, et al., d/b/a District 10 Pool and d/b/a District 10 Growers*, AMA Doc. No. F&V 993-2, decided by the Judicial Officer on June 20, 1978 (29 pages), the Judicial Officer sustained Judge Palmer's Decision that petitioners were the handlers of prunes in sales to Products of the Sun and Conservas de Baja California. Products did not receive the prunes or perform any other handling function. Conservas was not a handler within the area. Accordingly, petitioners did not come within the exception relating to sales by a grower to a

handler with the area. Exceptions must be strictly construed. The administrative construction should be given great weight. It is not enough that the sales were within the area; the handler must also be within the area. Petitioners were not denied due process because they were not advised with sufficient clarity the basis of the challenged determination or because respondent did not sufficiently reply to the Administrative Law Judge's notice requiring briefs of the parties.

In *In re Borden, Inc.*, AMA Doc. No. M 63-3, decided by the Judicial Officer on June 30, 1978 (21 pages), the Judicial Officer reversed Chief Judge Campbell's Decision and held that there was no evidence to support the "for Borden's own good" findings in the Secretary's Order which promulgated a location adjustment applicable to Borden only. The case was, therefore, remanded to the Secretary for further rulemaking proceedings, with directions to clarify whether the Secretary was concerned with Borden's competitive price relationship vis-a-vis retail competitors. Consideration should be given as to whether uniformity as to "all handlers" means all handlers within the area rather than regulated by the same order.

In *In re Maplecroft Farm Dairies, Inc.*, AMA Doc. No. M 4-19, decided by the Judicial Officer on July 14, 1978 (21 pages), the Judicial Officer adopted Judge Palmer's Decision dismissing the milk handlers' petition. The petitioners were given sufficient notice of the hearing. The amendment of the Order was supported by substantial evidence even in the absence of testimony by petitioners and other producer-handlers similarly affected. Petitioners' activities are included under the commerce power. The compensatory payment provisions are not unlawful trade barriers. The Order does not violate the prohibition against regulating a producer in his capacity as a producer. The Order is not unlawful because there may be less restrictive alternatives.

In *In re Norwich Veal and Beef, Inc.*, P&S Doc. No. 5444, decided by the Judicial Officer on July 18, 1978 (6 pages), the Judicial Officer adopted Judge Palmer's Decision issuing only a cease and desist order based upon respondents' failure to obtain a packer bond and hold money in trust, inasmuch as the Act is susceptible to more than one construction, and complainant's construction of the Act was apparently not published or brought to respondents' attention. The cease and desist order should apply to the individual respondents as well as to the corporate respondent under the alter ego doctrine.

In re Roy Thompson and De Los Thompson, AMA Doc. Nos. M 126-6 and M 130-3, decided by the Judicial Officer July 27, 1978 (17 pages), the Judicial Officer adopted Judge Palmer's Decision dismissing the petition. It was held that the petitioners deliberately concealed purchases of dry milk powder from the Market Administrator thus tolling the statute of limitations and that the Market Administrator properly rejected their claim that the dry milk powder was sold to Mexican buyers as "cement."

In *In re Animal Research Center of Massachusetts*, LAWA Doc. No. 74, decided by the Judicial Officer on July 31, 1978 (1 page), the Judicial Officer denied motion to file an appeal after it had become final.

In *In re Gold Bell-I & S Jersey Farms, Inc.*, I&G Doc. No. 65, decided by the Judicial Officer on August 22, 1978 (68 pages), the Judicial Officer reversed Judge Baker's Decision and held that complainant proved that respondent engaged in wilful misrepresentations and deceptive acts by switching small and peewee size eggs for medium size eggs in military contracts. Burden of proof is the preponderance of the evidence standard. An agency may differ with the Administrative Law Judge as to the facts in appropriate circumstances. There is a presumption of regularity supporting the acts of public officials. Severe sanction should be imposed.

In *In re Robertsdale Livestock Auction, Inc.*, P&S Doc. No. 5157, decided by the Judicial Officer on August 30, 1978 (161 pages), the Judicial Officer adopted Judge Baker's rate Decision

and Order. The complainant's rate order is not invalid because it was unpublished and unannounced Agency policy. No inflation impact or environmental impact statement was necessary. The Agency action was not without reference to any ascertainable standards. The respondent had no burden of proof. If pending legislation is enacted permitting value-based tariffs, a remand would probably be required.

Fiscal Year 1979

In *In re Jackson Union Stockyards*, P&S Doc. No. 5371, decided by the Judicial Officer on October 4, 1978 (16 pages), the Judicial Officer affirmed Judge Palmer's Order requiring respondents to cease and desist from charging sellers of livestock any service or yardage charge on livestock purchased for their own dealer account. Corporate veil pierced.

In *In re National Meat Packers, Inc.*, C&M Meat Packing Corp., and Charles D. Olsen, I&G Doc. No. 60, decided by the Judicial Officer on October 27, 1978 (44 pages), the Judicial Officer reversed Judge Weber's Decision, which withdrew meat grading as to Olsen for one year (retroactive for 7 months). The Judicial Officer withdrew meat grading for 10 years because of Olsen's bribery of Federal meat graders. The offense of bribery on a single occasion must be viewed in the light of its setting. Severe sanction policy. Removing respondent from the meat business for the rest of his life is not too severe. His cooperation in procuring the indictment of a meat grader was relevant in the criminal proceeding but not in the administrative proceeding. His criminal punishment should be considered, but the combined punishment is not too severe. Consent orders are given no consideration. The administrative factors leading to more lenient consent orders are not present in this litigated proceeding.

In *In re Mountainside Butter and Egg Company*, I&G Doc. No. 64, Order issued by the Judicial Officer on October 27, 1978 (19 pages), the Judicial Officer remanded the case for further proceedings. The Judicial Officer held that the Egg Products Inspection Act authorizes withdrawal of inspection services for violations of the regulations relating to sanitary practices. A new hearing is required, however, because the Government failed to produce all of the Jencks Act memoranda relating to the state of mind of the inspectors as to the respondent. The proceeding would not be remanded to receive evidence that a party should have produced at the original hearing but failed to do so. Great weight must be afforded to the decisions of the Administrative Law Judges who see and hear the witnesses testify. Only in rare circumstances can findings of fact be set aside. Settlement agreements are enforced in the absence of extraordinary circumstances such as fraud. Evidence of current compliance with the Department's regulatory programs is irrelevant in determining the sanction for past violations. The Judicial Officer has consistently refrained from exercising any authority other than quasi-judicial authority. After the revised initial Decision, the case will be automatically returned to the Judicial Officer.

In *In re Sol Salins, Inc.*, PACA Doc. No. 2-4436, decided by the Judicial Officer on November 3, 1978 (76 pages), the Judicial Officer reversed Judge Palmer's Decision which had suspended respondent's license for 45 days for consignment accounting violations, and suspended respondent's license for 21 days as a dealer and 90 days as a commission merchant. Weight must be given to Administrative Law Judge's findings of fact because he saw and heard witnesses testify. Duties of a fiduciary. Over-payments, as well as underpayments, are prohibited. Three prior warnings (1962 and 1963 warnings are not too stale). Recordkeeping violations are serious. In determining sanction, consideration must be given to fact that respondent hired auditors to make complainant's audit; made excess restitution; the violations were not intentional; they involved consignments only, which were only 1/2 of 1% of respondent's total business; and respondent's business is much larger than most produce firms. Suspension for less than total activities is appropriate here. Consent orders are entitled to no weight whatever. The number of employees thrown out of work is irrelevant; as is damage to particular growers and customers.

In re C.E. Mills, d/b/a Mills Auction Mkt., P&S No. 5151, Order of November 27, 1978 dismissed [interim?] order.

In *In re Zelma Wilcox*, P&S Doc. No. 5425, decided by the Judicial Officer on November 9, 1978 (47 pages), the Judicial Officer reversed Judge Baker's Order suspending respondent until she is solvent plus 10 days, and suspended respondent for 60 days and thereafter until solvent. Although great weight must be given to ALJ's findings, I am compelled to reverse as to the facts. Inference because respondent's witnesses did not testify. It is a common trade custom for packers to accept a small amount of shrink without a price deduction. Padding actual weight, by adding an arbitrary amount of weight is a serious violation of the Act.

In *In re Dr. James V. Scott*, VA Doc. No. 2, decided by the Judicial Officer on November 22, 1978 (23 pages), the Judicial Officer adopted Judge Weber's Order revoking respondent's accreditation as a veterinarian for improperly issuing and signing incomplete official health certificates for the sale and interstate transportation of cattle.

In *Western Iowa Farms Co. v. Sioux City Stockyards*, P&S Doc. No. 5556, decided by the Judicial Officer on February 15, 1979 (4 pages), the Judicial Officer remanded the case for further evidence by P&S as to the issues, including expert testimony as to the ultimate question at issue. It is of no consequence that P&S did not attempt to introduce evidence at the original hearing challenging the validity of a stockyard regulation providing that each market agency must pay annual minimum yardage fee to the stockyards calculated on 25,000 cattle and 55,000 hogs.

In *In re Oak Tree Farm Dairy*, AMA Doc. No. M 2-36 (et al.), decided by the Judicial Officer on February 22, 1979 (78 pages), the Judicial Officer held that the shrinkage provisions of the New York-New Jersey Order are authorized by the statute and were adequately supported by the evidence and findings. Classification principles explained. Act is intended to benefit producers. Use means handlers' use, not ultimate use. Contemporaneous and longstanding administrative construction entitled to weight. Cooperative experience relevant but not decisive in construing statute. Reasonable class prices are an area rather than a pinpoint. There is no requirement of uniformity in the absence of differences in production or marketing conditions. Wisdom of Secretary's decision not at issue. Due process is not denied because regulation may be disadvantageous to certain areas or persons. Absolute equality is not demanded. The Secretary's decision not to change an Order need not be supported by evidence. Notice of hearing was adequate. The Secretary adequately ruled on exceptions. Evidence in 15 A proceeding was not admissible with respect to adequacy of rulemaking hearings. If the findings had been deficient, I would have remanded proceeding to the Secretary to issue revised findings. Class actions are not required. Administrative agencies are free to fashion their own rules of procedure. Issues raised in petition but not briefed are waived. Fitchett's claim is barred in part under administrative res judicata and collateral estoppel.

In *In re William H. Hutton*, I&G Doc. No. 63, decided by the Judicial Officer on February 23, 1979 (22 pages), the Judicial Officer reversed Judge Weber's Decision, which withdrew meat grading and acceptance services for 1 year, and increased the sanction to 10 years, because respondent was convicted of bribery of a Federal meat grader.

In *In re Dr. Daniel M. Winger*, VA Doc. No. 3, decided by the Judicial Officer on February 26, 1979 (40 pages), the Judicial Officer adopted Judge Campbell's Decision revoking respondent's accreditation as a veterinarian for submitting false test reports certifying that blood samples had been taken from 19 horses and 13 bulls, when in fact the samples were taken from 3 horses and 3 bulls. The best evidence rule does not apply. Points not raised below cannot be raised on appeal. Lay witnesses are competent to testify on the mental state of a person. The Department's doctor who sat through the administrative hearing is competent to give an opinion as to respondent's mental condition. There is no basis for reopening the hearing to consider further psychiatric testimony. Even if Judge Campbell had found that respondent's mental conduct caused the violations and that he would probably suffer no further attacks, that would not have been a defense nor have changed the sanction.

In *In re Norwich Beef Company, Inc.*, FMIA Doc. No. 29, decided by the Judicial Officer on March 7, 1979 (60 pages), the Judicial Officer reversed Judge Liebert's Decision dismissing the complaint. Inspection Service is indefinitely withdrawn to respondent unless Alan Roessler is not associated with the firm (after 90 days) and sells his stock (within one year). While working for another firm, Alan Roessler had knowingly handled a carload of highjacked beef. The Act authorizes this sanction because of "(1) any felony," irrespective of whether it relates to transactions in food. The felony was of the type that makes respondent unfit to receive inspection since the plant's reliability and integrity must be depended upon by Inspection Service. In addition, consideration was given to Alan Roessler's one misdemeanor, involving submitting a false statement to obtain inspection services. Although some USDA officials knew of Alan Roessler's conviction when inspection was granted, equitable estoppel does not apply against the Department and respondent did not have clean hands. Consent orders are not relevant.

In *In re Vernon Cooperative Creamery Association*, AMA Doc. No. M 61-4, decided by the Judicial Officer on March 16, 1979 (13 pages), the Judicial Officer affirmed Judge Campbell's Decision granting petitioner's (15)(A) petition. Petitioner "delivered" milk to the Little Dutch Mill Dairy when it pumped milk into the Dairy's truck while located in a special room at the plant where a pump and agitator were located. The truck when in this location was equivalent to a holding tank within the plant. Since the milk was "delivered," it was properly regarded as diverted by petitioner even though the milk was then immediately pumped back into petitioner's truck. Petitioner was advised not to file certain data with the Market Administrator and, therefore, the Market Administrator was directed to consider the data and verify petitioner's claim for this period. Although the delivery to the Dairy was a sham transaction, the Market Administrator did not contest one of the sham transactions and, therefore, the Government's attorney cannot challenge the other transactions as sham.

In *In re Edward O. Philipp, d/b/a New Hope Dairy Farm*, AMA Doc. No. M 36-8, decided by the Judicial Officer on March 26, 1979 (3 pages), the Judicial Officer affirmed Judge Palmer's Decision modifying the Market Administrator's determination to reflect that the obligations are owed by Edward O. Philipp solely and not by his wife. It is not necessary to show a partnership, but only to show a "business unit." Federal law is controlling. However, petitioner sustained the burden of proving that his wife's participation in the dairy's business was because of their relationship as man and wife rather than as joint participants in a partnership or other business unit.

In *In re Samuel Esposito*, LAWA Doc. No. 101 (177 pages), decided by the Judicial Officer on April 26, 1979, the Judicial Officer affirmed Judge Weber's Decision suspending respondent's license for 14 days for failing to transport dogs in compatible groups and in enclosures with sufficient space. Standards for housing animals are irrelevant in transportation cases. Standards for monetary penalties are inapplicable in suspension cases. Even if owner of business did not have actual knowledge of employee's violation, that is not ordinarily a mitigating circumstance. In a lengthy appendix, the Judicial Officer replied to Judge Weber's attack in the DeBoer case on the Department's sanction policy.

In *In re Apex Meat Co., Inc.*, P&S Doc. No. 5575-79, decided by the Judicial Officer on May 10, 1979 (8 pages), the Judicial Officer ruled on a certified question that civil penalties cannot be assessed against meat packers under an amendment not effective until after the violations had ceased. Statutes are to be construed prospectively. The exception as to statutes relating to remedies and procedure does not relate to penalties.

In *In re Gus Z. Lancaster Stock Yards, Inc.*, P&S Doc. No. 5574, decided by the Judicial Officer on May 25, 1979 (14 pages), the Judicial Officer affirmed Judge Campbell's Decision suspending respondent for 14 days for increasing weights by pencil. Respondent also bought livestock from consignments and resold them the same day at a higher price without remitting to

consignors the additional proceeds. Hardship to community as a result of respondent's suspension is irrelevant.

In *In re Jack B. Fleming*, Plant Variety Protection Appeal Application No. 7400070, decided by the Judicial Officer on June 6, 1979 (15 pages), the Judicial Officer held that the Commissioner of the Plant Variety Protection Office properly denied petitioner's application for plant variety protection for an oat designated as "J.F.O. 3Tee."

In *In re Upland Packing Company*, P&S Doc. No. 5621, decided by the Judicial Officer on June 19, 1979 (4 pages), the Judicial Officer affirmed Judge Weber's Decision ordering respondent to cease and desist from engaging in business as a packer without filing a bond.

In *In re Ben Gatz Company*, PACA Doc. No. 2-4844, decided by the Judicial Officer on June 29, 1979 (19 pages), the Judicial Officer affirmed Judge Palmer's Decision dismissing the complaint. The evidence is insufficient to warrant overturning Judge Palmer's findings that the transactions were f.o.b., rather than delivered, and, therefore, respondent could lawfully make a secret profit on freight and was not required to remit to buyers the amount of in-transit losses recovered from transporters. Hearsay is admissible, but inferior to actual testimony. The word "shall" is the language of command. The word "any" is a broad and comprehensive term. Humpty Dumpty's own meaning given to words cited. Trial judge who saw witnesses testify is in the best position for determining (sentence not complete).

In *In re Collier and Marsh*, P&S Doc. No. 5582, decided by the Judicial Officer on July 12, 1979 (39 pages), Judge Weber's decision was affirmed suspending respondents for six months and ordering them to cease and desist from billing from customers on the basis of false weights and collecting from principals at prices other than the actual purchase prices plus the agreed buying commission. Adding arbitrary weight to purchase weight is an unfair and deceptive practice. Even if a financing arrangement was usurious and illegal, that would not prevent enforcement of the contract under the Packers and Stockyards Act.

In *In re Weissglass Gold Seal Dairy Corp.*, AMA Doc. No. M 2-56, decided by the Judicial Officer on July 19, 1979 (10 pages), the Judicial Officer affirmed Judge Liebert's decision dismissing the complaint. Petitioner's contention that the classification of shrinkage under the New York - New Jersey order is illegal was resolved in the Oak Tree Farm Dairy Case. The shrinkage provisions do not constitute an economic trade barrier prohibited by 7 U.S.C. 608c(5)(G).

In *In re Borden, Inc.*, AMA Doc. No. M 63-2 and M 63-3, decided by the Judicial Officer on August 3, 1979 (18 pages), the Judicial Officer remanded the cases to Judge Campbell for further proceedings. Judge Campbell's decision in docket M 63-3, in which he awarded petitioner damages by multiplying the quantity of milk purchased by the price difference effected by the invalid order provisions, was reversed. In both cases, the Judicial Officer held that the question of damages must be determined by evaluating the equity of the situation by considering the complex economic relationships between producers and handlers during the time period for which damages are sought. The questions to be considered include whether petitioner would have been able to buy milk at prices lower than the relevant order prices, whether petitioner was given credits by a cooperative to enable it to be competitive, whether petitioner was able to pass on part of its increased costs, to what extent are the producers who receive the benefit of the increased prices the same as the producers who would suffer, to what extent would taking petitioner's damages from the producers settlement fund impede attainment of the statutory goal, and what action would the secretary have taken if he had known that the actions taken were illegal? A Court of Appeals decision may be disregarded irrespective of whether certiorari was applied for. Consideration should be given as to whether interest should be awarded.

In In re Unionville Sales Co., Inc., P&S Docket No. 5327, decided by the Judicial Officer on August 22, 1979 (8 pages), the Judicial Officer remanded the proceedings to Judge Liebert for further evidence as to the ownership of six animals, which is material in determining whether false weighing occurred. Judge Liebert's ten day suspension order for two cattle under weighed by 5 and 10 pounds is inappropriate. A suspension order of at least 30 days (generally longer) is appropriate for false weighing. Great weight must be given to Judge Liebert's findings because he saw witnesses testify. In order to protect the public interest, further evidence is needed as to the ownership of the animals which Judge Liebert found against complainant's position. Although complainant failed to file an appeal, where an appeal is filed by respondent, the Judicial Officer may on his own motion raise additional issues, including whether suspension period should be increased. In addition, although complainant did not appeal, it raised the issues presented here in its response to respondent's appeal. Equitable estoppel does not apply to the government. It is not unusual for one falsely weighing livestock to falsely weigh some rather than all and to short weigh some more than others, and to short weigh in amounts different than the back balanced condition of the scale.

In *Western Iowa Farms Co. v. Sioux City Stock Yards*, P&S Doc. No. 5556, decided by the Judicial Officer on September 21, 1979 (36 pages), the Judicial Officer reversed Judge Liebert's decision holding that a stock yard rule is invalid which required market agencies to pay an annual minimum yardage fee calculated on 25,000 cattle and 55,000 hogs. The 1968 amendments to the Act were for the purpose of making it clear that stockyard owners have the right to regulate the commission firm's at the stock yard.

In *In re American Fruit Purveyors, Inc.*, PACA Doc. No. 2-4355, decided by the Judicial Officer on September 28, 1979 (52 pages), Judge Liebert suspended respondent's license for 14 days for violating a 1971 order and for an additional seven days because of respondent's present slow payment practices. The Judicial Officer increased the additional suspension period to 30 days. Once a violation has occurred, no subsequent agreement between the parties can negate a violation. The acceptance and presentment of checks does not constitute an agreement to extend credit. Even if respondent's violations had not been wilful, the prior order issued in 1971 would satisfy the notice requirements of the APA. There is no basis for the argument that this disciplinary proceeding was a result of selective enforcement of the Act, but selective enforcement is legal so long as not arbitrary. In view of tremendous size of respondent's business, and the Judicial Officer's policy not to increase administrative recommendations, respondent's registration will be suspended for 30 days for the present violations. Respondent's present compliance with the payment requirements does not make inappropriate the suspension referred to above for past violations.

Fiscal Year 1980

In *In re De. John Purvis and Dwayne Elliott*, HPA Doc. Nos. 54 and 72, decided by the Judicial Officer on October 12, 1979 (15 pages), the Judicial Officer reversed Judge Liebert's finding that a horse was not sored. The fact that he horse had bilateral sensitivity on its legs was sufficient to lead me to infer that the horse was sored notwithstanding the fact that the violation occurred before the 1976 amendments to the Act. I infer that the testimony of the trainer, who did not testify, would have been adverse to respondents. The fact that the show veterinarians permit the horse to appear is to be considered but is not controlling. Respondent Elliott showed the horse and therefore violated the Act even though it is quite possible he took no part in soring the horse. The owner of the horse is also responsible. He had the right to control the trainer but in any event is responsible.

In *In re Richard Wall*, HPA Doc. No. 87, decided by the Judicial Officer on October 30, 1979 (58 pages), the Judicial Officer increased from two years to 5 years the disqualification provisions against respondent for his third violation. Under the 1976 amendments, five years is the minimum for a second violation. Under the 1976 amendments, five years is the minimum for a second violation, notwithstanding the fact that the previous-violations occurred prior to the enactment of the amendatory legislation. Consent proceedings are to be given no consideration. Respondent should have adduced evidence that he is unable to pay a $2,000.00 civil penalty.

In *In re Mr. & Mrs. Richard L. Thornton and Bill Cantrell*, HPA Doc. Nos. 64 and 70, decided by the Judicial Officer on November 9, 1979, the cases were remanded to Judge Baker for more detailed findings. There is no basis for over turning Judge Baker's findings based on the demeanor of the witnesses. Judge Baker erred if she gave weight to the fact that there is no scientific or objective evidence to substantiate veterinary opinions. An estimate of the size of callouses is sufficient. If only some sore spots can be explained away, the presumption of soring from bilateral sensitivity remains. Witnesses should not be permitted to indicate areas on an exhibit which are not clearly revealed in the printed record. Respondents would be responsible for showing a sored horse even if it suffered a spontaneous relapse from hard work outs. An observer can determine whether a horse is reluctant to lead. To the extent that expert evidence demonstrates that factors possibly affecting thermovision were adjusted or compensated for, the result should not have been discredited. Whether thermography can detect deep seated tumors is irrelevant in Horse Protection Act cases. Numerous offers of proof should be considered as evidence. An attorney for either party who believes that his witness has made a mistake should be free to ask sufficient questions to probe the matter. Expert witnesses should be permitted to testify as to the ultimate issue. Responsible hearsay is admissible. Affidavits should have been admitted (by the veterinarians who are available to testify in the case and who did testify). Warning letters are not of much significance since they do not establish that a prior violation occurred.

On November 14, 1979, the Judicial Officer affirmed Judge Baker's order dismissing the complaints after she made a specific finding on the basis of the demeanor of the witnesses that Dr. Wood used excessive pressure in palpating the horse. Judge Baker accepted the testimony by respondent's wife and two close friends.

In *In re Jerome G. Roseth and Duwayne E. Burton*, P&S Doc. No. 5650, decided by the Judicial Officer on Jan. 10, 1980 (26 pages), the Judicial Officer affirmed Judge Baker's order suspending respondents for 14 days and until custodial account deficit is eliminated. Complainant permitted respondents to set aside consent decision and order when they said they did not understand that an active 14 day suspension would be in effect. Failing to deposit funds from sale on time amounted to financing respondents and buyers from c.a., which is in violation of Act. Van Wyk and 76 amendments relate to purchases of livestock and are not applicable to

c.a. Violations wilful, but warning letter sent. Respondent Burton permitted to act as dealer after 14 days even though ordinarily registrant-not registration-is suspended.

In *In re Thomaston Beef and Veal, Inc.*, P&S Doc. No. 5674, decided by the Judicial Officer on January 30, 1980 (35 pages), the Judicial Officer adopted Judge Baker's decision assessing a $4,000 civil penalty against a packer for operating without the required bond, issuing NSF checks and failing to pay the full purchase price of livestock. Respondents did not file an answer and there is no basis for misunderstanding as to the answer requirement. Accordingly, the facts are deemed admitted. But, in any event, the fact that respondents' difficulties resulted from the bankruptcy of another company which owed them $75,000 would not be a mitigating circumstance. There is no showing that the individual respondents are unable to pay the penalty.

In *In re Castleberry's Food Co.*, FMIA Doc. No. 36 (2 pages), the Judicial Officer remanded a decision on January 30, 1980, to Judge Palmer in order to permit him to consider a motion for reconsideration.

In *In re Sterling Colorado Beef Co.*, P&S Doc. No. 5201, decided by the Judicial Officer on February 12, 1980 (132 pages), the Judicial Officer reversed Judge Baker's findings and conclusions. Findings may be reversed if based on documentary evidence or inferences. Sterling violated the Act by changing weights (with pencil) of carcasses and changing grades and eliminating deductions. Ceres violated by failing to notify its customers of the changes. An agent has a duty to make full disclosure to a principal. Ceres is a market agent if it charges a commission or a dealer if it does not. The Act does not require that a dealer be a speculator or that he be engaged in the sole business of buying or selling livestock. Legislative history as to farmers discussed. An agent is one who acts for another. A private party cannot alter an act of Congress and cannot exclude himself from coverage as an agent merely by stating in a contract that he is not an agent. Solomon Valley feedlot case distinguished and criticized. P&S bond applies to purchaser for disclosed principal which principal pays for the livestock. Old laws apply to changed situations so that if the changed situation fits the terms of the Act, even though not contemplated originally by Congress, it is covered. Broad legislative history of Act set forth. Where an amendment is defeated, the legislative intent is not to be construed as embracing the effect of the language rejected. Sterling's dual price system was an unfair preference to shareholders and was not justified by supply contracts since they were not enforced. Sterling's payment of $81,000 to Sonneberg was an undue or unreasonable preference and unfair and was not justified as payments for his kill rights since his default required the purchase of Colossal cattle. Also, if Sterling's capacity was inadequate, shareholders could be reduced pro rata. Sterling violated the Act in giving the difference between the shareholder and the non-shareholder price on CSCC cattle to the Lebsack's. Sterling was required to ascertain from CSCC whether it agreed to this highly unusual deal. C & D appropriate even though violations had ceased. P&S, unlike FTC Act, does not require C & D's to be in the public interest. The Secretary is directed to issue C & D if a packer is violating or has violated. The word shall is the language of command. Public interest requires C & D as to past violation to deter others. Order should not be effective for 60 days so as not to interrupt Sterling's business.

In *In re Baltimore Tomato Co.*, PACA Doc. No. 2-5347, decided by the JO on March 6, 1980 (48 pages), the JO affirmed Judge Palmer's order revoking respondent's license for failing to pay for produce. Complainant's failure to prove no agreement for deferred payment irrelevant since this in no pay case. Failure to prove responsibly connected individuals irrelevant. Sanction evidence erroneously excluded.

In *In re Jerry Seal and Howard Roberts*, HPA Doc. No. 78, decided by the Judicial Officer on April 9, 1980 (6 pages), the Judicial Officer affirmed Judge Weber's default order assessing a $2,000 civil penalty against respondent Seal. There is no basis for setting aside the

default decision. But even if respondent's contentions could be considered, the owner of a horse is responsible for the acts of his trainer.

In *In re King Meat Co.*, FSQS Docket No. 4 (4 pages), the Judicial Officer remanded the proceeding on April 9, 1980, to Judge Baker. She erroneously failed to give binding weight to an instruction interpreting a regulation, which was brought to respondent's attention. The instruction is controlling unless unreasonable, plainly erroneous or inconsistent with the regulation. Also, the public interest requires further evidence as to whether arm chucks are subprimal cuts within the meaning of the regulations. Administrative construction as to this was also brought to respondent's attention and is binding under the same conditions stated above.

In *In re Pastures, Inc.*, P&S Docket No. 5690 (12 pages), decided by the Judicial Officer on April 21, 1980, the Judicial Officer affirmed Judge Baker's default order requiring respondents to cease and desist from operating while insolvent, issuing n.s.f. checks, and failing to pay when due for livestock. The individuals owning and operating the packing company were assessed a $2,500 civil penalty. There is no basis for setting aside the default merely because respondents did not know an order would be issued against them as individuals. There is no basis for a stay pending respondents' bankruptcy proceeding.

In *In re Apex Meat Co.*, FSQS Docket No. 5, decided by the Judicial Officer on May 8, 1980 (38 pages), the Judicial Officer reversed Judge Baker's order withdrawing meat inspection and grading for respondents for 60 days for violating the consent bribery order. Isolation provisions construed. Entrapment is a defense. No violations proven. If the order had been violated, it would have been inappropriate to change the agreed sanction.

In *In re Kafcsak*, PACA Docket No. 2-5307, decided by the Judicial Officer on May 15, 1980 (49 pages), the Judicial Officer reversed Judge Baker's decision which published the facts as to respondent's failure to pay for produce, but fixed the effective date of the order in determining his eligibility for employment as of April 11, 1977, which is prior to the issuance of the complaint in this case. Bankruptcy is no defense for failure to pay. 1978 bankruptcy legislation cited. Where a seller agrees to accept partial payment, that is not full payment. There is no need to show wilfulness since no license is being suspended or revoked. The act calls for payment - not excuses. Esposito mitigating circumstances incorporated by reference. An expired license can be suspended or revoked. A suspension order would not have been appropriate here because of the payment violations. Where there is a failure to pay, it is the Department's policy to revoke a license or publish the facts, which has the same effect as license revocation. The collateral effects of the order on respondent are prescribed by Congress, and they are consistent with the Department's severe sanction policy. The restrictive rules followed in court proceedings are not followed here, such as to limit cross-examination to direct-examination.

In *In re Agar Food Products Co.*, FMIA Doc. No. 37, decided by the Judicial Officer on June 17, 1980 (16 pages), the Judicial Officer affirmed Chief Judge Campbell's decision setting aside the Administrator of FSQS's determination that respondent's product may not be labeled "Ham Balogna." Under the regulations, the term designating the species must be used, but ham adequately describes the species swine. Although another produce containing chucks of ham is labeled "Ham Balogna," there is little chance that buyers would be misled, and in any event, if respondent's product were labeled "Pork Balogna," as determined by the Administrator, many buyers would be misled into believing that it was not made with ham as the only meat ingredient.

In *In re Utica Packing Co.*, FMIA Doc. No. 35, decided by the Judicial Officer on June 25, 1980 (26 pages), the Judicial Officer affirmed Judge Palmer's order withdrawing inspection service indefinitely from respondent under the Federal Meat Inspection Act because the president and half-owner of respondent was convicted of a felony under 18 U.S.C. § 201(b) of bribing the supervisor of the meat inspectors at respondent's plant on four occasions. However, the sanction

will not be imposed if respondent's president is disassociated from respondent within 90 days and disposes of his stock within one year. The complaint was adequate to advise respondent of the matters at issue. Withdrawal of inspection service is not a punitive order beyond the remedial powers that may be conferred upon an administrative agency. It is not appropriate to consider the constitutional issues raised by respondent. The agency may define and apply policy in the context of an adjudicative proceeding without previously engaging in rule making. The statutory language authorizing withdrawal of meat inspection, 21 U.S.C. § 671, indicates that inspection service is to be withdrawn, because a responsibly connected individual has been convicted of some felony, and if that section is ever to be applied, it must be applied here, in view of the nature of the felony conviction involved here. It is not our function to reweigh the evidence to determine whether the felony conviction was warranted. It is not appropriate to consider other facts and circumstances as to the convicted felon's reputation in the community or as to present conditions at the respondent's meat plant. Norwich Beef case, 38 Agric. Dec. 380, distinguished. It would be inappropriate to determine whether it is likely that a future attempt will be made to bribe a meat inspector. Even where the public health is not involved, and a license is being suspended for a violation of a remedial statute, a "second chance" is not given in the case of serious and wilful violations, and a sanction is imposed without any determination that it is likely that respondent will again violate the act in the future. It is hoped that the order will not adversely affect respondent's community, but sanctions are imposed even where the order will cause damage to respondent's community, customers or employees. Whether lesser sanctions have been imposed in consent cases is irrelevant, but in any event, the sanction here is consistent with the Department's present policy, and it is the Department's policy to increase the sanction, where appropriate, in the present case rather than merely announcing that in future cases the sanction will be increased. The provisions of the proposed order under which inspection service would be withdrawn if respondent or certain persons associated with respondent were convicted of certain crimes within three years is omitted since the statute affords sufficient basis to withdraw inspection service where appropriate if future crimes are committed.

In *In re MCM Livestock, Inc.*, P&S Doc. No. 5639, decided by the Judicial Officer on July 16, 1980 (18 pages), the Judicial Officer reversed Judge Palmer's order and extended the cease and desist order to include the individual respondent McAninch. Respondents failed to deposit in their custodial account the amounts required by the regulations, permitted an employee of a firm buying livestock as a dealer at the market to serve as weighmaster, and added an arbitrary number of pounds to sale's weights when selling livestock previously purchased by respondents. The corporate respondent was suspended for 120 days. A cease and desist order and a $3,000 civil penalty was assessed against the general manager of the firm whose wife owned one-third of the shares. The cease and desist order was also extended by the Judicial Officer to include the president of the firm whose wife owned two-thirds of the stock. He did not have personal knowledge of the violations but knew of the firm's prior custodial account violations and he had been given a general warning by P&S about the way the firm's general manager conducted business affairs.

In *In re Dr. Lucas*, VA Docket No. 11, decided by the Judicial Officer on August 5, 1980 (11 pages), the Judicial Officer affirmed Judge Weber's decision suspending respondent's accreditation as a veterinarian for 120 days for permitting the sale of 14 pigs at a public market which showed symptoms of being infected with atrophic rhinitis. Since respondent's conduct was wilful, no prior notice was required.

In *In re Mountainside Butter & Egg Co.*, I&G Docket No. 64, decided by the Judicial Officer on August 19, 1980 (21 pages), the Judicial Officer affirmed Judge Palmer's decision withdrawing inspection services for 12 months because of respondent's violations of a consent order. Testimony by respondent's president as to present compliance with the regulations was not considered as evidence since the testimony, offered at the remand hearing, was beyond the scope of the remand order. In addition, even if such testimony had been considered as evidence,

evidence of current compliance with a regulatory program is totally irrelevant in determining the sanction for past violations. Furthermore, the withdrawal of inspection services for 12 months is not a sanction imposed for the present violations. The present violations merely triggered the sanction previously agreed to by respondent in the consent order.

In *In re Mrs. Martin*, AWA Docket No. 126, decided by the Judicial Officer on August 25, 1980 (5 pages), the Judicial Officer affirmed Judge Baker's order requiring respondent to cease and desist from violations and assessing a civil penalty of $500. The complaint charged respondent with selling or offering for transportation in commerce animals without being licensed as a dealer, and failing to meet the minimum facility and operating standards for dogs under the Animal Welfare Act. Respondent failed to file an answer or any other document until more than five months after her answer was due and therefore there is no basis for considering her contentions at this time.

In *In re Sharon*, AWA Docket No. 128, decided by the Judicial Officer on September 11, 1980 (5 pages), the Judicial Officer affirmed Judge Weber's default order ordering respondent to cease and desist from certain violations and assessing a civil penalty of $170.

Fiscal Year 1981

In *In re Great Western Packing Co.*, FSQS Docket No. 9, decided by the Judicial Officer on November 5, 1980 (29 pages), the Judicial Officer reversed Judge Weber's decision and activated the withdrawal and denial of Federal meat inspection services and Federal meat grading and acceptance services from respondents for violations of a prior consent order. The consent order requires Great Western to isolate Dale Clark completely from all functions of its business that call for his direct contact or communication with local meat inspectors or graders and to assure that Clark will not contact them with respect to any matter covered by the consent order. The Judicial Officer held that these requirement are violated if in the normal course of Clark's duties direct contact or communication with inspectors or graders can reasonably be expected; or if Clark discusses any matter involving meat inspection, meat grading or acceptance services with local inspectors or graders.

The words "shall," "isolate," "completely" and "all" are broad and forceful terms in the consent order which must be given effective meaning. An inference is drawn that the testimony of two witnesses who were not called by respondents, but who would have been expected to testify for them, would have been adverse to respondents. The sending of a warning letter does not preclude the later filing of a formal complaint based upon the same circumstances because equitable estoppel does not apply to the Government acting in its sovereign capacity. Great Western knew of, acquiesced in, or had opportunity to discover and prevent the violations of the consent order. The effective date of the order is delayed for 60 days to permit Great Western to make changes which might convince the administrative officials that inspection, grading and acceptance services can be provided to Great Western without jeopardizing the integrity of the Federal programs.

In *In re LeaVell*, P&S Docket No. 5707, decided by the Judicial Officer on December 4, 1980 (two pages), the Judicial Officer dismissed an appeal from an order by Judge Baker denying a motion to dismiss for lack of jurisdiction inasmuch as the Rules of Practice do not permit interlocutory appeals.

In *In re Livolsi*, HPA Docket No. 111, decided by the Judicial Officer on December 8, 1980 (18 pages plus appendixes), the Judicial Officer reversed Judge Palmer's decision assessing civil penalties of $1,000 and $350 against respondents and increased the penalties to $2,000 and $1,000, for showing a sored horse. It is not a mitigating circumstance that the horse was treated better under respondent's ownership than under previous ownership. Soring horses is cruel and may harm the breed. The owner of a sored horse must be held responsible for the violation. The penalty as to the trainer would normally be $2,000 but is reduced to $1,000 because of his financial condition. It is not necessary to determine whether the trainer committed a separate violation by transporting the horse in a shored condition. However, in appropriate circumstances, an inference may be drawn that a horse was sored when transported even though the horse was not examined on the earlier date.

In *In re Wyszynski Provision Co.*, FMIA Docket No. 41, decided by the Judicial Officer on February 13, 1981 (20 pages), the Judicial Officer agreed with the order but not the reasoning of Judge Baker in withdrawing inspection service indefinitely from respondent because of felony convictions, but with the order to be suspended so long as Walter J. Wyszynski, the firm's former vice-president who was responsible for the violations, is not associated with the firm and the respondent does not violate the Act within three years. The felony convictions resulted from the surreptitious addition of sodium sulfite to meat products when the inspector was not present. As in the case of bribery of a meat inspector, this type of felony compels the determination that respondent is unfit to receive inspection service. Other circumstances relating to the respondent's past or present compliance with the Act are irrelevant. It is not necessary to determine that a subsequent violation will likely occur. The criminal fines and adverse publicity resulting from the criminal convictions are also irrelevant. Since the felony convictions warrant the withdrawal

of inspection service from respondent, respondent is not in a position to question the conditions under which complainant is willing to continue to provide inspection service, but in any event, Walter J. Wyszynski should be completely disassociated from the firm.

In *In re Crowder, Hale, and Groover*, HPA Docket Nos. 74, 75 and 82, decided by the Judicial Officer on February 24, 1981 (17 pages), the Judicial Officer affirmed Judge Campbell's order assessing $2,000 penalties against Crowder and Hale and disqualifying them for one year because of soring violations. The complaint against Groover was dismissed. The Administrative Law Judge was in the best position to determine the credibility of the witnesses. The owner of the horse is responsible even though he had a contract with the trainer relieving the owner of liability. The owner is assessed the same penalty even though he had no control of the trainer's activities. Groover rode the horse only as a favor to respondent and received no compensation for riding it. He was not culpable. The fact that the horse was not written up as sored two days earlier is not sufficient to overcome the evidence.

In *In re Columbus Fruit Co.*, PACA Docket No. 2-5538, decided by the Judicial Officer on February 25, 1981 (13 pages), the Judicial Officer reversed Judge Campbell's decision (which had suspended respondent's license for 90 days and suspended the suspension on condition respondent is current in all payments within about eight months), and revoked the license for failure to pay. Respondent's violations involved a large number of transactions and were repeated; in view of the large amount of money and number, they were flagrant; and also they were wilful. The Act calls for payment - not excuses. If respondent were to be given eight months to comply, same result would have to be followed in all other similar cases, leading to damage in some.

In *In re Gallop*, AWA Docket No. 155, decided by the Judicial Officer on March 4, 1981 (2 pages), the Judicial Officer vacated the default decision and remanded the proceeding to determine whether there was just cause for failing to file an answer.

In *In re Martin*, HPA Docket No. 127, decided by the Judicial Officer on March 11, 1981 (6 pages), the Judicial Officer affirmed Judge Palmer's order dismissing the complaint under the Horse Protection Act, because of the weight that must be given to the findings of fact by the Administrative Law Judge who saw and heard the witnesses testify. The Judicial Officer expressed his personal view that the Horse Protection Act should be repealed, and that the formal procedure before Administrative Law Judges and the Judicial Officer should not be followed.

In *In re United Fruit and Vegetable Co., Inc.*, PACA Docket No. 2-5536, decided by the Judicial Officer on April 3, 1981 (19 pages), the Judicial Officer affirmed Judge Weber's decision revoking respondent's license for payment violations. Respondent was not denied due process because his records were seized by the FBI. Failure to pay is a serious violation. A suspension or revocation order can be issued notwithstanding the termination of the license. An order finding a repeated or flagrant violation has the same effect as a license revocation. A number of violations are repeated even though occurring during a short period of time resulting from a single financial setback. A violation is flagrant if it involves a substantial sum of money or results from a licensee entering into transactions knowing that its financial condition is such as to make violations likely. The Act calls for payment - not excuses. Even if respondent's creditors accepted partial payment in full satisfaction of the debts (because of respondent's bankruptcy), that would not constitute full payment.

In *In re Mirman Brothers, Inc.*, FSQS Docket No. 15, decided by the Judicial Officer on April 3, 1981 (12 pages), the Judicial Officer affirmed Judge Palmer's decision denying meat grading and acceptance services for three years because respondent delivered meat products accompanied by documents falsely purporting to be official certificates certifying compliance with contractual provisions. The violation would not be lessened if the documents were

produced by altering photocopies rather than originals of the official certificates. It is not necessary to prove who made and issued the false documents. The variance between the complaint and the proof is not significant. The Agricultural Marketing Act of 1946 does not provide for subpoena power, but respondent's inability to subpoena witnesses was not prejudicial.

In *In re Woosley*, HPA Docket No. 131, decided by the Judicial Officer on April 28, 1981 (5 pages), the Judicial Officer affirmed Judge Palmer's decision imposing a $1,000 penalty against respondent Woolsey for entering and exhibiting a sore horse at the Tennessee Walking Horse National Celebration, Shelbyville, Tennessee on August 25, 1978.

In *In re King Meat Packing Co., Inc., and In re Union Packing Co.*, P&S Docket Nos. 5576 and 5579, decided by the Judicial Officer on May 1, 1981 (7 pages), the Judicial Officer affirmed Judge Palmer's decision that the meat packers and their officers did not enter into a conspiracy with a broker to bribe a chain store's meat buyer to give the packers unfair and undue preference in purchasing meat. However, the Judicial Officer reversed Judge Palmer's decision holding that King Meat and its officers paid unlawful brokerage commissions to a broker who was also an officer of the buyer. The payment of brokerage commissions to an officer of the buyer would have been unlawful if the seller knew, or should have known, of the broker's status with the buyer. However, there is no basis for holding that King Meat should have known that Mike Kneubuhl was involved in the management of B.F. Kneubuhl, Inc. The payment of a brokerage commission by the seller is customary even where the broker acts for the buyer. The payment of two brokerage commissions is not unusual in export transactions. Evidence that respondents knew that the broker was "a purchasing agent buyer for B.F. Kneubuhl" is consistent with respondents' view that they thought he was just a broker.

The mere fact that the broker has the same last name as the buyer is not sufficient to hold that the seller had a duty to inquire as to the broker's status with the buyer since (i) there was a 5,000 mile distance between the parties, (ii) there were only a few isolated transactions, (iii) there is no litigated case under the Act as to important issues, and this case is not as strong factually as desirable for a test case, and (iv) the violations occurred long ago.

In *In re Naraghi*, AMA Docket No. F&V 981-1, decided by the Judicial Officer on May 5, 1981 (3 pages), the Judicial Officer dismissed an interlocutory appeal filed by the Department, relating to the California almond marketing order, on the ground that the rules of practice do not provide for interlocutory appeals. The Department sought to prevent the taking of oral depositions for discovery purposes which had been permitted by Judge Palmer. Although without jurisdiction to consider the matter, the Judicial Officer indicated that it is by no means certain that the Department's position would have sustained, and recommended that the rules of practice be amended if the Department wishes to prevent the use of depositions for discovery purposes in marketing order cases.

In *In re Toscony Provision Co.*, FMIA Docket No. 40, decided by the Judicial Officer on May 6, 1981 (13 pages), the Judicial Officer affirmed in part and reversed in part an order by Judge Palmer withdrawing federal meat inspection service from respondent because respondent and its president were convicted of the felony of knowingly distributing adulterated meat food products, viz., sausage to which an industrial chemical had been added to preserve its fresh appearance. The Judicial Officer affirmed the indefinite withdrawal of inspection service, which was suspended on condition that the firm's president is not associated with respondent in any manner and sells his stock, and the firm does not violate the Act within two years. Judge Palmer's actual 30 day withdrawal of inspection service was set aside because the complainant had not requested a similar actual withdrawal of inspection service in three recent, similar cases. There was nothing in the record to distinguish the three cases, and complainant did not purport to be announcing a new policy in this respect. It is the Department's policy to impose uniform sanctions in contested cases for comparable violations of a particular regulatory Act. In view of the nature of the felony convictions, it was not appropriate to consider other facts and

circumstances relating, e.g., to the reputation or prior good conduct of the firm and its president, or whether it is likely that they will again commit a similar felony.

In *In re Naraghi*, AMA Docket No. F&V 981-1, on May 19, 1981 (5 pages), the Judicial Officer quashed a subpoena to take an oral deposition for discovery purposes. He stated that the marketing order rules of practice do not expressly prohibit depositions for discovery purposes, and that they should be amended if that is the Secretary's policy. However, he quashed the subpoena to avoid expense and loss of time to the deponent, who is willing to testify in the administrative hearing. If the petitioner is surprised by the deponent's testimony at the administrative hearing, a continuance may be granted. However, a continuance might not be necessary since petitioner seems to be seeking to challenge the wisdom of desirability of the order based on the factual situation he proposes to present at the administrative proceeding. That can only be done in a legislative proceeding. The Judicial Officer did not rule on a similar request filed by the California Almond Growers Exchange to quash all of the similar subpoenas issued by the Administrative Law Judge inasmuch as the Exchange is not a party.

In *In re Mel's Produce, Inc.*, PACA Docket No. 2-5690, decided on June 17, 1981 (5 pages), the Judicial Officer dismissed respondent's petition for reconsideration since it was filed after the default decision became final, and, therefore, the Judicial Officer has no jurisdiction to consider the matter. But even if the petition could have been considered, it would have been dismissed. Respondent contends only that it paid in full for many of the transactions referred to in the complaint, but the Act requires payment for all transactions. The license of a violator who fails to pay for produce is revoked irrespective of excuses why payment could not be made.

In *In re Dude Crowder*, HPA Docket No. 75, decided by the Judicial Officer on June 30, 1981 (3 pages), the Judicial Officer denied complainant's petition requesting that the one-year disqualification of respondent for soring a horse be terminated. Complainant contends the disqualification order has caused financial difficulties for respondent and prevented him from paying the $2,000 civil penalty. But it is more important to have an effective order to deter future violations than to collect the civil penalty. The administrative officials can compromise or remit the penalty. It was recognized when the order was issued (for respondent's third violation) that it would cause financial difficulties. Nonetheless, if complainant files another petition requesting that the one-year disqualification be terminated, the motion will be granted since it is the policy of the Judicial Officer not to impose sanctions more severe than those desired by the administrative officials, but the case would control all comparable, future cases under the Horse Protection Act, and would make it difficult for complainant to justify a disqualification order against a horse trainer in any future case.

In *In re De Graaf Dairies, Inc.*, AMA Docket No. M2-72, decided by the Judicial Officer on July 9, 1981 (49 pages), the Judicial Officer issued a tentative decision and order reversing Judge Liebert's decision, which would have granted the dairy complete relief from the Market Administrator's determination that it owed $906,782.54 for fraudulently failing to report sales of milk and using skim powder for reconstitution rather than fortification. The Judicial Officer agreed with Judge Liebert that the Market Administrator's method of determining the dairy's obligations (based on a reconstruction of its sales using computations and projections based on the volume capacity of milk containers it purchased) was invalid, and that the chemical analyses of its milk did not support the Market Administrator's determination that all of its skim milk powder was used for reconstitution. But the Judicial Officer directed the Market Administrator to recompute the dairy's obligations based on its known unreported sales in 1975, increased by 5% to allow for undiscovered sales, and increased by the amount of its shrinkage on its reported sales, to determine the amount of its additional obligations for 1975. The dairy's additional obligations from July 19, 1968, through 1974 are to be determined by assuming that it underreported its obligations in the earlier years in the same proportionate amount as in 1975. It was held that the dairy has the burden of proof except for fraud; that fraud avoids the two-year

limitation provision; that it is inferred that the testimony of potentially key witnesses for the dairy who failed to testify would have been adverse; that although anonymous letters are usually entitled to no weight (and they were not relied on here), they could have been relied on in this case, if necessary, since they were corroborated in many ways; that material placed on the blackboard for the benefit of the Administrative Law Judge should be copied for the record; and that statements in the government's brief relying on boxes of data received in evidence but stored in the Market Administrator's office are valueless in the absence of an exhibit analyzing the data. The parties were afforded an opportunity to file briefs with respect to the tentative decision.

In *In re C.B. Foods, Inc.*, PACA Docket No. 2-5544, decided by the Judicial Officer on July 13, 1981 (14 pages), the Judicial Officer adopted Chief Judge Campbell's initial decision an order finding that respondent has committed repeated, flagrant and wilful violations of the Perishable Agricultural Commodities Act by failing to pay for $179,897.00 worth of produce. It was held that the transactions were in commerce even though the immediate transactions between respondent and its suppliers took place within Pennsylvania and the produce was to be used by respondent in Pennsylvania, since it had been sent to the respondent's suppliers from other states. The PACA disciplinary proceeding is not subordinate to respondent's bankruptcy proceedings. Respondent's violations were wilful, but even if not, it would be of no consequence in this case since this cases does not involve the suspension or revocation of a license, but merely a finding that respondent has committed flagrant or repeated violations of the Act.

In *In re C.B. Foods Inc.*, PACA Docket No. 2-5544, decided by the Judicial Officer on July 13, 1981 (14 pages), the Judicial Officer adopted Chief Judge Campbell's initial decision and order finding that respondent has committed repeated, flagrant and wilful violations of the Perishable Agricultural Commodities Act by failing to pay for $179,897.00 worth of produce. It was held that the transactions were in commerce even though the immediate transactions between respondent and its suppliers from other states. The PACA Disciplinary proceeding is not subordinate to respondent's bankruptcy proceedings. Respondent's violations were wilful, but even if not, it would be of no consequence in this case since this case does not involve the suspension or revocation of a license, but merely a finding that respondent has committed flagrant or repeated violations of the Act.

In *In re Happy Valley Farms*, AMA Docket No. F&V 917-1, decided by the Judicial Officer on July 14, 1981 (2 pages), the Judicial Officer denied petitioner's application for interim relief seeking permission to market its russeted organic pears under Marketing Order No. 917. The Pear Commodity Committee of the California Tree Fruit Agreement has recently made recommendations for a new regulation which would allow petitioner to market its russeted organic pears, and the Department is currently in the process of preparing such a regulation to be effective August 1, 1981. Therefore petitioner has failed to demonstrate that interim relief is necessary, but petitioner may file a new petition if the proposed regulation is not issued.

In *In re John Waller*, Plant Variety Protection Appeal Application No. 7200036, decided by the Judicial Officer on July 14, 1981 (7 pages), the Judicial Officer reversed the determination by the Commissioner of the Plant Variety Protection Office denying petitioner's application for protection of his "Redskin" dahlia. The Commissioner was originally willing to consider petitioner's dahlia as entitled to protection because of its novelty, consisting of a dwarf dahlia with dark bronzed leaved foliage, but later determined that petitioner would also have to develop a uniform flower color. However, the Act requires uniformity only in the sense that any variations are describable, predictable and commercially acceptable. The Commissioner did not determine that the variations in the flower colors of the Redskin dahlia were not describable, predictable and commercially acceptable. Statutory definitions control over the popular understanding of the term uniformity. The case was remanded to the Commissioner to redetermine petitioner's application, considering petitioner's variations in flower color as being in

compliance with the standard of uniformity if the variations in flower color are describable, predictable and commercially acceptable.

In *In re Oklahoma Beef and Provision Co.*, FMIA Docket No. 38, PPIA Docket No. 3, decided by the Judicial Officer on July 15, 1981 (5 pages), the Judicial Officer reversed Judge Liebert's decision which would have dismissed complainant's action seeking a five-year denial of inspection services because respondent and its president were convicted of certain crimes. Judge Liebert held that the case was moot because the agency voluntarily withdrew inspection when respondent ceased operations, but the Judicial Officer held that the voluntary withdrawal of inspection was unrelated to the present case and did not make the case moot. The case was remanded to the Administrative Law Judge for a determination on the merits.

In *In re Hugh Reynolds*, ERCIA Docket No. 2, decided by the Judicial Officer on August 12, 1981 (7 pages), the Judicial Officer ruled, in response to a question certified by the Administrative Law Judge, that the amendment to the Egg Research and Consumer Information Act enacted in 1980, which authorizes the Secretary to assess civil penalties, applies to violations occurring from 1976 to 1979, provided that the complainant does not seek penalties in excess of the civil penalties previously authorized to be collected in a district court proceeding, and the complainant does not apply the $500 minimum penalty provision of the 1980 legislation. Generally, substantive legislation is construed to operate prospectively only, and remedial or procedural changes are construed to operate retroactively. In this case, although Congress in 1980 increased the penalty from $1,000 to $5,000, and imposed a $500 minimum (which were substantive changes), the complainant construes the 1980 legislation as applying only the procedural changes to previously occurring violations, and not the changes in the amount of the authorized penalty. Since (i) complainant's construction is in accord with the legislative intent, (ii) it is a contemporaneous construction of the Act by administrative officials charged with enforcing the Act, and (iii) courts are frequently willing to stretch statutes to carry out the spirit rather than the letter of a statute, I am upholding complainant's position, although I do not personally agree with it. In my view, the Department and Congress should have foreseen the possibility of violations occurring prior to the amendatory legislation, and should have drafted express provisions to apply the procedural changes to previously occurring violations. I would not avoid the unfortunate results of careless draftsmanship in this case by stretching the statute.

In *In re Landmark Beef Processors, Inc.*, FSQS Docket No. 14, decided by the Judicial Officer on August 13, 1981 (27 pages), the Judicial Officer affirmed Chief Judge Campbell's order withdrawing meat grading and acceptance services from respondent for 30 days, and for an additional 11 months with respect to its steak department. Respondent's employees intentionally shipped steaks to the Department of Defense which did not comply with the contract and embarked upon a scheme to evade the Department's (spot check) acceptance service. It is no defense that inexperienced graders may have facilitated respondent's violations. The actions of respondent's quality control officer, who ordered the illegal actions, were to benefit respondent and in turn promote his personal position with the organization, and were not outside the scope of his employment. The southern California bribery consent decisions are irrelevant in this litigated proceeding.

In *In re Connecticut Celery Co.*, PACA Docket Nos. 2-5582 and 2-5603, decided by the Judicial Officer on August 24, 1981 (29 pages), the Judicial Officer affirmed Judge Weber's decision revoking respondent's license and denying its application for a new license for failing to pay over $400,000 for produce. However, the decision reverses Judge Weber's reasoning in his initial decision. Failure to pay for produce is a very serious violation warranting revocation. It is the policy of the Department to impose severe sanctions for serious violations. Respondent's violations were repeated and flagrant. An agreement to extend the payment date after the contract is entered into is irrelevant for regulatory purposes. Excuses why respondent could not pay are irrelevant. The 1978 bankruptcy law does not prevent revocation in the case of

bankruptcy. Although a terminated license can be suspended or revoked, a finding that respondent has committed flagrant or repeated violations has the same regulatory significance as revocation and, therefore, it is not necessary to also revoke respondent's license.

In *In re Wayne Cusimano, Inc.*, PACA Docket No. 2-5531, decided by the Judicial Officer on August 26, 1981 (11 pages), the Judicial Officer affirmed Judge Weber's decision revoking respondent's license for failure to pay over $136,000 for produce. Respondent's business difficulties preventing payment are irrelevant. Respondent consented to the Department's investigator searching its files and therefore there is no basis for a constitutional argument relating to the investigation of this case. The allegations of the complaint were proven by respondent's business records, which are not hearsay, but responsible hearsay is admissible in an administrative proceeding.

In *In re Moser Farms Dairy, Inc.*, AMA Docket No. M 1-7, decided by the Judicial Officer on September 9, 1981 (8 pages), the Judicial Officer agreed with the Administrator's argument that he has no authority to grant interim relief to a milk handler challenging the validity of obligations imposed by the Market Administrator of a milk order, where the Department has filed an enforcement action in court. The same result would necessarily follow if an enforcement action is about to be filed. The Agricultural Marketing Agreement Act provides for enforcement issues to be determined in district court proceedings, and for the underlying issues presented by a handler's claim to be determined by the agency. If enforcement is not contemplated by the administrative officials, the handler has, in effect, been granted interim relief by the administrative officials, and, therefore, the handler could not demonstrate the need for the Judicial Officer to grant interim relief. Accordingly, the granting of interim relief by the Judicial Officer in milk cases is either not authorized or inappropriate. The rules of practice should be amended to prevent the needless filing of applications for interim relief by milk handlers in future cases. Whether this ruling applies to handlers other than milk handlers will be left for determination in a future case.

In *In re Castleberry's Food Co.*, FMIA Docket No. 36, decided by the Judicial Officer on September 18, 1981 (39 pages), the Judicial Officer reversed Judge Palmer's order and required respondent to label its product "Imitation Corned Beef Hash." Respondent's product is an imitation of Corned Beef Hash because of its looks, taste, smell, ingredients, method of preparation, and manner of marketing. It is nutritionally inferior to Corned Beef Hash. Therefore, it must be labeled "Imitation Corned Beef Hash." If I had discretion, I would not require the imitation label because it may be misleading to consumers, but the statute permits no discretion.

In *In re Stevens Foods, Inc.*, FSQS Docket No. 10, decided by the Judicial Officer on September 25, 1981 (28 pages), the Judicial Officer affirmed Judge Liebert's decision withdrawing and denying federal meat inspection services and federal meat grading and acceptance services because of respondents' 48 felony convictions in connection with meat transactions. The felonies involved conspiring to defraud the Department of Defense, giving gratuities to federal inspectors, and causing false inspection certificates to be presented to the Department of Defense. In view of the seriousness of the felony convictions, it is not appropriate to consider any other facts and circumstances, such as respondents' reputation in the community or present compliance with the Act. However, even if mitigating circumstances were to be considered, they would not change the result. Although the felony convictions do not involve the wholesomeness of the meat or the sanitary conditions at the plant, the Federal Meat Inspection Act is not concerned only with such conditions. Congress was also concerned with the injury to purchasers, and the economic advantage gained by packers, where a meat product is misrepresented. Although the gratuities were given to a meat inspector rather than a meat grader, the inspector was "authorized to perform" grading functions and therefore it is appropriate to withdraw grading and acceptance services from respondents.

Fiscal Year 1982

In *In re Preach Fleming*, HPA Docket No. 152, decided by the Judicial Officer on October 6, 1981 (14 pages), the Judicial Officer affirmed Chief Judge Campbell's decision imposing a penalty of $2,000 against respondent and disqualifying him under the Horse Protection Act for exhibiting a sore horse. The meaning of a sore horse is sufficiently defined by Congress and is determinable by the observation techniques utilized by USDA veterinarians.

In *In re King Meat Company*, FSQS Docket No. 4, decided by the Judicial Officer on October 21, 1981 (69 pages), the Judicial Officer withdrew meat grading from respondent for 45 days for removing the yield grade designations (but not the quality grade designations) from 100 beef arm chucks shipped to a chain store on October 17, 1977, that had not been "substantially trimmed of external fat," as required by the regulation. In addition, the violation triggered the 12-month withdrawal of grading services based on a prior consent decision which was entered into as a result of the Southern California bribery cases. The decision reverses Judge Baker's initial decision, which dismissed the complaint. A beef arm chuck is not a "subprimal" cut exempt from the substantial trimming requirement. An agency's interpretation of its own regulation is controlling unless capricious, irrational or inconsistent with the regulation. If the administrative construction had not been brought to respondent's attention, that would have been relevant in determining the sanction. The administrative instruction interpreting the regulation is an interpretative rule which is not subject to the notice and comment provisions of the Administrative Procedure Act. A person who has actual notice of a regulatory requirement is bound even if it is not published in the Federal Register. In view of the presumption of regularity supporting the official acts of the Chief of the Meat Grading Branch, it is presumed that he had authority to issue the instruction. There is a presumption of the existence of a state of facts justifying the administrative instruction. In re Agar distinguished. Merely because a determination as to substantially trimmed is subjective in some respects does not mean that it is unenforceable. An administrative law judge's findings may be reversed where documentary evidence or inferences are involved. An inference is drawn against respondent because its vice-president did not disagree with the graders' serious charges at the time they were made. Since a key employee of respondent who "probed" the arm chucks to determine the thickness of the fat cover was not called as a witness, it is inferred that his testimony would have been adverse to respondent. The additional 12-month suspension is not imposed for the violation here but, rather, the present violation merely triggers the suspension previously agreed to by respondent for the bribery offenses.

In *In re Magic Valley Potato Shippers, Inc.*, PACA Docket No. 2-5671, decided by the Judicial Officer on October 28, 1981 (34 pages), the Judicial Officer reversed Judge Weber's order suspending respondent for 60 days for shipping 9 lots of misbranded potatoes, and reduced the suspension for 30 days. It is irrelevant that respondent had no intent to defraud. Department's severe sanction policy explained. Although great weight is given to administrative recommendation (90 days), it is not controlling. A more severe sanction would have been imposed except for respondent's "innocence of mind." The suspension order should be effective during respondent's heavy shipping season so as to be an effective deterrent. Respondent's exceptionally large size is a relevant consideration in determining the sanction. If a sanction imposed by the Judicial Officer is reduced upon the withdrawal of respondent's appeal, the reduced sanction becomes the new standard controlling future cases.

In *In re Thomas Burton, Jr.*, HPA Docket No. 154, decided by the Judicial Officer on November 25, 1981 (13 pages), the Judicial Officer affirmed Judge Palmer's decision assessing a $2,000 civil penalty against respondent and disqualifying him from exhibiting any horse for one year because, as owner, he permitted the showing of a horse which was sore. The Act, as amended, confers jurisdiction over all horses shown at any horse show. The owner is fully responsible for his trainer's conduct in soring a horse.

In *In re George Blades*, HPA Docket No. 173, decided by the Judicial Officer on November 25, 1981 (20 pages), the Judicial Officer reversed Judge Palmer's decision, which assessed a $2,000 civil penalty against respondent and disqualified him from exhibiting any horse for one year. The Judicial Officer increased the disqualification period to five years, which is the minimum provided by the statute for a second violation. The owner of a horse is responsible for its soring by the trainer, irrespective of whether he had knowledge of the soring. It is the policy of this Department to impose severe sanctions for serious violations. Respondent's appeal was filed late, but was received since a party may raise new issues in his response to the other party's appeal; i.e., the rules permit a cross-appeal to be made by way of a response to an appeal.

In *In re King Meat Co.*, FSQS Docket No. 4, the Judicial Officer issued an order on December 3, 1981 (17 pages), denying respondent's petition for reconsideration, rehearing and reopening. The petition to reopen is denied because it was filed after the Judicial Officer's decision. But even if it had been timely filed, it would have been denied since the evidence respondent would now adduce was in its possession at the time of the original hearing. Respondent's other arguments are without merit for the reasons previously set forth in the decision. The Department's severe sanction policy is set forth. Litigants have long been on notice that they should introduce evidence as to particular circumstances relating to their business activity that should be taken into consideration in connection with the sanction. Humpty Dumpty quote used.

In *In re Sequoia Orange Co.*, AMA Docket Nos. F&V 907-6 and 907-8, the Judicial Officer issued an order on December 7, 1981 (3 pages), denying motions to dismiss filed by the government, except as to persons who were not handlers subject to the order. The petitioners are challenging Order 907 regulating the handling of Navel Oranges Grown in Arizona and Designated Part of California.

In *In re Rowland*, HPA Docket No. 107, decided by the Judicial Officer on December 9, 1981 (38 pages), the Judicial Officer affirmed Judge Weber's decision assessing a civil penalty of $2,500.00 against the trainer of a sored horse and disqualifying him from exhibiting horses for one year, and a penalty of $1,750.00 against the owner (without a disqualification order). Judge Weber's findings are entitled to weight since he saw and heard the witnesses testify. Affidavits based upon past recollection recorded were properly received in evidence. The fact that a horse passes a pre-show examination can never be a circumstance discrediting complainant's post-show examination where the horse wore action devices in the show ring since the action devices could have raised pain to the level discernible upon the post-show examination. (This is a strong argument in favor of adopting the proposal now being considered to prohibit the use of all action devices in horse shows). The owner or exhibitor of a horse is an absolute guarantor that action devices used during a show will not sore the horse. It is not necessary to show intent. Pre-show examinations are not as thorough as post-show examinations; and an anesthetic can mask pain during the pre-show examination. The Department's veterinarians are not required to consider variables, such as the threshold of pain of the individual horse, the action devices used on the horse, the length of time the horse has been worked, or the track condition of the show ring. The owner of a horse who allows his horse to be exhibited while sore violates the Act irrespective of knowledge or intent. The inclusion of "reason to believe" and "knowingly" in some subsections of the Act while omitting it in the subsection involving owners shows that Congress intended an owner to be held responsible for a sored horse irrespective of knowledge or intent. It is the Department's policy to impose severe sanctions for serious violations. Evidence should be adduced at the hearing relating to the sanction or particular circumstances affecting the sanction. There is no rational basis for imposing a lesser sanction against the owner than against the trainer, but since the Department did not appeal, the sanction will not be increased against the owner in this case. However, in future cases the Judicial Officer will *sua sponte* raise the question as to whether the sanction should be increased irrespective of whether complainant

appeals, and it will be the policy of the Judicial Officer to impose at least the minimum disqualification order permitted by the statute in all Horse Protection Act cases at least until the industry is "cleaned up" to the point that horse soring is not a widespread practice. The decision in Worsley that it is the policy of the Judicial Officer never to increase the sanction recommended by the administrative officials is overruled. The Department's rules of practice permit a party who has not appealed to raise additional issues in his response to the appeal. The Judicial Officer can also raise issues on appeal *sua sponte*.

In *In re M & R Tomato Distributors, Inc.*, AMA Docket No. F&V 966-2, the Judicial Officer issued an order on January 12, 1982 (2 pages), denying petitioner's application for interim relief from the handling regulation issued under Marketing Order 966, Tomatoes Grown in Florida, changing the container weight requirement from 30 pounds to 25 pounds. Petitioner has not shown that it is a handler subject to the order entitled to challenge the regulatory program. But even if petitioner were a handler, it is likely that the application would have been denied because of the disruptive effect of granting the application and the small livelihood of petitioner's success on appeal.

In *In re Joe Fleming*, HPA Docket No. 144, decided by the Judicial Officer on January 15, 1982 (19 pages), the Judicial Officer affirmed Judge Weber's decision assessing a civil penalty of $2,000.00 against respondent, the trainer and exhibitor of a sored horse, and disqualifying him from showing or exhibiting any horse for one year. Judge Weber's findings are entitled to weight since he saw and heard the witnesses testify. Ability to pay is a relevant factor in considering the amount of the civil penalty, but the financial effect of a disqualification order is not a relevant factor in determining whether to issue such an order.

In *In re Moser Farms Dairy, Inc.*, AMA Docket No. M 1-5, decided by the Judicial Officer on January 18, 1982 (42 pages), the Judicial Officer affirmed Chief Judge Campbell's order dismissing the petition filed by a milk handler under the Agricultural Marketing Agreement Act of 1937 challenging obligations imposed by the Market Administrator of Order No. 1, regulating milk in New England. Petitioner complained of overage and shrinkage determinations. The order provisions for separate accounting of butterfat and skim milk and for determining overages and shrinkages are authorized by the statute. Where the interest of producers and handlers clash, the Act favors producers. This is not a forum to challenge questions of policy. Butterfat testing as it now exists in the milk industry is an accurate means of measuring butterfat. Any problems in testing resulting from sampling procedures at the farm bulk tank level are within petitioner's power to control. In challenging the sufficiency of the evidence to support an Order, petitioner has the burden of analyzing the promulgation hearing record. The Market Administrator's interpretation of the Order provisions was valid. Where petitioner kept results from two different testing methods, and always chose the most favorable test, the Market Administrator acted properly in averaging the two types of test results.

In *In re Roberts Enterprises, Inc.*, P & S Docket No. 5777, decided by the Judicial Officer on January 26, 1982 (9 pages), the Judicial Officer reversed Judge Baker's order dismissing the complaint, and ordered respondents to cease and desist from using their own livestock to fill purchase orders on a commission basis without full disclosure and consigning or purchasing livestock under false or fictitious names. Respondent violated his fiduciary obligation as an agent and engaged in an unfair and deceptive practice when he consigned livestock for sale at an auction market and repurchased his own animals for principals without disclosing his ownership. However, since Judge Baker believed respondent's explanation that these violations were inadvertent and unintentional lapses rather than a scheme to make a secret profit from principals. only a cease and desist order is issued. The use of false and deceptive names in the purchase or sale of livestock, even though not done for a sinister purpose, is a violation of the Act and regulations. A cease and desist order should be issued even though the violations are no longer continuing. A complaint specifying particular violations may include a charge of violations at

"divers other times," but where complainant knows the dates of the other violations, complainant should include the dates in the complaint, or else respondent would be entitled to a delay of the hearing to prepare an appropriate defense.

In *In re Alex's Produce*, PACA Docket No. 2-5630, decided by the Judicial Officer on February 3, 1982 (5 pages), the Judicial Officer reversed Judge Baker's decision revoking respondent's license for failure to pay promptly 47 sellers a total of $120,939.15 for 113 lots of produce from October 1979 through March 1980, and suspended respondent's license for 70 days. Revocation is the Department's policy in "no pay" cases, but suspension orders are issued in "slow pay" cases. Although a revocation order could be issued in a "slow pay" case, this case is not an appropriate case for such a change of policy because respondent's payment practice is improving. However, further violations after this order will lead to a more severe sanction.

In *In re Gray*, HPA Docket No. 124, decided by the Judicial Officer on February 17, 1982 (5 pages), the Judicial Officer vacated Judge Liebert's initial decision dismissing the complaint, which alleged that a horse trainer and a horse owner violated the Act by entering and showing a sored horse. Judge Liebert's holding that the horse was not shown because the rider withdrew the horse from competition before completing the show is erroneous. There is no basis for relieving respondents from their stipulation that the horse was shown, and the statute does not require that a horse complete the showing or exhibition to constitute "showing or exhibiting." A violation of the Act does not have to be predicated upon deliberate soring. It is not a necessary part of complainant's proof for the Department's veterinarians to determine accurately the exact procedure used to sore a horse. The fact that the horse was sore on the anterior portion of its legs and not the posterior portion does not discredit evidence that the horse was sore. Judge Liebert's holding that a horse is not "entered" until after it has been cleared by the Show Steward is erroneous. The regulations prohibit all substances from being applied to the extremities of a horse while being shown or exhibited except those expressly authorized, and it is not necessary to show that a substance contained a chemical irritant or caustic which would cause pain to a horse.

In *In re De Graaf Dairies, Inc.*, AMA Docket No. M2-72, decided by the Judicial Officer on March 29, 1982 (76 pages), the Judicial Officer reversed Judge Liebert's decision, which would have granted the dairy complete relief from the Market Administrator's determination that it owed $906,782.54 for fraudulently failing to report sales of milk and using skim powder for reconstitution rather than fortification. The Judicial Officer held that the dairy owes a total of $480,684.30. The Judicial Officer agreed with Judge Liebert that the Market Administrator's method of determining the dairy's obligations (based on a reconstruction of its sales using computations and projections based on the volume capacity of milk containers it purchased) was invalid, and that the chemical analyses of its milk did not support the Market Administrator's determination that all of its skim milk powder was used for reconstitution. But the Judicial Officer directed the Market Administrator to recompute the dairy's obligations based on its known unreported sales in 1975, increased by 5% to allow for undiscovered sales, and increased by the amount of the presumed shrinkage on the unreported sales, to determine the amount of its additional obligations for 1975 (determined to be $88,307.02 owed to the pool and $437.39 for administrative assessments). The dairy's additional obligations from July 19, 1968, through 1974 were to be determined by assuming that it underreported in the earlier years in the same proportionate amount as in 1975 (determined to be $414,859.11 owed to the pool and $2,379.96 for administrative assessments). It was held that the dairy has the burden of proof except for fraud; that fraud avoids the two-year limitation provision; that fraud is usually proved by circumstantial evidence; that it is inferred that the testimony of potentially key witnesses for the dairy who failed to testify would have been adverse; that although anonymous letters are usually entitled to no weight (and they were not relied on here), they could have been relied on in this case, if necessary, since they were corroborated in many ways; that material placed on the blackboard for the benefit of the Administrative Law Judge should be copied for the record; that

statements in the government's brief relying on boxes of data received in evidence but stored in the Market Administrator's office are of little value in the absence of an exhibit analyzing the data; that the case would not be remanded to have the Market Administrator's new computations pursuant to the Judicial Officer's tentative decision placed in the record since petitioner has the burden of proof and failed to make a showing that there is any real dispute as to the computations; that petitioner failed to show an adequate basis for a remand to enable it to introduce new evidence proving that other dairies supplied some of the milk involved in petitioner's contracts to deliver milk to state institutions; that hearsay is admissible; that the Judicial Officer has power to modify the Market Administrator's determinations (without giving petitioner the opportunity to file a new (15)(A) petition); that the Judicial Officer can raise new issues on appeal *sua sponte*; that there is no basis for petitioner's motion to disqualify the Judicial Officer for bias; and that there is no basis for petitioner's argument that a fair hearing cannot be obtained where the Department's counsel represents the Department and the Judicial Officer represents the Secretary.

In *In re Hatcher*, P&S Docket No. 5835, decided by the Judicial Officer on April 6, 1982 (19 pages), the Judicial Officer affirmed Judge Weber's decision suspending respondent's registration for six months, assessing a $10,000.00 civil penalty, and ordering respondent to cease and desist from the violations found. Respondent, when purchasing livestock on commission for a packer, arbitrarily increased the prices and weights on livestock and used counterfeit invoices to conceal his fraud, exceeding $17,500.00 in 108 transactions over a 6-month period. Respondent engaged in an unfair and deceptive practice and failed to furnish true accounts of his purchase transactions. Only a preponderance of the evidence is necessary. The economic pressures placed on respondent by the packer do not mitigate the violations. Respondent's cooperation with investigators, candor in admitting violations, cooperation in stipulating facts, and prior unblemished record are not mitigating circumstances. Department's severe sanction policy explained. Great weight is given to administrative recommendations as to the sanction, although it is not controlling. It was not error to exclude the recommendation by a P&S auditor as to the sanction since he is not a policy making employee. Consent orders are given no weight in determining sanctions in litigated cases. Evidence should be adduced at administrative hearings relating to the sanction. Hardship to respondent's community, customers or employees resulting from a suspension order is given no weight in determining the sanction.

In *In re County Line Cheese Co.*, AMA Docket No. M 49-1, decided by the Judicial Officer on April 13, 1982 (11 pages), the Judicial Officer ruled on a question certified by the Administrative Law Judge that the Indiana Milk Order, which requires that milk from a supply plant be "shipped to" a distributing plant, should be interpreted to require that the milk be unloaded and received at the distributing plant. This is consistent with a 1965 decision by the Judicial Officer under identical language involving the Northeastern Wisconsin Milk Order. Although some milk orders, but not Indiana, expressly require that milk shipped from a supply plant be physically unloaded into the distributing plant, this is not persuasive since there is nothing in the legislative history of the Indiana Order to indicate that the language used there was used in a different manner than in the case construed by the Judicial Officer. There is, however, a serious question as to the legality of the Order, as thus construed since the Market Administrator interprets the Order as being complied with if the supply plant ships its milk to a distributing plant and then immediately pumps the milk back into its truck before delivering it to a non-pool plant, its intended destination. This seems to indicate that the Order is really concerned merely with whether milk from a supply plant is *available* to a distributing plant. It would appear arbitrary, capricious and an abuse of discretion, bordering on the absurd, to require that a supply plant, in order to prove that it is ready, willing and able to ship milk to a distributing plant, if needed, must engage in the ritual of shipping the milk to a distributing plant, pumping it into that plant's tanks, and then immediately pumping it back to its truck, before delivering it to its intended destination. Even if that requirement is legal, the Secretary may want to reconsider

the requirement in light of the current administration's philosophy with regard to unnecessarily burdensome regulations and the current energy situation.

In *In re V. P. C., Inc.*, PACA Docket No. 2-5844, decided by the Judicial Officer on April 14, 1982 (27 pages), the Judicial Officer affirmed Judge Palmer's decision finding that respondent has committed repeated and flagrant violations of the Perishable Agricultural Commodities Act and denying respondent's application for a license. Respondent failed to make full and prompt payment in 580 transactions totaling $187,336.50. Respondent's payments were often a year or more late, with most being over two or three months late, and $35,679.50 unpaid. It is the purpose of the Act to bar all but financially responsible persons. Respondent's violations were willful. The effect of the sanction on responsibly connected persons is not relevant. Respondent admittedly had no express agreements to extend the 10-day payment period in the regulations, and implied agreements are not relevant. Unsworn written statements by many of respondent's suppliers have no probative value. The particular suppliers to whom respondent is indebted have a motive for wanting respondent to continue in business, but the Secretary must consider the broader public interest. Excuses are routinely rejected as to why payment could not be made fully or promptly. Congress has recognized that this is a "tough" law, which has the almost unanimous approval of the industry. The 1978 bankruptcy law recognizes the need for special regulation of the perishable agricultural commodities, livestock and meat industries. The Department's severe sanction policy explained. If a violator who fails to pay for produce does not have a license in effect, an order is issued finding that he has engaged in a repeated or flagrant violation of the Act, which has the same effect as a license revocation. The Act primarily protects producers, but it also protects consumers.

In *In re Molnar Packing Co.*, P&S Docket No. 5937, decided by the Judicial Officer on May 14, 1982 (8 pages), the Judicial Officer affirmed Chief Judge Campbell's order assessing a civil penalty of $1,000 and ordering respondent to cease and desist from purchasing livestock without having the required bond. Legislative history of bonding requirement explained. The fact that respondent has now obtained the required bond does not warrant reducing the $1,000 civil penalty.

In *In re Dr. James S. Ruster*, VA Docket No. 15, decided by the Judicial Officer on May 14, 1982 (23 pages), the Judicial Officer affirmed Judge Liebert's order revoking respondent's accreditation as a veterinarian for deliberately issuing health certificates for the improper, unrestricted movement of brucellosis exposed cattle. The administrative proceeding should not be dismissed because of an agreement between respondent and the Assistant United States Attorney settling a criminal action against respondent. The Assistant United States Attorney mistakenly told respondent that the administrative proceeding would be dismissed if respondent voluntarily surrendered his accreditation for six months. However, respondent's attorney knew that the Assistant United States Attorney was not a counsel of record in the administrative proceeding and he should have ascertained directly from complainant's attorney information as to what action complainant would take based upon the plea bargaining in the criminal proceeding. In addition, equitable estoppel does not apply to the government acting in its sovereign capacity. But even if it did, the public interest would be unduly damaged if respondent's accreditation were suspended for only six months, as agreed to by the Assistant United States Attorney. The Department's severe sanction policy explained. I believe respondent should never again be accredited as a veterinarian to carry out the Department's disease eradication programs; but after 12 months, he can seek to demonstrate to the administrative officials that he should again be accredited.

In *In re Thorton*, HPA Docket No. 125, decided by the Judicial Officer on May 19, 1982 (85 pages), the Judicial Officer affirmed that part of Judge Weber's order assessing civil penalties of $2,000 each against a horse's owner and trainer for exhibiting and allowing a sore horse to be exhibited, and disqualifying the trainer from exhibiting horses for one year. However, the

Judicial Officer reversed part of Judge Weber's decision, and disqualified the owner for one year. The statutory presumption that a horse is sore if it manifests abnormal sensitivity in both forelimbs is constitutional if interpreted to create only a rebuttal presumption. Whether scar tissue was present on the anterior pasterns is of no importance because scar tissue is not necessarily more sensitive than other tissue. Evidence as to the horse's illegal heel-toe ratio disregarded because not alleged in the complaint, and there is no evidence that the illegal ratio would have caused the pain detected by USDA vets. Evidence concerning observations by USDA vets who selected horses for examination based on their appearance in the ring disregarded since it makes no difference why the horse was selected for examination. Home movies of the physical examinations disregarded because they were taken in spurts of a few seconds, with many gaps. Physical examination of the horse a week before the show irrelevant. The pre-show examination by show stewards is not as thorough as the USDA examination, and is never relevant where the horse wore action devices during the show. The fact that the Department permits action devices on horses, but makes the exhibitor a guarantor that the action devices will not sore the horse, is a strong argument in favor of adopting the proposal now being considered by USDA to prohibit the use of all action devices in horse shows since, to have an equal chance of winning, action devices must be used, but the exhibitor cannot be sure that they will not cause the horse to be sored. Evidence of an examination of the horse the morning after the show not relevant because it is possible to find extreme pain in a horse one day and none the next day. Also, there is no evidence that the non-USDA exams were conducted after a 45 minute workout with 10 ounce chains. The fact that the horse passed numerous USDA examinations at other shows is irrelevant. The fact that swabs taken of the horse's front feet the morning after the show showed no chemicals is irrelevant. A lab report of a biopsy taken the morning after the show is irrelevant because there is no interpretation of the report by an expert, and no evidence that the biopsy was taken from the spots found sore by USDA. Moreover, other evidence shows conclusively that the horse had abnormal tissue in the posterior pasterns. The imposition of $2,000 civil penalties on the owner and trainer is consistent with other cases. All of the statutory factors must be determined in considering the amount of a civil penalty, including ability to pay and culpability. The respondent must introduce evidence if he lacks ability to pay. An owner or trainer is regarded as culpable without proof that he actually sored the horse since such proof is impossible of attainment. Judge Weber's view that it would violate due process to impose a disqualification order against the owner since it was not recommended until complainant's reply brief is erroneous. Complainant also raised the issue of a disqualification order against the owner in a cross appeal, filed together with the response to respondents' appeal. The Wall case (CA 6 1981) holding that the Judicial Officer cannot increase the sanction where the government does not file a cross appeal is erroneous for many reasons. In addition, in this case the Judicial Officer sua sponte raised the issue as to a disqualification order against the owner. Judicial Officer's functions explained. It does not violate due process or the equal protection clause to increase a sanction when respondents appeal. Complainant did not vindictively file a cross appeal in this case to punish respondent for exercising his appellate rights, but was merely following the Judicial Officer's views set forth in the Rowland case. Reasons for imposing disqualification orders against a horse's trainer (exhibitor) and owner. The Act does not require intent to sore a horse or proof that the owner or exhibitor knew that the horse was sore. Department's sanction policy explained. Disqualification is not a punishment but is to achieve the remedial purposes of the Act.

In *In re Hampshire Open Air-Mkt., Inc.*, PACA Docket No. 2-5675, decided by the Judicial Officer on May 28, 1982 (11 pages), the Judicial Officer affirmed Judge Baker's decision dismissing the complaint, which alleged that respondent failed to pay promptly for produce. Although Judge Baker's findings that respondent had express agreements for deferred payment, which negated the 10-day requirement in the regulations, are supported only by weak and vacillating evidence, and the printed record would lead to a contrary conclusion, her findings are upheld since she saw and hear the witnesses testify, and it is the primary responsibility of the administrative law judges to find the facts. The Judicial Officer reverses as to the facts only if

the record compels reversal. A regular course of dealing between the parties does not corroborate evidence of express agreements because a course of dealing is just as indicative of an implied agreement as an express agreement. Only express agreements negate the 10-day payment requirement. Legislative history of express agreement requirement set forth. The regulations do not require payment terms to be discussed as to each transaction, but only that an express agreement be in effect at the time each order is made. Complainant relied on hearsay that express agreements were not in effect; although responsible hearsay is admissible in administrative proceedings, its shortcomings are recognized, and it should not be relied on for a crucial finding, except to corroborate other evidence. Complainant would only have to call two or three industry witnesses, and any hardship to them is a necessary price to attain the benefits of the program. Evidence as to transactions not alleged in the complaint, and not set forth in a prior decision, are not admissible to explain complainant's recommendation as to the sanction, or for any other purpose.

In *In re Carlton F. Stowe, Inc.*, PACA Docket No. 2-5730, decided by the Judicial Officer on June 4, 1982 (47 pages), the Judicial Officer reversed Judge Palmer's decision (which dismissed the complaint because of considerations relating to respondent's bankruptcy proceeding), and revoked respondent's license for failing to pay for over $735,000 worth of produce. Failure to pay is a serious violation. Department's sanction policy explained. Respondent's violations were repeated and flagrant. Even if respondent had good excuses, the Act calls for payment -- not excuses. Reasons for rejecting excuses explained. Judge Palmer erred in holding that a determination under § 4(a) is a condition precedent for exercise of the revocation power in § 8(a) of the Act. Administrative determination under § 4(a) of the Act not reviewable by the ALJ or JO. Bankruptcy law of 1978 and its legislative history explained. Equitable estoppel does not apply to the government acting in its sovereign capacity. It is respondent's responsibility - not the Department's - to advise the bankruptcy court of all relevant information relating to a reorganization plan, including any possible administrative sanctions against respondent. A bankruptcy court has no power to prevent the Secretary from instituting an administrative disciplinary action. Although respondent's license terminated automatically upon confirmation of its reorganization plan, the Department erroneously renewed respondent's license, and then cancelled it without a hearing. To avoid any question as to that matter, respondent's license can be suspended or revoked. The consequences of finding that a respondent has committed repeated or flagrant violations are the same as the consequences of a revocation order.

In *In re Ruster*, VA Docket No. 15, decided by the Judicial Officer on June 21 1982 (2 pages), the Judicial Officer changed the effective date of the revocation order previously issued so as to credit respondent with the time served from December 18, 1981, until the present, during which respondent voluntarily ceased acting as an accredited veterinarian, pursuant to an erroneous agreement with the Assistant United States Attorney. However, the Judicial Officer does not believe that respondent should ever again be accredited as a veterinarian.

In *In re Sequoia Orange Co.*, AMA Docket Nos. F&V 907-6 and 907-8, decided by the Judicial Officer on June 21, 1982 (4 pages), the Judicial Officer denied appeals relating to Navel Orange Marketing Order 907. Judge Liebert permitted Sunkist to participate by making oral argument and filing a brief. Petitioners' argument that Sunkist is not a handler and, therefore, should not be permitted that limited participation is without merit. Sunkist's argument that it should be permitted to intervene fully as a party is rejected since the rules of practice do not permit intervention as a full party. The Judicial Officer has no authority to depart from the Department's rules of practice. Also, the statute does not contemplate that a non-handler should have the right to litigate fully with respect to marketing agreements or orders in a § 15(A) proceeding. Interlocutory appeals are not permitted. Assuming, without deciding, that the appeals were properly filed, they are denied on the merits.

In *In re Finer Foods Sales Co.*, PACA Docket No. 2-5543, decided by the Judicial Officer on June 24, 1982 (55 pages), the Judicial Officer affirmed Judge Liebert's decision revoking respondent's license for failure to pay approximately $70,000 for produce, except that in lieu of revocation, a finding was made that respondent committed repeated and flagrant violations, which has the same effect as a revocation order. Failure to pay is a serious violation. Department's severe sanction policy explained. Respondent's violations were repeated, flagrant, and wilful. Even if respondent had good excuses, all excuses are rejected since the Act calls for payment -- not excuses. Reasons why excuses are rejected set forth. Bankruptcy law of 1978 and its legislative history explained. The Act does not require that an informal or reparation complaint precede a formal disciplinary complaint. However, the Secretary's right to inspect accounts and records is limited (insofar as relevant here) to the investigation of complaints. Where there was a complaint by one person, as in this case, the Secretary may extend the inquiry to include other similar violations. If a reviewing court were to hold that an informal or reparation complaint must precede a formal disciplinary complaint, the Department could (and I believe should) start this proceeding anew. There is no statute of limitations, and the failure to file an informal complaint did not "taint" the evidence previously obtained. Whether respondent's violations were wilful is to be determined by the evidence adduced at the hearing. Hence it was not error for the ALJ to refuse to subpoena the Director who signed the complaint to determine what evidence as to wilfulness was reviewed by him. Since respondent's license is not being suspended or revoked, the APA's "second chance" requirement is not applicable here.

In *In re Powell*, P. & S. Docket No. 5876, decided by the Judicial Officer on July 7, 1982 (20 pages), the Judicial Officer affirmed Chief Judge Campbell's order suspending respondent for 21 days and ordering respondent to cease and desist from the financial and custodial account violations found. The test of insolvency is whether current liabilities exceed current assets. When insolvency is established, it is considered as continuing until respondent demonstrates that he is no longer insolvent. A line of credit extended by a bank is irrelevant in determining solvency or in determining whether a custodial account is being maintained properly. Absence of injury to consignors is not a defense to insolvency or custodial account violations. Failure to maintain a custodial account properly is an unfair and deceptive practice. A violation is wilful if an act is done with careless disregard of statutory requirements. Severe sanction policy explained. Suspension and cease and desist orders are issued notwithstanding the fact that respondent has discontinued violating by the time the final order is issued. Any hardship to respondent's community, customers or employees resulting from a suspension order is given no weight in determining the sanction.

In *In re County Line Cheese Co.*, AMA Docket No. M 49-1, decided by the Judicial Officer on July 8, 1982 (4 pages), the Judicial Officer ruled in response to a certified question that respondent had not yet demonstrated the need for a trial-type hearing, but that he should be given an opportunity to do so. When the lawfulness of a milk order is attacked, the Act affords no trial *de novo* in a (15)(A) hearing.

In *In re DeQuoin Packing Co.*, P. & S. Docket No. 5921, decided by the Judicial Officer on July 13, 1982 (26 pages), the Judicial Officer reversed Judge Palmer's decision, which had issued only a cease and desist order as to William S. Martin, a dealer, for weighing violations. The Judicial Officer suspended his registration for 45 days. A single incident may be an "unfair practice" in violation of the Act. In addition, respondent used a back-balanced scale, which is an unfair "device" prohibited by the Act. Respondent's violations were wilful. Warning letters are not sent where serious and deliberate false weighing violations can be proven. Operating a scale back-balanced by 123 pounds is sufficient to warrant a substantial suspension. In addition, false weighing by itself is sufficient for a substantial suspension. A back-balanced scale does not necessarily prove short weighing. Severe sanction policy explained. Packer buyers are required to be registered as dealers.

In *In re Hampshire Open Air Market, Inc.*, PACA Docket No. 2-5675, decided by the Judicial Officer on August 3, 1982 (2 pages), the Judicial Officer denied complainant's petition for reconsideration. Although the printed record strongly supports complainant's position, it is not sufficiently strong to compel a reversal as to the facts.

In *In re DeQuoin Packing Company*, P. & S. Docket No. 5921, decided by the Judicial Officer on August 11, 1982 (1 page), the Judicial Officer denied a petition for reconsideration as to William S. Martin since the arguments presented were fully considered when the decision and order was originally filed.

In *In re Sequoia Orange Co.*, AMA Docket No. F&V 910-3, decided by the Judicial Officer on August 17, 1982 (20 pages), the Judicial Officer affirmed Judge Weber's order dismissing the petition filed by handlers under the California and Arizona Lemon Order. The petition fails to set forth a full statement of facts clearly and concisely so that issues may be joined on the petition. Allegations that the Lemon Order is not working and will not achieve the congressional goal can be considered by the Secretary only in his legislative capacity. The lawfulness of a marketing order must be judged by the facts contained in the promulgation hearing record rather than by facts introduced at a (15)(A) hearing. It is presumed that substantial evidence supports the present order provisions. Once an order is issued in accordance with law, the Secretary's decision not to adopt a proposed amendment or not to terminate the order is a discretionary, nonreviewable function. Petitioners appropriately raise constitutional issues in the administrative proceeding, but an agency has no authority to question the constitutionality of a statute under its jurisdiction.

In *In re Kraft, Inc.*, AMA Docket No. M 11-1, decided by the Judicial Officer on September 20, 1982 (11 pages), the Judicial Officer issued a tentative decision and order in a case heard initially by the Judicial Officer (without a prior decision by an Administrative Law Judge). Kraft seeks to set aside the decision by the Director of the Dairy Division denying its request for a temporary downward adjustment in the supply plant shipping requirements of the Tennessee Valley milk order. Kraft contends that in order to pool its milk, it will be required to ship about 12 loads of milk a month 80 miles to a distributing plant, pump the milk into the distributing plant, pump it back into the truck, and then backhaul it 80 miles. The Judicial Officer held that the Director's decision is not in accordance with law because it does not consider the issue as to whether a downward adjustment is necessary to prevent uneconomic shipments of milk. Both parties may file briefs by October 6 and reply briefs by October 15.

In *In re Bosma*, P & S Docket No. 5884,, decided by the Judicial Officer on September 23, 1982 (23 pages), the Judicial Officer added a $10,000 civil penalty to the record keeping order previously proposed by Judge Baker because respondent failed to show its name as buyer when it bought consigned livestock. It is a serious breach of the fiduciary relationship for an agent to buy consignors' livestock without revealing that fact to the consignors. Severe sanction policy discussed. As to complainant's main charge that respondent was purchasing out of consignments for speculation, the record does not support reversing Judge Baker's finding that respondent was buying for market support purposes. Role of the Administrative Law Judge as to fact finding discussed. Although a market support account would ordinarily show a loss or only a very small profit, and respondent was making a $10,000 per month gross profit from his "market support" operations, the record shows that there were no other buyers available and therefore he had to buy the cows. If complainant had charged respondent with failing to furnish reasonable selling service (by not giving adequate market information to his consignors and by not selling the livestock for fair market value), complainant's request for a $15,000 civil penalty and a 45-day suspension order would have been granted. Respondent had a duty to inform his buyers fully as to market conditions and to pay fair market value when buying for market support. One of the main objectives of the Act is to safeguard farmers against receiving less than the true market value of their livestock. The report of the task force to review regulations issued

under the P&S Act, which recommends deleting the requirement that a market agency buying for market support remit to a consignor any profit resulting from resale of the consigned livestock on the same day is equivalent to weighty testimony that failure to remit the profit is not unfair and, therefore, the regulation cannot be enforced in the absence of strong supporting evidence. Judge Baker erred in permitting respondent to introduce complainant's proposed settlement made prior to the hearing.

Fiscal Year 1983

In *In re Stamper*, HPA Docket No. 168, decided by the Judicial Officer on October 6, 1982 (21 pages), the Judicial Officer vacated Judge Baker's decision and remanded the case for a new decision. Judge Baker's finding that the horse was sore is contrary to her finding that the horse's sensitivity was not caused by any of the factors enumerated in the Act. Judge Baker relied on the presumption in the statute that a horse is sore if it manifests abnormal sensitivity in both forelimbs, but that is merely a rebuttable presumption, which has been overcome if the sensitivity was not caused by one of the factors enumerated in the definition of "sore." Complainant does not have to prove the exact method used to sore a horse and frequently cannot tell how it was sored. Judge Baker appears to have the erroneous view that a hard workout with chains of a lawful weight is not unlawful even if it causes pain to the horse. Any action device can be unlawful. The Act was amended to eliminate the need to prove intent. Owners and exhibitors are absolute quarantors that action devices used on a horse will not cause it to suffer pain. Owners and exhibitors must take into account the condition of the track, i.e., the possibility of sand and grit being rubbed by the chain. The court's decision in Burton v. U.S.D.A. (C.A. 8), that an owner has not violated the Act if he has no knowledge that the horse was sore, he directs the trainer not to show a sore horse, and a designated qualified person approves the horse before the show is erroneous and will not be followed by this Department in cases from which an appeal does not lie to the Eighth Circuit. On remand, if it is found that the horse was sore, the $100 civil penalties imposed by Judge Baker are totally inadequate to achieve the purpose of the Act. The minimum disqualification provisions in the Act should be imposed, as well as $2,000 civil penalties, unless the horse's trainer is unable to pay $2,000. Where a husband and wife jointly own a horse, they should only be required to pay a single civil penalty.

In *In re Trenton Livestock, Inc.*, P. & S. Docket No. 5848, decided by the Judicial Officer on October 27, 1982 (29 pages), the Judicial Officer reversed Judge Baker's decision dismissing the complaint as to the individual respondent Hargett and imposed a $5,000 civil penalty against him. Hargett owns 98.9% of the corporation's stock and is its only manager. Therefore, it is appropriate to pierce the corporate veil and hold him responsible for the corporation's violations under the *alter ego* doctrine. Judge Baker mistakenly thought that it is not appropriate to pierce the corporate veil where the owner and controller of the corporation is acting in his corporate capacity rather than his individual capacity. Failure to pay promptly for livestock is a serious violation. Cease and desist orders are routinely issued even though the violator ceases violating or discontinues business. Under the Act, cease and desist orders do not have to be in the public interest, as is the case under the Federal Trade Commission Act. Cease and desist orders are to deter others as well as the respondent. Suspension order not applied to Hargett individually because of the mitigating circumstances involved in his payment of corporate debts from personal assets.

In *In re Produce Brokers, Inc.*, PACA Docket No. 2-6081, decided by the Judicial Officer on November 8, 1982 (9 pages), the Judicial Officer ruled on questions certified by Judge Weber that respondent's general denial in its answer is offset by implied admissions as to respondent's failure to pay; that the admitted violations are sufficient to warrant a finding that respondent has committed repeated and flagrant violations; that no finding of wilfulness is necessary since no license is being revoked or suspended; and that it is not necessary to hold a hearing to afford respondent an opportunity to present mitigating circumstances, e.g., that its violations were caused by a serious illness of its president and the state of the economy. The Act calls for payment --not excuses.

In *In re Charles Brink*, AWA Docket No. 182, decided by the Judicial Officer on November 8, 1982 (1 page), the Judicial Officer dismissed an appeal filed after the effective date of the Administrative Law Judge's order. The Judicial Officer has no jurisdiction to consider an appeal filed after the effective date.

In *In re George W. Saylor, Jr.*, P. & S. Docket No. 5753, decided by the Judicial Officer on November 9, 1982 (21 pages), the Judicial Officer affirmed, with slight modifications, Judge Weber's order as to respondent based on billing customers on false weights and prices, and misrepresenting sales commissions. The Judicial Officer assessed a $10,000 civil penalty and a cease and desist order, but reduced the suspension period from nine months to eight months because complainant failed to show that respondent engaged in an unfair practice when it charged for insurance and maintained its own self insurance program for the benefit of customers.

In *In re Utica Packing Co.*, FMIA Docket No. 35, decided by the Judicial Officer on November 18, 1982 (29 pages), the Judicial Officer dismissed the complaint seeking to withdraw inspection service from respondent, so long as David Fenster is associated with the plant, because of Fenster's convictions for bribing the supervisory meat inspector. In his original decision in the case, the Judicial Officer held that the bribery convictions established conclusively that respondent is unfit to receive inspection, irrespective of any mitigating circumstances. The District Court affirmed, but the Court of Appeals reversed, requiring the Judicial Officer to consider the mitigating circumstances. Since under the Circuit Court's opinion a bribery conviction is not sufficient in itself to warrant a finding of unfitness without considering the mitigating circumstances, and since the mitigating circumstances here are as strong as can reasonably be expected in any case, the complaint was dismissed in this case. However, since I disagree with the Sixth Circuit's opinion, it will not be followed in any case from which an appeal does not lie to the Sixth Circuit.

In *In re Bosma*, P. & S. Docket No. 5884, decided on November 30, 1982 (2 pages), the Judicial Officer denied respondent's petition for reconsideration, which consisted in the main of matters previously considered. Respondent's new claim that he is financially unable to pay a $10,000 civil penalty comes too late since he offered no evidence in this respect at the hearing. Respondent's annual report for 1982, attached to this petition, fails to show that he is unable to pay.

In *In re Brink*, AWA Docket No. 182, decided on November 30, 1982 (2 pages), the Judicial Officer denied a petition for reconsideration because it was filed late. But even if it had been timely filed, it would have been denied because the rules of practice make no provision for extending the time for appeal because of the absence of respondent from the country, where service is accepted on his behalf by someone at his place of business.

In *In re Melvin Beene Produce Co.*, PACA Docket No. 2-5845, decided on December 2, 1982 (28 pages), the Judicial Officer reversed Judge Baker's decision suspending respondent for 90 days, and revoked respondent's registration for failing to pay 14 sellers $182,640.58 for 227 lots of produce. Failure to pay is a serious violation. Severe sanction policy explained. Respondent's violations were repeated, flagrant, and wilful. They were engaged in for 15 months during which respondent knew further violations were likely. Excuses for failure to pay, including bankruptcy, are routinely rejected. Bankruptcy law legislative history explained, which permits PACA sanctions notwithstanding bankruptcy. Ordinarily only a finding would be made that respondent has committed repeated and flagrant violations of the Act, since its license is not now in effect. A finding of repeated and flagrant violations has the same effect on respondent and responsibly connected persons as a revocation order. But since there is some question as to whether complainant should have notified respondent that it had to repay its license renewal fee in order to keep its license in effect, respondent's license will be treated as if it were in effect, and a revocation order will be issued. Unsworn petitions by respondent's creditors requesting leniency are of no probative value. In addition, pleas by creditors for leniency on a respondent so that he can repay his debts to them are ignored since the broader public interest of deterring others requires that severe sanctions be issued. Respondent's reliance on a Department publication, Plain Talk About PACA, indicating that it is not the policy to institute actions

against persons involved in business failures resulting from circumstances beyond their control, is not persuasive since the pamphlet no longer reflects present Department policy, and the Department takes a very narrow view as to what circumstances are beyond a person's control, i.e., this refers only to circumstances such as an act of God.

In *In re Saylor*, P&S Docket No. 5753, decided by the Judicial Officer on January 5, 1983 (2 pages), the Judicial Officer denied a petition to reopen, since it was not timely filed, and a petition to reconsider, since it was without merit.

In *In re Robinson*, AWA Docket No. 190, decided by the Judicial Officer on January 6, 1983 (10 pages), the Judicial Officer affirmed Judge Palmer's decision ordering respondent to cease and desist from transporting any animal without a license, and assessing a civil penalty of $500. Judge Palmer did not preclude respondent from raising constitutional or evidentiary issues. Respondent cannot raise on appeal issues which were raised in his answer but abandoned in his trial brief.

In *In re Stamper*, HPA Docket No. 168, decided by the Judicial Officer on January 11, 1983 (65 pages), the Judicial Officer reversed Judge Baker's decision dismissing the complaint, and assessed one year disqualification orders and $2,000 civil penalties against respondents, for exhibiting and allowing (as owner) the exhibiting of a sore horse. The statute and regulation make owners and exhibitors absolute guarantors that chains will not sore a horse. ALJ findings are rarely overturned, but the record in this case compels reversal as to the facts. Inference drawn that the testimony of a witness not called by respondents would have been adverse. Lack of intent or knowledge that a horse was sore is irrelevant in determining whether a violation occurred or in imposing the sanction. The fact that the horse passed a pre-show inspection by a Designated Qualified Person is irrelevant. The Burton decision (8th Cir. 1982) is erroneous. Contemporary and settled administrative construction entitled to weight. Department's severe sanction policy explained.

In *In re Mattes Livestock Auction Market, Inc.*, P. & S. Docket No. 5911, decided by the Judicial Officer on January 20, 1983 (52 pages), the Judicial Officer reversed Judge Baker's decision, which permitted Mrs. Mattes to register to operate her husband's auction market during his 21-day suspension, and held that she cannot be registered until after his suspension order expires inasmuch as her application is a stratagem devised to circumvent the suspension order. Although Judge Baker determined the credibility issues against the Department, there is no real conflict in testimony, and Judge Baker failed to draw an adverse inference from the failure of the individual respondents to testify. Accordingly, reversal as to the facts is appropriate. The power to suspend carries with it the implied power to prevent circumvention of a suspension order. Although there is no case precisely in point, cease and desist and suspension orders have been applied to a new corporation not in existence when the violations occurred, to a corporation in existence at the time of the violations but not involved in the violations, and to the responsible individuals of the corporation, in order to prevent the evasion of such orders.

In *In re Veg-Pro Distributors*, PACA Docket No. 2-6063, decided by the Judicial Officer on February 4, 1983 (2 pages), the Judicial Officer vacated Judge Weber's default decision under the Perishable Agricultural Commodities Act and remanded the case for further proceedings. Respondent was not a licensee when service of the complaint was attempted, and respondent never actually received the complaint. Therefore, in order to assure due process, respondent should be permitted to respond to the complaint.

In *In re Old Virginia, Inc.*, PACA Docket No. 2-5938, decided by the Judicial Officer on February 22, 1983 (6 pages), the Judicial Officer reversed Judge Weber's initial decision, and revoked respondent's license for failure to pay 15 sellers $145,000.00 for 82 lots of produce. Judge Weber revoked respondent's license, but suspended the revocation order to permit the sale

of respondent's business. If the sale were consummated, Judge Weber would have imposed no sanction against respondent. The Judicial Officer stated that the negotiations for the sale of the corporation were unsuccessful, but that, in any event, it would not be appropriate to suspend the revocation order to permit respondent to sell the business. Judge Weber's order would have resulted in no sanction against the persons responsible for the violations, if respondent's business had been sold. This Department routinely ignores requests for leniency from creditors of a violator since they have a strong motive for wanting the violator to continue in business, but the Department must consider the broader public interest. The doctrine of piercing the corporate veil is a sword -not a shield; it cannot be used to permit a corporation to escape the statutory penalty for misconduct.

In *In re Dietz*, HPA Docket No. 165, decided by the Judicial Officer on February 24, 1983 (4 pages), the Judicial Officer affirmed Judge Palmer's order dismissing the complaint because complainant failed to prove that a horse was sore. Although the cold record strongly supports complainant's position, the Administrative Law Judge, who saw and heard the witnesses testify, is primarily responsible for determining the facts. However, I believe Judge Palmer erred in failing to resolve a conflict in the evidence.

In *In re Yankee Brokerage, Inc.*, PACA Docket No. 2-6130, decided by the Judicial Officer on March 3, 1983 (1 page), the Judicial Officer dismissed an appeal filed 35 days after the initial decision, since it was filed late.

In *In re Bananas, Inc.*, PACA Docket No. 2-6064, decided by the Judicial Officer on March 3, 1983 (2 pages), the Judicial Officer denied a motion to intervene in a disciplinary proceeding filed by a creditor of respondent. The rules of practice make no provision for intervention in a disciplinary proceeding. In any event, requests for leniency from creditors of a respondent are routinely disregarded since the Secretary must consider the broader public interest, involving thousands of suppliers and licensees. If lenient sanctions were imposed for the benefit of a few creditors, the sanctions would not have a strong deterrent effect.

In *In re Evans Potato Company, Inc.*, PACA Docket No. 2-6077, decided by the Judicial Officer on March 9, 1983 (23 pages), the Judicial Officer affirmed Judge Liebert's order revoking respondent's license for failure to pay 17 sellers over $214,000.00 for 80 lots of produce, and failure to pay six sellers promptly for 28 lots of produce totalling over $90,000.00. Respondent did not raise the issue below (when complainant's proposed Decision and Order was served on respondent) as to the inadequacy of Judge Liebert's conclusions, and therefore, respondent cannot challenge the adequacy of the conclusions on appeal. But, in any event, the revocation order is in accord with settled precedent. Failure to pay is a serious violation resulting in a revocation order. Respondent's violations were wilful, repeated and flagrant. The Act calls for payment -- not excuses. All excuses, including bankruptcy, are rejected.

In *In re Bananas, Inc.*, PACA Docket No. 2-6064, decided by the Judicial Officer on March 25, 1983 (24 pages), the Judicial Officer affirmed Judge Palmer's decision publishing the finding that respondent has committed repeated and flagrant violations of the Act by failing to pay for produce, and paying late for produce. Since respondent admits not paying for over $54,000.00 worth of produce, it is irrelevant that the record does not show the exact unpaid sellers as of the date of the order. A seller's agreement to accept partial payment in full satisfaction of respondent's debt does not constitute full payment, and does not negate a violation of the Act. Failure to pay is a serious violation resulting in a revocation order or, if a license is not in effect, an order finding that respondent has committed repeated and flagrant violations, which has the same effect as a revocation order. Respondent's violations were wilful, repeated and flagrant. The Act calls for payment--not excuses. All excuses, including bankruptcy, are rejected. Pleas for leniency from creditors, who hope that leniency will result in additional payments on their claims, are routinely rejected since the Secretary must consider the broader

public interest. If lenient sanctions were imposed for the benefit of a few creditors, the sanctions would not have a strong deterrent effect and would not be in the public interest.

In *In re Hageman*, P&S Docket No. 5938, decided by the Judicial Officer on March 29, 1983 (25 pages), the Judicial Officer affirmed Chief Judge Campbell's cease and desist and record keeping order, ad order suspending respondent for 90 days and thereafter until solvent and the bonding requirements are met, and assessing a $5,000 civil penalty. Respondent operated without adequate bond coverage, while insolvent; added pencil weight to livestock purchased on commission; arbitrarily increased prices over prices actually paid for livestock bought on commission; and consigned livestock to auction markets under false and fictitious names. A person is insolvent if his current liabilities exceed current assets. Issuance of insufficient fund checks is a violation even though full payment is later made. Severe sanction policy explained.

In *In re Petro*, PACA Docket No. 2-5970, decided by the Judicial Officer on May 9, 1983 (2 pages), the Judicial Officer dismissed an appeal filed more than 35 days after service of the Administrative Law Judge's decision since the Judicial Officer has no jurisdiction to hear an appeal filed after it has become final.

In *In re Rubel*, P&S Docket No. 6054, decided by the Judicial Officer on June 2, 1983 (11 pages), the Judicial Officer affirmed a default decision issued by Judge Baker suspending respondent for 21 days for increasing the purchase weights of livestock purportedly sold on respondent's actual purchase weights. The suspension order properly applies to respondent's auction market business even though the violations involve only his dealer business, but that was considered in determining the suspension period. There is no basis for permitting respondent to reopen the hearing to present mitigating circumstances since he waived oral hearing by failing to file an answer and failing to request a hearing. Application of the default provisions of the Rules of Practice does not deprive respondent of Due Process.

In *In re King Meat Co.*, FSQS Docket No. 4, decided by the Judicial Officer on June 8, 1983 (21 pages), the Judicial Officer determined that King Meat's "newly discovered evidence," ordered to be considered by the District Court's remand order, was without weight, and did not warrant further exploration at a hearing. A letter written by the Department to Western States Meat Association does not support King Meat's contention that a beef arm chuck is a subprimal cut. Evidence that the trimming requirement is not enforced uniformly throughout the country is of no help to King Meat since the regulations were properly applied as to it. The fact that there are more graders to monitor compliance does not suggest that the sanction should be lessened since the grading service cannot watch a plant 24 hours a day and must be able to rely upon the integrity of the plant. The fact that King Meat no longer removes yield stamps without removing quality stamps is not significant since there are many ways to thwart the federal grading program.

In *In re Berhow*, AWA Docket No. 220, decided by the Judicial Officer on June 9, 1983 (6 pages), the Judicial Officer affirmed Judge Weber's order ordering respondents to cease and desist from failing to comply with the Act and regulations relating to dog kennels, assessing a $750 penalty, and suspending respondents' license for 60 days and until in compliance. Respondents seek to reargue the facts, but they were admitted by their failure to file an answer.

In *In re Machado*, P&S Docket No. 5943, decided by the Judicial Officer on May 9, 1983 (2 pages), the Judicial Officer reversed a decision by Judge Palmer, which dismissed the complaint because complainant refused to comply with Judge Palmer's rulings that it make an investigative report available for *in camera* examination. The Judicial Officer remanded the proceeding for the preparation of an initial decision based on the evidence in the record, and ordered that no inference is to be drawn that complainant's investigative report contains materials which would exculpate the respondent. In order to expedite the proceeding, the case was remanded on May 9, with the decision to follow later.

In *In re Machado*, P&S Docket No. 5943, decided by the Judicial Officer on June 24, 1983 (66 pages), the Judicial Officer filed a decision reversing Judge Palmer's order dismissing the complaint because complainant refused to comply with his rulings to make an investigation report available for in camera examination. Discovery is not available under the Packers and Stockyards Act. The Department's policy is to protect the confidentiality of investigation reports to the maximum extent permitted by law. Under the Jencks Act, the trial judge can only direct the Government to deliver material to the defendant; he cannot deliver it personally or dismiss the complaint if the Government refuses to comply. Respondent was attempting to engage in a general fishing expedition by demanding complainant's entire investigation report, which is not authorized by the Jencks Act. Respondent failed to make a proper request for a Jencks Act "statement." A Jencks Act request may be denied if it comes too early or too late, but the request may be made during cross-examination. Legal reasoning, interpretations, opinions and analyses are not producible "statements" under the Jencks Act. A Jencks Act statement, to be producible, must relate to the witness' direct testimony, and can be used only during cross-examination for impeachment. However, a respondent need not show that the Jencks Act statement and the witness' testimony are inconsistent, or that the statement is admissible in evidence. An in camera examination of a witness' statement is appropriate in doubtful cases, but not here, in view of respondent's attempt to engage in a general fishing expedition, etc. The Brady doctrine, holding that it is a violation of due process for the Government to fail to turn over to the defendant in a criminal case exculpatory evidence, does not apply to administrative disciplinary proceedings. But assuming that it does apply, legal reasoning is not producible under the Brady doctrine. Also, material not producible under the Jencks Act is not producible under Brady, if it is of the type of material within the general orbit of the Jencks Act. Where there is a basis for believing that the Government possesses Brady material, an in camera examination is appropriate, but an in camera examination is not appropriate where the defendant makes a blanket request for favorable material and the Government denies that it has any exculpatory evidence.

In *In re Dick*, HPA Docket No. 179, decided by the Judicial Officer on June 28, 1983 (3 pages), the Judicial Officer held that respondent's motion to be relieved from a stipulation and consent decision filed a year ago must be denied since it was not filed within 35 days after the filing of the initial decision. In any event, it would have been denied on the merit since there is no reasonable basis for respondent's belief that the consent order would only have prevented him from showing his own horses. A unilateral mistake as to the legal effect of a settlement order is not a ground for permitting a party to withdraw from a settlement agreement.

In *In re De Graaf Dairies, Inc.*, AMA Docket No. M2-74, decided by the Judicial Officer on June 29, 1983 (7 pages), the Judicial Officer reversed Judge Liebert's decision granting summary judgment to the dairy because the Market Administrator's revised audit adjustments were filed more than two years after the handler's reports. One a Market Administrator files timely audit adjustments, the 2-year limitation period applicable to all milk orders does not prevent the Market Administrator from issuing revised audit adjustments less than the original audit adjustments.

In *In re Veg-Pro Distributors*, PACA Docket No. 2-6063, decided by the Judicial Officer on July 18, 1983 (2 pages), the Judicial Officer denied an appeal filed one day after a default decision became final since the Judicial Officer has no jurisdiction to hear an appeal filed after it has become final. But even if it had not been filed late, it would have been rejected because it does not allege any errors of fact or law.

In *In re Dean Foods Company*, AMA Docket No. M 30-4, decided by the Judicial Officer on August 16, 1983 (1 page), the Judicial Officer denied a petition for interim relief filed by a handler regulated under Federal Milk Order 30 for the reasons set forth in In re Moser Farms Dairy, 40 Agric. Dec. 1246 (1981).

In *In re Oliverio Jackson, Oliverio, Inc.*, PACA Docket Nos. 2-6193 and 2-6200, decided by the Judicial Officer on August 31, 1983 (29 pages), the Judicial Officer affirmed Judge Palmer's order publishing the finding that respondent has committed repeated and flagrant violations of the Act by failing to pay for produce, and denying respondent's application for a license because of the violations. Failure to pay is a serious violation resulting in a revocation order or, if a license is not in effect, an order finding that respondent has committed repeated and flagrant violations, which has the same effect as a revocation order. Respondent's violations were repeated and flagrant. Since no revocation or suspension order is being issued, it is not necessary to find that the violations were wilful. The Act calls for payment--not excuses. All excuses, including bankruptcy, are rejected. Respondent's repayment schedule does not provide for interest and, therefore, does not provide for full payment. A seller's agreement to accept less than full payment does not constitute full payment and does not negate a violation of the Act. Since respondent cannot make full payment at this time, this case is a "failure to pay" case rather than a "slow pay" case. An agreement to extend the time for payment made after the payment time has expired does not negate a prompt payment violation. Pleas for leniency from creditors, who hope that leniency will result in additional payments on their claims, are routinely rejected since the Secretary must consider the broader public interest. If lenient sanctions were imposed for the benefit of a few creditors, the sanctions would not have a strong deterrent effect and would not be in the public interest.

In *In re Farrow*, P&S Docket No. 5893, decided by the Judicial Officer on September 21, 1983 (59 pages), the Judicial Officer reversed Judge Baker's decision dismissing the complaint, and issued a cease and desist order and a 45-day suspension order because respondents entered into an agreement under which they did not bid against each other for the purchase of pound cows at the Algona Livestock Auction and Exchange, Algona, Iowa. ALJ's findings are given great weight, but may be reversed where documentary evidence or inferences to be drawn from the facts are involved. Complainant required to prove case only by preponderance of evidence. It is inferred that testimony of witness not called by respondents would have been adverse to respondents. If auction market regularly bought substantial volumes of livestock as market support, an investigation would be warranted to determine whether the market was illegally speculating in consignments. P&S Act is broader than other regulatory statutes, and is remedial legislation to be construed liberally. A practice is unfair if it is likely to injure competition. The Act is designed to prevent potential injury by stopping unlawful practices in their incipiency. A single violation may be an unfair practice under the Act. The complaint was sufficiently specific for an administrative proceeding. A violation is wilful if it is done intentionally or with careless disregard of statutory requirements. Severe sanction policy explained.

In *In re McBryde*, AWA Docket No. 228, decided by the Judicial Officer on September 27, 1983 (4 pages), the Judicial Officer affirmed Judge Palmer's default decision ordering respondent to cease and desist from operating as a dealer without being licensed and assessing a $500 civil penalty.

Fiscal Year 1984

In *In re Jarosz Produce Farms, Inc.*, PACA Docket Nos. 2-6031 and 2-6176, decided by the Judicial Officer on October 6, 1983 (40 pages), the Judicial Officer affirmed Judge Baker's order revoking respondent Jarosz' license for failing to pay for produce, and denying respondent Custom Packers' application for a license because of the violations. Inference drawn that respondents' testimony would have been adverse to their position since they did not testify. Creditors' acceptance of less than full payment does not negate a violation. Agreement for delayed payment must be made at time contract is made. Failure to pay is a serious violation resulting in a revocation order or, if a license is not in effect, an order finding that respondent has committed repeated and flagrant violations, which has the same effect as a revocation order. Respondent's violations were repeated, flagrant and wilful. The Act calls for payment--not excuses. All excuses, including bankruptcy, are rejected. A determination under § 4(a) of the Act as to whether the circumstances of respondent's bankruptcy did not warrant automatic termination of its license under § 4(a) is not a condition precedent for exercise of the revocation power in § 8(a) of the Act.

In *In re Machado*, P&S Docket No. 5943, decided by the Judicial Officer on October 20, 1983 (17 pages), the Judicial Officer increased Judge Palmer's sanction of a cease and desist order to include, also, a $5,000 civil penalty against respondent Cozzi. (Respondent Machado previously consented to a 30-day suspension.) Respondent's cross-appeal, in his response to complainant's appeal, is permitted by the Department's rules. An order buyer has a duty to disclose to his principal that he has a financial interest in cattle used to fill the principal's order. Unlawful conduct of an agent is imputed to the principal under the P&S Act. Respondent Cozzi, a stockyard owner, and respondent Machado, an order buyer, entered into a partnership or joint venture, with each being the agent of the other, in the purchase and sale of cattle. When respondent Machado repurchased some of the "partnership" cattle sold through respondent Cozzi's stockyard to fill orders for Imperial Cattle Company, without advising Imperial of his financial interest in the cattle, both respondents engaged in an unfair and deceptive practice. Severe sanction policy explained. Complainant's refusal to furnish its investigation report for an in camera inspection by Judge Palmer does not give rise to an inference that there is evidence favorable to respondent in the investigation report since Judge Palmer's rulings were erroneous.

In *In re Dock Case Brokerage Co.*, PACA Docket Nos. 2-6215 and 2-6257, decided by the Judicial Officer on November 7, 1983 (6 pages), the Judicial Officer refused to consider an appeal filed late since the Judicial Officer has no jurisdiction to hear an appeal filed after the initial decision has become final. But even if the appeal could have been considered, it would have been denied on the merits since excuses for failure to pay are routinely rejected.

In *In re Aldovin Dairy, Inc.*, AMA Docket No. M 2-71, decided by the Judicial Officer on November 15, 1983 (18 pages), the Judicial Officer reversed Judge Baker's determination that the Market Administrator discriminated against petitioner by sending petitioner audit adjustments based on a "book factor" set forth in the regulations to establish the amount of skim milk petitioner used to make skim milk powder and condensed skim milk. Under the regulations, the "book factor" is used where a handler's records are inadequate. The record here shows that petitioner's records were not reliable. Since the Market Administrator also applied the "book factor" to other plants which had inadequate records, there is no basis for petitioner's claim of discrimination. But even if there had been discrimination, petitioner cannot complain if the regulations were properly applied to it.

In *In re Foursome Brokerage, Inc.*, PACA Docket No. 2-6078, decided by the Judicial Officer on December 5, 1983 (23 pages), the Judicial Officer increased the 15-day suspension ordered by Judge Palmer to 80 days, because of respondent's failure to pay promptly 21 sellers a total of $202,175.30 for 80 lots of produce. Payment was made from 1 to 21 months late.

Respondent's violations were repeated, flagrant, and wilful. Failure to pay promptly is a serious violation. Severe sanction policy explained. The fact that only one of the three partners who formed respondent corporation caused the violations, and he is no longer with the firm, is not a mitigating circumstance with respect to the corporation's violations. The fact that the corporation ultimately made full payment is not a mitigating circumstance, but it did convert the case from "no pay" to "slow pay," thereby preventing license revocation, which would have resulted if full payment had not been made. In any event, mitigating circumstances are routinely disregarded in payment violation cases under the Perishable Agricultural Commodities Act. Evidence as to the appropriate sanction will no longer be needed in PACA payment violation cases since the Department's policy is well settled in this area.

In *In re Peterman*, P&S Docket No. 5979, decided by the Judicial Officer on December 12, 1983 (43 pages), the Judicial Officer affirmed Judge Palmer's order requiring respondent to cease and desist from engaging in various unfair and deceptive trade practices, including bait and switch sales transactions, failure to deliver bonuses as advertised, misrepresenting the cutting loss on purchases of carcass meat, and misrepresenting the grade of meat sold to customers. Respondent is ordered to affirmatively advise each future customer or prospective customer that his business is operating subject to the terms of the cease and desist order issued in this case. The order also assesses a $20,000 civil penalty. If respondent is unable to pay the $20,000 civil penalty, he should have introduced evidence at the hearing as to his financial condition since it has long been the practice in this Department to receive evidence relating to the appropriate sanction. Respondent is a packer since he purchased sides of beef from out-of-state suppliers which he processed and sold in bulk quantities to consumers who often transported the bulk meat purchases to out-of-state residences. Respondent's "bait and switch" tactics are an unfair and deceptive practice, which is not excused merely because he had some satisfied customers. Respondent is responsible for the practices at his own stores and also at franchised branches, since the franchise agreements require the franchisees to observe sales and advertising practices designed by respondent. Affirmative action is authorized in a cease and desist order.

In *In re Aldovin Dairy, Inc.*, AMA Docket No. M 2-71, decided by the Judicial Officer on January 3, 1984 (1 page), the Judicial Officer denied a motion for reconsideration since it merely reargued matters previously considered by the Judicial Officer in connection with the original decision.

In *In re Willard Lambert*, AWA Docket No. 264, decided by the Judicial Officer on January 4, 1984 (5 pages), the Judicial Officer upheld the default decision and order issued by Judge Baker directing respondent to cease and desist from violating the Act and regulations and assessing a civil penalty of $1,000. Respondent had exhibited a bear without a license, in an unclean enclosure, and without providing adequate veterinary care for the animal. Respondent's failure to deny the allegations of the complaint in an answer constituted an admission of the allegations, making the holding of a hearing inappropriate.

In *In re Kent Cheese Co.*, AMA Docket No. M 30-5, decided by the Judicial Officer on January 6, 1984 (6 pages), the Judicial Officer upheld Chief Judge Campbell's decision dismissing the petition filed by Kent Cheese since Kent Cheese lacks standing as a "handler" to institute the action, and the petition does not comply with the rules of practice. Petitioner does not have standing to institute the action merely because of an agency relation with Certified Growers of Illinois, Inc., which is a handler.

In *In re Gilardi Truck & Transportation, Inc.*, PACA Docket No. 2-6186, decided by the Judicial Officer on January 27, 1984 (49 pages), the Judicial Officer affirmed Judge Palmer's order revoking respondent's license for failing to pay for produce. Agreements for delayed payment must be made at time contract is made; they must be express, but need not be written. Failure to pay is a serious violation resulting in a revocation order or, if a license is not in effect,

an order finding that respondent has committed repeated and flagrant violations, which has the same effect as a revocation order. Respondent's violations were repeated, flagrant and wilful. "Slow pay" is also a serious violation. The Act calls for payment--not excuses. All excuses, including bankruptcy, are rejected. Extraordinary circumstance, such as war or collapse of national banking system, might constitute mitigating circumstance. Pleas for leniency by creditors are routinely rejected. Hardship to respondent's community, customers or employees resulting from disciplinary order is disregarded. Respondent's due process rights were not violated by complainant's examination of respondent's records after the formal complaint was filed, notwithstanding fact that respondent has no discovery rights under Department's Rules of Practice. Prejudicial error was not committed when Judge Palmer refused to continue hearing for third time or to disqualify himself for allegedly pre-judging issues. In future cases, respondents must make full payment by opening of the hearing in order to receive a suspension order (for "slow pay") rather than a revocation order (for "no pay"). But until respondents have an opportunity to learn of this new policy, they can make full payment after the opening of the hearing. A more severe sanction policy can lawfully be applied without prior warning, but that is not the case here.

In *In re R. H. Produce, Inc.*, PACA Docket No. 2-6069, decided by the Judicial Officer on April 6, 1984 (28 pages), the Judicial Officer reduced Judge Weber's 80-day suspension order to 55 days, where respondent failed to pay promptly six sellers over $222,000 for 72 lots of produce. An agreement to extend the time for payment must be made at the time the contract is made. Custom and usage does not prevail over the provisions of the regulations as to when payment must be made. A promissory note is not "full payment." If a seller agrees to accept partial payment of the purchase price, that does not constitute full payment. A tender of payment of a disputed amount, as an accord and satisfaction, is not full payment. The absence of a definition of "payment" does not make the Act and regulations unconstitutionally void for vagueness. An 80-day suspension order would have been issued except for the fact that respondent is an exceptionally large operator. Mitigating circumstances properly disregarded. The fact that respondent's employees will suffer from a suspension order is irrelevant. Procedural error was not committed by permitting a government witness, who testified as to the sanction, to hear the testimony of the government's investigator. Giving sanction testimony prior to the presentation of respondent's evidence is not a violation of due process. Sanction evidence is not necessary in PACA payment cases. Whether a particular individual is a person responsibly connected with respondent may only be raised in a separate proceeding.

In *In re Mayer*, P&S Docket No. 6155 (decision as to respondent Doss), decided by the Judicial Officer on April 12, 1984 (12 pages), the Judicial Officer affirmed a default order issued by Judge Baker suspending respondent for two years for failing to pay in full for livestock purchases. Failing to pay for livestock, issuing insufficient funds drafts, and issuing drafts in payment for livestock without obtaining express, written agreements from the sellers are violations of sections 312(a) and 409 of the Act. Respondent had no constitutional right to have an attorney provided by the government, even if he was unable to afford counsel. Respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing. To be entitled to a reopened hearing, respondent would have to show "good reason" why the evidence was not adduced at the original hearing, similar to the judicial practice regarding newly discovered evidence. The two-year suspension of registration does not constitute confiscation of property in violation of due process of law. The fact that respondent will be unable to make restitution to livestock market agencies not paid for livestock if his registration is suspended is irrelevant.

In *In re Clarence Miller Co.*, PACA Docket No. 2-6394, decided by the Judicial Officer on April 18, 1984 (12 pages), the Judicial Officer affirmed Judge Weber's order revoking respondent's license for failure to pay promptly $107,766.15 and failure to make full payment of $48,589.28. Respondent contends on appeal that full payment has now been made as to all of the

transactions alleged in the complaint, but complainant's attorney sent a letter to respondent enclosing a copy of the *Gilardi* decision (which sets forth the guidelines as to the handling of cases in which respondent contends full payment was made after the hearing), and requesting respondent to submit an affidavit as to full payment and present compliance with the payment requirements of the Act and regulations. Respondent did not reply to the letter and, therefore, there is no basis for considering respondent's claim of full payment.

In *In re R. H. Produce, Inc.*, PACA Docket No. 2-6069, decided by the Judicial Officer on April 23, 1984 (3 pages), the Judicial Officer denied respondent's petition for reconsideration. Agreements for delayed payment made after the original sales contracts were concluded do not extend the 10-day period for making payment. Although respondent could lawfully use a variety of methods to make "full payment," such "full payment" must be fully consummated within 10 days after the day on which the produce was accepted, to constitute 'full payment promptly."

In *In re Sanchez*, A.Q. Docket No. 18, decided by the Judicial Officer on May 24, 1984 (4 pages), the Judicial Officer ruled on questions certified by Judge Palmer that a civil penalty of $5,190 imposed under the customs laws does not prevent this Department from imposing a civil penalty relating to the same transaction for violation of the animal quarantine laws. However, the fact that a civil penalty has been imposed on respondent by another governmental agency should be taken into consideration in determining the sanction in this proceeding. Failure to file an answer within the time provided is deemed an admission of the allegations in the complaint leading to a default decision, which is seldom set aside.

In *In re James*, P&S Docket No. 6215, decided by the Judicial Officer on May 30, 1984 (6 pages), the Judicial Officer affirmed Judge Liebert's order requiring respondent to cease and desist from engaging in business for which bonding is required without filing a bond, and suspending respondent until he complies with the bonding requirements. A civil penalty of $1,250 was assessed. Respondent's failure to file an answer constitutes an admission of the facts in the complaint. It is no defense that respondent's financial condition makes it impossible for him to obtain a bond or that there are other persons operating without a bond.

In *In re Joseph Buzun*, A.Q. Docket No. 12, decided by the Judicial Officer on June 13, 1984 (9 pages), the Judicial Officer affirmed a default decision issued by Judge Palmer assessing a civil penalty of $3,500 against respondent for feeding garbage to swine without a permit or license, in violation of the Swine Health Protection Act. Respondent was not denied due process of law even if he did not actually receive a copy of the complaint since the complaint was sent to his residence, certified mail, return receipt requested, and was received by someone at the residence. There is no basis for setting aside the default order here.

In *In re Jacobson*, AWA Docket No. 277, decided by the Judicial Officer on June 26, 1984 (9 pages), the Judicial Officer affirmed the default Decision and Order issued by Chief Judge Campbell directing respondents to cease and desist from violating the Animal Welfare Act and assessing a civil penalty of $1,000 for violations involving respondents care for dogs. Respondents challenged the facts on appeal, but their failure to file an answer is deemed an admission of the allegations in the complaint. Although on rare occasions default decisions have been set aside for good cause shown or where complainant did not object, respondents have shown no basis for setting aside the default order here.

In *In re Toscony Provision Co.*, FMIA Docket No. 40, decided by the Judicial Officer on July 12, 1984 (7 pages), the Judicial Officer denied respondent's late appeal on the ground that he lacks jurisdiction to consider an appeal after it has become final and effective. The Department's construction of its rules of practice is consistent with the construction of the Federal rules of Appellate Procedure, under which the appeal time has been construed as "mandatory and jurisdictional." The Department's rules, unlike the Federal Rules of Appellate Procedure, do not

provide for an extension of the time for filing a notice of appeal upon a showing of excusable neglect or good cause made within 30 days after the expiration of the appeal time. If an appeal had been timely filed, however, I would have adopted Judge Palmer's initial decision withdrawing and denying inspection to respondent so long as Henry Dei is associated with the firm.

In *In re Mid-West Veal Distributors*, P&S Docket No. 5735, decided by the Judicial Officer on July 13, 1984 (47 pages), the Judicial Officer increased the civil penalty from $47,000 (with $27,000 suspended) imposed by Judge Palmer to $77,000 (with $27,000 suspended) for a packer's trust dissipation violations, failures to pay, issuance of insufficient funds checks,and failure to maintain a bond. Failure to pay for livestock is an unfair practice. The Act authorizes an order requiring an insolvent packer to cease and desist from purchasing livestock while insolvent except when payment is made at the time of purchase by cash. Failure to obtain the required bond is an unfair and deceptive practice. The issuance of NSF checks is an unfair practice. Failing to maintain and destroying purchase and inventory records violates section 401 of the Act. The corporate veil may be pierced to assess civil penalties against the owner and operator of the packing corporation. Respondents' claim that they expected a bank and a packing company to whom respondents' trust assets were turned over to make payments to the unpaid livestock sellers is not a mitigating circumstance because respondents were heavily indebted to the bank and packing company and should have known that the bank and packing company might protect their own interests rather than the interests of respondents' unpaid livestock sellers. Severe sanction policy explained. Ideally, the civil penalty imposed for violations of the packer-trust provisions should equal the value of the trust assets dissipated (to eliminate the "profit" from the violations), less any amount attributable to mitigating circumstances, plus an additional sum to serve as a deterrent to the violator and other potential violators. But here the civil penalty must be reduced because of respondent's inability to pay a larger civil penalty. Since the individual respondent is 62 years old and has negligible assets (but has an earning potential of $50,000 to $75,000 a year), $5,000 should be payable upon the effective date of the order and $7,500 per year upon each of the net six anniversaries of the effective date of the order.

In *In re Stumbo*, AWA Docket No. 216, decided by the Judicial Officer on August 7, 1984 (26 pages), the Judicial Officer affirmed Judge Liebert's cease and desist order and order assessing a civil penalty of $4,000 and suspending respondent's license for 120 days, for interfering with federal veterinarians inspecting his dog holding facilities, and for failing to comply with the regulations as to the care and handling of dogs. Severe sanction policy explained.

In *In re Interstate Meat Packing Co.*, P&S Docket No. 6104, decided by the Judicial Officer on August 8, 1984 (5 pages), the Judicial Officer dismissed an appeal from Judge Palmer's initial decision assessing a $5,000 civil penalty for trust dissipation violations and failing to pay for livestock because the appeal does not conform to the rules of practice. However, since respondent does not have an attorney, he was given 30 days in which to file an appeal conforming to the rules. Respondent's appeal indicates that he plans to call additional witnesses, but further evidence will not be received unless respondent sets forth a "good reason" why the evidence was not introduced at the original hearing. This is similar to the "newly discovered evidence" rule applicable in Federal courts. If respondent files a new appeal, respondent may file a cross-appeal asking for an increase in the civil penalty, or the Judicial Officer may, on his own motion, raise the issue as to whether the civil penalty should be increased under the guidelines in In re Mid-West Veal Distributors, decided July 13, 1984.

In *In re Apex Meat Co.*, FMIA Docket No. 78, decided by the Judicial Officer on August 14, 1984 (15 pages), the Judicial Officer ruled in response to a question certified by Judge Weber that the administrative proceeding to withdraw meat inspection because of the conviction of respondent's president of 22 felonies involving wire fraud should not be stayed pending an appeal

of the criminal conviction. Respondent's criminal appeal raises a substantial question and respondent will be unable to recover the money spent in this proceeding irrespective of the outcome of the criminal appeal, but the public interest requires a prompt hearing since the criminal conviction raises a sufficient question as to whether respondent is fit to receive inspection. Withdrawal of inspection based on a felony conviction is only to protect the public health--not to punish or to deter others. It is not the department's function to retry the felony case.

In *In re Darrel Focken*, A.Q. Docket No. 64, decided by the Judicial Officer on September 5, 1984 (3 pages), the Judicial Officer ruled on questions certified by Judge Weber that complainant's motion for adoption of a decision imposing a $1,000 civil penalty for violations of the Animal Quarantine and Related Laws involving the movement interstate of 13 cattle not tested for brucellosis and not accompanied by a certificate should be granted where respondent's answer did not deny the allegations in the complaint and respondent's mitigating circumstances were unpersuasive. Ignorance of the law is not a mitigating circumstance in imposing civil penalties involving violations of the Brucellosis Eradication Program.

In *In re Interstate Meat Packing Co.*, P&S Docket No. 6104, decided by the Judicial Officer on September 14, 1984 (2 pages), the Judicial Officer denied an extension of time for filing a late appeal (after the initial decision had become final), which has the effect of preventing respondents from appealing the initial decision to the Judicial Officer.

Fiscal Year 1985

In *In re Landmark Beef Processors, Inc.*, P&S Docket No. 6174, decided by the Judicial Officer on October 2, 1984 (1 page), the Judicial Officer dismissed an interlocutory appeal since an appeal may be filed only after issuance of the ALJ's initial decision.

In *In re Dr. Petty*, V.A. Docket No. 21, decided by the Judicial Officer on October 31, 1984 (94 pages), the Judicial Officer reversed Judge Baker's initial decision, which had dismissed the complaint. The Judicial Officer revoked respondent's accreditation as a veterinarian authorized to perform official duties under State-Federal disease eradication programs because respondent (i) issued official health certificates permitting the interstate movement of known brucellosis exposed cattle, (ii) conducted unauthorized brucellosis card tests in a State in which he was not licensed or accredited, and (iii) failed to immediately report to State or Federal officials that he found brucellosis reactor cattle when he conducted the unauthorized card tests. Respondent's cross-appeal is permitted by the Department's rules of practice. Although the Judicial Officer gives great weight to findings of fact by ALJ's, he can reverse as to the facts, particularly where documentary evidence or inferences to be drawn from the facts are involved. The Judicial Officer may raise additional issues on appeal *sua sponte*. Offers of proof may be considered as evidence without affording respondent an additional opportunity to rebut it. But here respondent was afforded an opportunity by the JO to rebut the offers of proof. Adverse inference drawn against respondent because he refused to testify. The existence of a pending lawsuit against respondent would not prevent the drawing of such an adverse interest. The ALJ erred in refusing to permit complainant to amend the complaint to correct the health certificate numbers alleged in the complaint, and in rejecting numerous exhibits. Where the respondent learned complainant's claims as the case unfolded, and where the hearing was conducted at intervals, there is no lack of due process because the complaint was vague or inaccurate. The civil penalty provision of the Act cannot be applied retroactively. The words "any" and "all" are broad and comprehensive terms. Responsible hearsay is freely admitted in our proceedings, but whether hearsay is enough to support a finding of fact without corroboration depends on the importance of the fact to the ultimate conclusion and whether better evidence was readily available. Severe sanction policy explained. Revoking a veterinarian's accreditation is not a "license" revocation. An action is wilful if intentionally done, irrespective of evil intent, or done with careless disregard of requirements.

In *In re Corbett Farms, Inc.*, ERCIA Docket No. 5, decided by the Judicial Officer on November 1, 1984 (11 pages), the Judicial Officer affirmed the initial, default decision issued by Judge Weber requiring respondent to cease and desist from violating the Egg Research and Consumer Information Act by failing to file handler reports, and remit assessment obligations to the American Egg Board on a timely basis, and by failing to remit overdue assessment obligations, totalling $24,635.40. A civil penalty of $54,000 was assessed. Respondent waived its right to a hearing when it failed to file an answer and request a hearing and, therefore, Judge Weber correctly refused to give respondent an opportunity to demonstrate that it is without financial assets. Sanction evidence would have been relevant at a hearing, if properly requested. Severe sanction policy explained.

In *In re Vrana*, AWA Docket No. 244, decided by the Judicial Officer on November 6, 1984 (21 pages), the Judicial Officer affirmed Judge Palmer's order directing respondent to cease and desist from violating the Act and regulations, assessing a civil penalty of $3,000, and suspending respondent's license for 30 days, because respondent (i) sold dogs and cats which had not been held for the requisite length of time after acquisition, (ii) transported animals in a van that was unclean and poorly ventilated, (iii) used cages and a cardboard carton to transport animals which caused them to be crowded and unprotected against normal dangers of transit, and (iv) failed to provide veterinary care to cats with viral infections. There is no basis for altering Judge Palmer's findings based on his determination of the credibility of the witnesses. Severe

sanction policy explained. Mitigating circumstances were considered, except that no weight was given to the fact that respondent was jailed as a political prisoner by the communists for 7 ½ years. Respondent's violations were wilful.

In *In re Lucas*, V.A. Docket No. 30, decided by the Judicial Officer on November 7, 1984 (8 pages), the Judicial Officer affirmed Judge Weber's decision revoking respondent's accreditation as a veterinarian authorized to perform official duties under State-Federal disease eradication programs for 9 months because respondent repeatedly calfhood vaccinated animals with Brucella abortus vaccine and failed to distribute copies of the vaccination certificates to the Minnesota Board of Animal Health within 14 days, as required. Respondent's answer failed to deny the allegations of the complaint and indicated that he wanted only to raise issues extraneous to the complaint (involving his disputes with the Livestock Sanitary Board in Minnesota), and, therefore, Judge Weber properly issued his decision without affording respondent an opportunity for a hearing.

In *In re Nebraska Beef Packers, Inc.*, FMIA Docket No. 76, decided by the Judicial Officer on November 14, 1984 (31 pages), the Judicial Officer affirmed Chief Judge Campbell's initial decision and order activating the 2-year withdrawal of inspection service from respondents under prior 1982 consent orders because respondent Cattle King Packing Co. processed adulterated meat and meat food products at its packing plant. Cattle King processed animals which died otherwise than by slaughter or which were unable to proceed to slaughter on their own power, and deliberately concealed such activities from USDA personnel. Under the terms of the 1982 consent orders, it is not necessary to show that Nebraska Beef and Cattle King are affiliated. However, the firms are affiliated since the joint owner of Nebraska Beef owns 100% of the stock of Cattle King. The securities laws, under which a controlling company is not responsible for the acts of its affiliate unless the controlling company acted in bad faith, are not relevant. Consent settlements are enforced in the absence of extraordinary circumstances, such as fraud, duress or unilateral mistake of fact. The doctrine of piercing the corporate veil is irrelevant, but if it were, the corporate veil would be pierced because of 100% ownership of Cattle King by a joint owner of Nebraska Beef. There is no discretion under the consent order to consider mitigating circumstances. Inspection service is not being withdrawn from Nebraska Beef because of Cattle King's violations. Cattle King's violations merely trigger activation of the consent order under which inspection service was withdrawn from Nebraska Beef for 2 years because Nebraska Beef was convicted of the felony of interstate transportation of adulterated meat. Complainant need only prevail by a preponderance of the evidence. The ALJ, who saw and heard the witnesses testify, was in the best position for determining the credibility of the witnesses.

In *In re Norwich Beef Company*, FMIA Docket No. 29, decided by the Judicial Officer on November 15, 1984 (2 pages), the Judicial Officer modified the order previously issued in this proceeding on March 7, 1979, to permit Alan Roessler to again be responsibly connected with respondent, since complainant recommended that respondent's motion to that effect be granted.

In *In re Petty*, V.A. Docket No. 21, decided by the Judicial Officer on November 21, 1984 (6 pages), the Judicial Officer denied respondent's objections to official notice being taken of the Colorado quarantine laws and denied respondent's petition for reconsideration. The Judicial Officer has authority to take official notice of appropriate documents. The petition for reconsideration is denied for the reasons set forth in the original decision.

In *In re Nebraska Beef Packers, Inc.*, FMIA Docket No. 76, decided by the Judicial Officer on November 28, 1984 (1 page), the Judicial Officer denied a petition for rehearing for the reasons set forth in the original decision.

In *In re Stafford*, P&S Docket No. 6381, decided by the Judicial Officer on December 3, 1984 (8 pages), the Judicial Officer affirmed Judge Palmer's order requiring respondents to cease and desist from specified practices and suspending respondents for 15 days and thereafter until they demonstrate solvency. The test for insolvency is established, it is deemed to continue until the respondent demonstrates solvency. Land is not ordinarily considered a current asset. Although respondents were attempting to sell their land, the evidence did not indicate the likelihood of a sale within a year. Therefore, respondents' land was not a current asset. Respondents' violations were willful, but willfulness is not required since they received three warning letters.

In *In re Tri-State Fruit & Vegetable, Inc.*, PACA Docket No. 2-6619, decided by the Judicial Officer on December 4, 1984 (3 pages), the Judicial Officer ruled on a question certified by Judge Baker that respondent's answer does not admit sufficient violations to permit a decision without further proceedings. However, the ALJ should determine through a prehearing conference whether respondent admits owing more than a de minimis amount for produce, in which case a hearing would not be necessary. Respondent's denial that its license terminated when it failed to pay the required fee is immaterial since respondent admits that its license was surrendered. Respondent denies that the violations were willful, flagrant and repeated, but if respondent failed to pay substantial sums of money in many transactions over a 7-month period, the violations would, as a matter of law, be willful, flagrant and repeated. Nonetheless, a finding of willfulness should not be made since no license would be revoked. [Only a finding would be made that respondent had committed repeated and flagrant violations.]

In *In re Fava & Co.*, PACA Docket No. 2-6547, decided by the Judicial Officer on December 4, 1984 (4 pages), the Judicial Officer ruled on a question certified by Judge Baker that although respondent denies that it owes the amount of money alleged in the complaint, respondent's Chapter 11 bankruptcy petition, of which official notice should be taken, admits that it owes most of the sums alleged. Hence there is no substantial dispute as to the amount owed. Respondent's denial that the violations were willful, flagrant and repeated is immaterial since the failure to pay such substantial sums of money in so many transactions over a 6-month period constitutes willful, flagrant and repeated violations, as a matter of law. But a finding of willfulness should not be made since no license would be revoked. Respondent contends that express agreements were entered into with various sellers waiving payment within 10 days. The ALJ should determine, through a prehearing conference, whether respondent contends that the sellers had expressly waived payment for more than 15 months, i.e., so that payment is not due even at the present time. To warrant a hearing, enough sellers would have had to enter into such express agreements for delayed payment so that the amount presently due and unpaid would be de minimis, e.g., less than $5,000.

In *In re Sequoia Orange Co.*, AMA Docket No. F&V 907-11, decided by the Judicial Officer on December 18, 1984 (3 pages), the Judicial Officer denied interim relief to a handler seeking a determination that the marketing order regulating the handling of naval oranges grown in Arizona and in designated parts of California, and obligations imposed thereunder, are not in accordance with law. The Agricultural Marketing Agreement Act of 1937 does not provide for interim relief. In In re Moser Farm Dairy, Inc., the Judicial Officer held that interim relief is not available to a milk handler who has filed a proceeding under § 8c(15)(A) of the Act. Since there is no basis for distinguishing between fruit and vegetable cases, the decision in Moser Farm Dairy is extended to fruit and vegetable cases, so that petitions for interim relief will no longer be considered. The Department should amend the rules of practice to make it clear that interim relief is not available. If interim relief were available, petitioner has made a sufficient showing of irreparable injury, but has not raised legal issues substantial enough to justify interim relief. Also, other handlers and growers and the public interest could be adversely affected by permitting petitioner to ship its oranges without restriction.

In *In re Steinberg Bros. Co.*, PACA Docket No. 2-6087, decided by the Judicial Officer on December 26, 1984 (40 pages), the Judicial Officer reversed Judge Baker's decision, which had dismissed the complaint, and suspended respondent's license for 90 days. The ALJ dismissed the complaint because she failed to properly apply the unequivocal terms of the Act and regulations to the undisputed facts. Respondent acted as a broker for the seller and owed the seller a high degree of care, honesty and loyalty. Respondent violated the regulations by failing to send to the seller and buyer a broker's confirmation or memorandum of sale i 114 transactions. Invoices sent to the buyer do not satisfy the requirement of sending a broker's memorandum of sale. Invoices received by respondent from the seller do not satisfy the requirement that respondent send to the seller a broker's memorandum of sale. Respondent's repeated and flagrant violations involving the failure to end broker's memoranda of sale in 114 transactions warrant a 50-day suspension. Respondent's violations were also willful. Ignorance of the law is never an excuse or even a mitigating circumstance in a disciplinary proceeding under the Act. Severe sanction policy explained. The ALJ improperly drew an adverse inference against complainant because complainant did not call the seller as a witness. Complainant had no more reason to call the seller than did respondent. Moreover, even if the seller were not concerned that he was not sent broker's memoranda of sale, and was satisfied with respondent's brokerage transactions, that is not a defense to a violation of the regulations. Respondent is suspended for an additional 40 days because it retained for itself $1,034.45 for about 3 years which belonged to the buyer. The seller had agreed that the buyer could take allowances in five transactions, totalling that amount, but the buyer forgot to deduct the allowances when it remitted to respondent. Respondent deducted from the seller even though the buyer had not deducted the allowances in remitting to respondent. Even though the ALJ found that respondent's failure in this respect was through oversight and bookkeeping error, respondent admittedly did not have any bookkeeping system that would ever discover such discrepancies. The complaint is not as accurate as desirable, but it is at least adequate for the purposes of an administrative proceeding. The formalities and technicalities of court pleading are not applicable in administrative proceedings. If complainant had moved to amend the complaint to conform to the evidence, which is permissible under the rules of practice, respondent's license would have been revoked. The complaint was brought on the theory that respondent was defrauding the seller by keeping for itself an additional $1 per sack which respondent added to the purchase price as shown on respondent's invoices to the buyer. However, the undisputed evidence shows that respondent merely acquiesced in the buyer's request that an additional $1 per sack be added to each invoice, and the money was meant to be, and was in fact, returned to the owner of the buying firm. I infer that this was done to permit the buyer to engage in income tax evasion, and respondent's falsification of the invoices was a serious violation of the regulations; but since that violation was not charged in the complaint, and complainant did not move to amend the complaint to conform to the proof, respondent's license cannot be revoked. Respondent received a $2,296 payoff from the buyer which respondent should have brought to the attention of the seller. But this serious violation was not alleged in the complaint, and complainant did not move to amend the complaint to conform to the evidence.

In *In re County Line Cheese Co.*, AMA Docket No. M 49-1, the Judicial Officer filed a Tentative Decision and Order on December 26, 1984 (105 pages), reversing Judge Baker's decision. Petitioners contend, and Judge Baker concluded, that the Market Administrator of the Indiana Milk Order improperly issued audit adjustments costing petitioners about $328,000. The burden of proof in a § 8c(15)(A) proceeding is on petitioners. County Line is a supply plant that also owns a cheese plant. Meadow Gold is a distributing plant. County Line and Meadow Gold are both owned by Beatrice Foods Co. For County line to become a "pool plant," 50% of its milk must be "shipped to" a distributing plant. The Market Administrator properly interpreted the Order to require that County Line's milk be pumped into Meadow Gold's tank to qualify as part of the 50% requirement. The Market Administrator's interpretation is entitled to great weight. Under the Market Administrator's interpretation, a supply plant's shipment to a distributing plant qualifies as part of the 50% requirement even though the milk is pumped into the distributing

plant's tank and then immediately pumped back out into the same truck, enroute to a cheese plant. However, County Line failed to pump a sufficient quantity of its milk into and out of Meadow Gold's tank to qualify as a pool plant. Petitioners contend that there is no reasoned agency decisionmaking explaining the need for pumping the milk into and out of the distributing plant's tank. Petitioners are engaged in business for profit and are not required, and should not be expected, to arrange their milk handling activities so as to maximize returns to producers rather than to their stockholders. The Secretary's findings fully justify and rationally explain the requirement that a supply plant's milk be physically unloaded into the distributing plant's tank when the milk is needed for fluid purposes. Although the Secretary's decision does not reveal why the milk should have to be pumped into and out of the distributing plant's tank when it is not needed by the distributing plant for fluid purposes, that is a matter that was not anticipated when the regulation was promulgated, and the changed circumstances should have been presented to the Secretary in his legislative capacity. The Order, as applied to the circumstances existing when the Order was promulgated, is supported by adequate findings and evidence, and is authorized by the Act. In addition, petitioners did not adequately brief the substantial evidence question. If the Secretary's decision did not adequately explain the Order provisions, respondent's briefs could not fill the gap. Moreover, respondent's briefs do not adequately explain why milk should be pumped into and out of a distributing plant's tank if all parties know in advance that the milk is not needed by the distributing plant and that it will be pumped into and out of the distributing plant's tank, enroute to a manufacturing plant. Two other milk orders do not require such pumping in and pumping out, and respondent has not explained why similar provisions would not be appropriate in Indiana. In In re Michaels Dairies, Inc., pumping in and pumping out was sustained because it was required to prevent too much milk from being associated with the milk pool. But the Secretary will have to explain in his legislative capacity whether similar reasoning applies here. If I had concluded that the circumstances presented here should have been anticipated by the Secretary when the Order was promulgated, I would have remanded the proceeding to the Secretary for the purpose of issuing revised findings of fact, perhaps after a further hearing. As a result of the Market Administrator's determination that County Line Cheese Co. was not a pool plant, some of Meadow Gold's milk purchased from County line was down-allocated from Class I to Class III and producer milk was up-allocated from Class III to Class I. That does not violate § 8c(5)(G). On that portion of the milk purchased by Meadow Gold from County Line that retained a Class I allocation, Meadow Gold was required to make a compensatory payment to the producer-settlement fund equal to the difference between the blend price paid to producers and the Class I price. That is not a trade barrier prohibited by § 8c(5)(G). Lehigh Valley distinguished. In addition, petitioners failed to prove the prices paid by its competitors for milk.

In *In re Farm Market Service, Inc.*, PACA Docket No. 2-6511, decided by the Judicial Officer on January 8, 1985 (23 pages), the Judicial Officer affirmed Judge Weber's decision revoking respondent's license for failure to pay for produce. Judge Weber did not err in failing to grant a continuance to enable respondent to obtain an attorney since respondent had adequate time within which to obtain an attorney and did not raise the issue until the morning of the hearing. A continuance would not have been in the public interest. A continuance should never be granted to give a respondent additional time in which to pay its obligations in order to convert a case from "no pay," in which a revocation order is appropriate, to "slow pay," in which a suspension order is appropriate.

In *In re Hulings*, P&S Docket No. 5744, decided by the Judicial Officer on January 15, 1985 (7 pages), the Judicial Officer denied a late appeal and refused to grant an extension of time for filing an appeal, since the Judicial Officer lacks jurisdiction to consider an appeal after it has become final.

In *In re Horner, Jr.*, A.Q. Docket No. 20, decided by the Judicial Officer on January 22, 1985 (2 pages), the Judicial Officer ruled on questions certified by Judge Weber that the

complaint alleges enough facts to support a default judgment. The allegation that cows were moved interstate without being accompanied by the "required" certificate and permit alleges, by implication, that the cows were over 24 months of age. Separate $500 civil penalties can be assessed for failing to have (i) an inspection certificate, and (ii) a permit for entry.

In *In re Defiance Milk Products Co.*, AMA Docket No. M33-3, decided by the Judicial Officer on January 24, 1985 (69 pages), the Judicial Officer reversed Judge Palmer's decision holding that petitioner was owed $68,000 by the Market Administrator of Order No. 33, regulating the handling of milk in the Ohio Valley marketing area. The Secretary's temporary, 2-month amendment created, in effect, a new Class III(A), consisting of butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd), priced 40¢ lower than Class III. Substantial evidence supports the temporary amendment. Substantial evidence did not support including evaporated milk in the new Class III(A), but even if it did, the Secretary's decision not to include evaporated milk in Class III(A) was not arbitrary, capricious or an abuse of discretion. The Secretary's action is justified by § 8c(5)(A) and 8c(7)(D) of the Act. Absolute equality and complete equity is not required in Federal Milk Marketing Orders. Particular weight should be given to administrative expertise in the field of milk marketing. The issue is whether substantial evidence supports the inclusion of evaporated milk in Class III(A)--not whether substantial evidence supports the exclusion of evaporated milk. The Secretary need not take ultimate consumer use of milk products into account in classifying milk. The existence of regulatory alternatives is not cognizable on review. The responsibility for selecting the best means of achieving the statutory policy is peculiarly a matter of administrative competence. The Secretary's rulemaking action must be judged solely by the evidence at the rulemaking hearing rather than the 8c(15)(A) hearing. If the Secretary's temporary rulemaking action were found unlawful, the proper course would be to remand the matter to the Secretary for lawful action, rather than to award damages to petitioner. If damages had been awarded to petitioner, interest would not have been appropriate.

In *In re Wood*, A.Q. Docket No. 82, decided by the Judicial Officer on January 25, 1985 (2 pages), the Judicial Officer ruled on questions certified by Judge Weber that the allegations of the complaint adequately allege a cause of action because a brucellosis-exposed bull can lawfully move interstate from a stockyard only to (1) a recognized slaughtering establishment; (2) a quarantined feedlot; or (3) in some circumstances, directly back to the farm of origin. Since the complaint alleges that a brucellosis-exposed bull was moved from a stockyard in Texas to a livestock company in Louisiana, which is not in one of the three permissible categories, the complaint adequately states a cause of action.

In *In re Kaplan's Fruit & Produce Co.*, PACA Docket No. 2-6059, decided by the Judicial Officer on January 30, 1985 (27 pages), the Judicial Officer substantially modified Chief Judge Campbell's decision suspending respondent's license for 10 days insofar as it involves buying as a dealer and for 45 days in a fiduciary capacity. The Judicial Officer suspended respondent's license for 30 days in all capacities. Since respondent handled consignment transactions but did not record on the sales tickets the lot numbers, as required, complainant determined the amount due consignors by taking an average of all sales of produce that was on hand at the time. Although this method tends to overstate the amount of underpayments, it is approved for the purposes of this case, but, where practicable, complainant should use judgment as to which sales to include in estimating the amounts owed to consignors. If a licensee had records other than the ones required to be kept by the Act that substantiated its accountings to consignors, they would be given substantial weight only if determined to be genuine, contemporaneous records of the actual sales prices. A license may be suspended if violations are willful or if prior notice has been given. Here we have both. Once a warning letter has been sent, no subsequent warning letters are required as to similar, subsequent violations. Severe sanction policy explained. Violations of fiduciary duty are extremely serious, as well as recordkeeping violations. In determining sanction, the facts that violations relate only to a trivial

part of the total business, and that respondent's business is unusually large, are considered. An additional suspension order applicable only to fiduciary transactions, as was issued in In re Sol Salins, Inc., will no longer be issued, in view of the administrative burdens of policing such sanctions.

In *In re County Line Cheese Co.*, AMA Docket No. M 49-1, decided by the Judicial Officer on February 12, 1985 (115 pages), the Judicial Officer reversed Judge Baker's order which upheld petitioner's challenge of audit adjustments by the Market Administrator of the Indiana Milk Order that cost petitioners $328,003.44. The burden of proof in a 15(A) proceeding rests with petitioners. Meadow Gold Dairy, a handler operating a pool distributing plant, and County Line Cheese Company, a handler operating a supply plant, are both wholly-owned subsidiaries of Beatrice Foods Company. The Market Administrator correctly concluded that County Line did not qualify under the order as a pool plant from September 1980 through February 1981 because 50% of its qualifying receipts were not pumped into and out of Meadow Gold's distributing plant tank before it was sent to County Line's Auburn Cheese Plant. The administrative construction of a regulation is entitled to a great weight. The order as interpreted by the Market Administrator is supported by reasoned agency decisionmaking. If circumstances change, making order provisions no longer applicable to present factual conditions, a handler must seek relief through the order amendment procedure. Court's may not accept appellate counsel's post hoc rationalizations for agency action. The requirement that milk be pumped into and out of a distributing plant was upheld in Michael's Dairies under the diversion provisions because the added expense was necessary to prevent too much manufacturing milk from being associated with the pool. If the Secretary had failed to engage in reasoned agency decisionmaking, it would have been appropriate to remand the proceeding to the Secretary for the purpose of issuing revised findings. The "down allocation" and compensatory payment provisions as to other source milk are in accordance with law. It is customary for the Secretary to determine which milk handlers and handling of milk shall be included in a marketwide pool, and which dairy farmers shall be included as producers. All federal orders give priority to producers in the pool in the assignment of milk to Class I utilization. That was upheld in Bailey Farm Dairy. The requirement that Meadow Gold make a compensatory payment into the pool equal to the difference between the Class I price and the blend price paid to producers on that portion of County Line's (other source) milk that retained the Class I classification is not a trade barrier in violation of section 8c(5)(G).

In *In re Tri-State Fruit & Vegetable, Inc.*, PACA Docket No. 2-6619, decided by the Judicial Officer on February 22, 1985 (3 pages), the Judicial Officer affirmed Judge Baker's order publishing the finding that respondent has committed repeated and flagrant violations of the Perishable Agricultural Commodities Act. Respondent challenges on appeal the ALJ's finding that respondent's license terminated on May 3, 1984, and the ALJ's conclusion that respondent's failure to make full payment was willful. Since neither finding is opposed by complainant, and neither finding is of legal significance, the findings are amended in accordance with respondent's appeal.

In *In re Palmer*, HPA Docket No. 132, decided by the Judicial Officer on February 22, 1985 (15 pages), the Judicial Officer affirmed Judge Palmer's order assessing a $2,000 civil penalty and disqualifying respondent from showing or exhibiting any horse for one year. The doctrine of laches is not applicable. An argument made for the first time on appeal comes too late to be considered. I infer that USDA officials properly presented their credentials. The requirement that the examination of a horse be conducted within reasonable limits and in a reasonable manner is not unconstitutionally vague, although an administrative agency has no power to question the constitutionality of a statute under its jurisdiction. Intention to sore a horse is not required. Lack of knowledge that a horse was sore is not a mitigating circumstance.

In *In re Zartman*, AWA Docket No. 259, decided by the Judicial Officer on February 27, 1985 (17 pages), the Judicial Officer affirmed Judge Baker's order dismissing the complaint, but for different reasons than those given by Judge Baker. Complainant sought a $2,000 civil penalty, a cease and desist order, and a 60-day suspension order for various violations of the Animal Welfare Act. Although the issue is not free from doubt, the Secretary is authorized to promulgate standards applicable to the operator of an auction sale as to the care, treatment, housing, feeding, watering, and sanitation of animals. No clause of a statute should be construed as superfluous. The proven violations relating to inadequate lighting, soundness of cages, and size of cages are too trivial to warrant a sanction. The allegation as to failure to establish and maintain a veterinary care program is dismissed because respondent had such a program, even though it was not perfect. Perfection is not required by the regulations. Nothing in the standards prohibits watering receptacles with chipped edges. A licensee is responsible for the acts of his employees. Parties are permitted and encouraged to introduce evidence indicating why the violations involved are serious, but complainant introduced no such evidence here.

In *In re Stuekerjuergen*, AWA Docket No. 265, decided by the Judicial Officer on February 27, 1985 (10 pages), the Judicial Officer reversed Judge Baker's order assessing a $2,000 penalty and suspending respondent's license for 15 days for violating the minimum age requirement as to shipping puppies, and increased the sanction to a $7,000 civil penalty and a 35-day suspension. Violation of the minimum age requirement is a serious violation of the Animal Welfare Act. The fact that this is the first adjudicated complaint filed under this particular section of the Act does not lead to a reduced sanction. The administrative recommendation to impose a sanction more severe than imposed here seems more Draconian than "severe."

In *In re Mayes*, A.Q. Docket No. 34, decided by the Judicial Officer on March 6, 1985 (5 pages), the Judicial Officer ruled on a question certified by Judge Weber that the complaint had not been properly served under the Department's rules of practice. The certified letter serving the complaint was returned "refused." An interoffice memorandum by a USDA employee qualifies as a "certificate" as to the further service of the document. However, the memorandum states that a copy was left at respondent's residence with his wife. Respondent's wife is not within the class of individuals with whom a copy of the complaint may be left. If a copy is left at the respondent's office or residence, it must also be mailed by regular mail to such address. That was not done here.

In *In re McConnell*, HPA Docket No. 174, decided by the Judicial Officer on March 8, 1985 (43 pages), the Judicial Officer reversed Judge Palmer's order under the Horse Protection Act assessing civil penalties ranging from $400 to $1,500, and increased the civil penalties to $750 against one respondent and $2,000 against six other respondents. That part of the order disqualifying each respondent from showing or exhibiting any horse for one year was affirmed. A pre-show examination does not discredit the Department's post-show examination. Exhibitors of horses are absolute guarantors that their training methods and action devices used during the show will not sore the horse. The horse's owners "allowed" the horse to be exhibited while sore even though they were without specific knowledge of the horse's condition when exhibited. Complainant need only prevail by a preponderance of the evidence. Intent is not an element of soring. Lack of knowledge by the owner is irrelevant. The statutory presumption that a horse is sore if it manifests abnormal bilateral sensitivity does not shift the ultimate burden of proof to respondent. The regulations do not "permit" 10-ounce chains if they cause a horse to be sored. Dr. O'Brien's examination of the horse 2½ or 3½ hours after the show is not given as much weight as the more immediate USDA examination. There is no evidence that the number or manner of USDA examinations had any effect on the sensitivity of the horse. The civil penalty as to McConnell, the trainer, is only $750 because of his extremely poor financial condition. Each of the six co-owners of the horse should be assessed $2,000 civil penalties. The contemporaneous and settled administrative construction of an Act is entitled to great weight. The Burton decision is erroneous and will not be followed outside the 8th Circuit. The USDA

rules of practice permit a cross appeal. It does not violate the equal protection clause of the fourteenth amendment to increase the sanction on complainant's cross appeal.

In *In re Nabydoski*, A.Q. Docket No. 86, decided by the Judicial Officer on March 12, 1985 (2 pages), the Judicial Officer directed the Hearing Clerk to send respondents the routine notification that the initial decision and order became final on the 35th day after service since respondent's letter seeking to be exempt from the Swine Health Protection Act was not an appeal, and even if it were an appeal, it was not timely filed.

In *In re ITT Continental Baking Co.*, P&S Docket No. 5956, decided by the Judicial Officer on March 18, 1985 (72 pages), the Judicial Officer affirmed that part of Judge Palmer's decision imposing a $10,000 civil penalty and ordering respondent to cease and desist from engaging in discriminatory promotional plans, and making payments without assuring that promotional services for which payments are made are actually provided. But the Judicial Officer reversed Judge Palmer's order dismissing paragraph IV of the complainant, relating to respondent's entertainment of chain store customers, and remanded the proceeding for a hearing as to paragraph IV. Since respondent owned the Gwaltney Co., a packer, when the violations occurred, respondent is a packer subject tot he Act even though it sold Gwaltney a week before the complaint was field. The Secretary can enforce Robinson-Patman Act principles under § 202(a) of the P&S Act. Section 2(d) of the Robinson-Patman Act was fashioned to reach discriminations disguised as promotional allowances. Respondent paid promotional allowances (shelf-stocking allowances and cooperative advertising allowances) to various customers that (i) were not made proportionately available to competing customers, and (ii) were not made in good faith to meet competition, which would have been permitted by § 2(d) of the Robinson-Patman Act. Predatory intent or likelihood of injury is not required. Adoption of a statute by reference is an adoption of the law as it existed at the time the adopting statute was passed. Complainant need only prevail by a preponderance of the evidence. A cease and desist order is appropriate even though respondent is no longer in the meat packing business. It is within the discretion of the agency whether to proceed by rulemaking or case by case. Investigative reports should not be made available to respondent. Expert testimony as to the ultimate question at issue is admissible.

In *In re Palmer*, HPA Docket No. 132, decided by the Judicial Officer on April 5, 1985 (4 pages), the Judicial Officer denied respondent's petition to reconsider and to reopen. In every Horse Protection Act case, the management of the show had previously found that the horse was not sore before the show. A petition to reopen cannot be filed after the issuance of the Judicial Officer's decision. The USDA officials are required to present their credentials to the management of the horse show, not to respondent. In absence of evidence to the contrary, I infer that the officials properly presented their credentials, but, if not, it would not be a fatal error. The rules of practice permitted the ALJ to make corrections to the transcript.

In *In re Stanley*, P&S Docket No. 6444, decided by the Judicial Officer on April 5, 1985 (5 pages), the Judicial Officer affirmed Judge Baker's default order suspending respondent as a registrant until he obtains a bond. However, since complainant stated that further investigation confirms respondent's contention that he is destitute and unable to pay the $500 civil penalty imposed by Judge Baker, the civil penalty provisions were deleted.

In *In re Borden, Inc.*, AMA Docket No. M-126-9, decided by the Judicial Officer on April 17, 1985 (1 page), the Judicial Officer denied interim relief, citing In re Moser Farm Dairy, Inc.

In *In re Sequoia Orange Co.*, AMA Docket No. F&V 907-11, decided by the Judicial Officer on May 6, 1985 (4 pages), the Judicial Officer affirmed Judge Palmer's order dismissing the petition, without prejudice. The petition requests an order terminating the marketing order

for California-Arizona navel oranges on the ground that the Secretary's remarks in press releases supporting amendments of the marketing order had the effect of terminating the existing order.

In *In re Rinella's Wholesale, Inc.*, PACA Docket No. 2-6695, decided by the Judicial Officer on May 20, 1985 (5 pages), the Judicial Officer denied a petition for reconsideration of Judge Palmer's decision because the petition was filed after Judge Palmer's decision had become final. The Judicial Officer has no jurisdiction to hear an appeal filed after the initial decision has become final. The Department's construction of its rules of practice is consistent with the construction of the Federal Rules of Appellate Procedure.

In *In re Powell*, P&S Docket No. 6248, decided by the Judicial Officer on May 28, 1985 (5 pages), the Judicial Officer denied a late appeal from an order issued by Chief Judge Campbell. Respondent's appeal, mailed 10 days after the decision had become final, was not timely and therefore his appeal cannot be heard. The Judicial Officer has no jurisdiction to hear an appeal filed after it has become final. However, since respondent is seeking to appeal merely to be sure that he can work as an employee for a registrant during his suspension period, the administrative officials may be able to allay his fears (9 C.F.R. § 201.12).

In *In re Ramos*, P.Q. Docket No. 36, decided by the Judicial Officer on June 10, 1985 (2 pages), the Judicial Officer ruled on questions certified by Judge Weber that respondent's answer raises issues of fact that preclude the issuance of a default decision, and that evidence as to mitigating circumstances may be received at an evidentiary hearing. [Later reversed in In re Ramos, June 24, 1985, and In re Lopez, Oct. 7, 1985.]

In *In re Magic City Produce Co.*, PACA Docket No. 2-6448, decided by the Judicial Officer on June 17, 1985 (19 pages), the Judicial Officer affirmed Judge Weber's order revoking respondent's license for failure to pay in full for produce. Implied agreements for delayed payment do not negate a violation. A regular course of dealing over several years in which payment is made beyond 10 days does not show existence of an express agreement, as required. Acceptance of partial payment in full satisfaction of the debt, e.g., because of bankruptcy, does not constitute full payment. Since respondent's license lapsed prior to the issuance of the order revoking its license, in order to avoid any issue, the order includes a revocation order and a publication of the finding that respondent has committed repeated and flagrant violations of the Act.

In *In re Stoltzfus*, A.Q. Docket No. 151, decided by the Judicial Officer on June 17, 1985 (4 pages), the Judicial Officer affirmed Judge Palmer's order assessing a $500 civil penalty for moving interstate 21 cattle not accompanied by a certificate, as required. Since respondent's answer did not deny that he moved the cattle without a certificate, a default decision was properly issued. Respondent's claim that the Department lacks jurisdiction because of a "private sealed document" is dismissed as frivolous.

In In re Ramos, P.Q. Docket No. 36, decided by the Judicial Officer on June 24, 1985 (2 pages), the Judicial Officer reversed his prior ruling (June 10, 1985), and held that a violation occurs when prohibited fruits are brought into the United States even though they were declared at Customs. However, unless complainant admits facts set forth in the answer, a hearing must be held to consider mitigating circumstances. [This holding was later reversed in In re Lopez, October 7, 1985.]

In *In re Cuttone*, PACA Docket No. 2-6761, decided by the Judicial Officer on August 20, 1985 (7 pages), the Judicial Officer affirmed Judge Baker's order revoking respondent's license for failure to pay promptly for produce. Failure to file an answer is an admission of the facts and constitutes a waiver of hearing and, therefore, the default decision was properly issued. Service on respondent by mailing a copy of the complaint to his last business address is adequate

service, and since someone signed for the document, there was no need to mail it again by regular mail.

In *In re Food Marketers, Inc.*, PACA Docket No. 2-6773, decided by the Judicial Officer on August 20, 1985 (7 pages), the Judicial Officer affirmed Judge Palmer's order publishing the finding that respondent committed repeated and flagrant violations of the Perishable Agricultural Commodities Act by failing to pay promptly for produce, and by failing to maintain the trust required by the Act. Failure to file an answer is deemed an admission of the allegations in the complaint and a waiver of hearing and, therefore, the default decision was properly issued. There was no need to serve the complaint on respondent's Assignee for the Benefit of Creditors. Requests for leniency by creditors are routinely ignored.

In *In re A. Pellegrino & Sons, Inc.*, PACA Docket No. 2-6693, decided by the Judicial Officer on August 21, 1985 (8 pages), the Judicial Officer affirmed Judge McGrail's order publishing the finding that respondent has committed repeated and flagrant violations of the Perishable Agricultural Commodities Act by failing to pay promptly for produce. The statute of limitations applicable to reparation proceedings is not applicable here. the complaint was not defective because it fails to state the authority of the division and individual who signed it. Respondent's admissions in bankruptcy pleadings were proper subjects of official notice. Since no license is revoked, it is not necessary to find willfulness. The Act does not require both a failure to pay and failure to truly and correctly account. There is no excessive conflict between PACA and the bankruptcy law.

In *In re Veg-Mix, Inc.*, PACA Docket No. 2-6612, decided by the Judicial Officer on August 21, 1985 (29 pages), the Judicial Officer affirmed Judge Palmer's decision publishing the finding that respondent committed flagrant and repeated violations of the Perishable Agricultural Commodities Act by failing to pay promptly for produce. No hearing is required where respondent's admissions and bankruptcy pleadings show that it admittedly has failed to pay for an amount that is not de minimis. Since the majority of respondent's customers were located outside of Florida, this establishes the interstate nature of its business. Official notice was properly taken of documents filed in respondent's bankruptcy proceeding by respondent's secretary, for the corporation. No hearing was required to consider mitigating circumstances since excuses are routinely rejected. The fact that certain persons caused payment violations by the corporation and then skipped out, causing other innocent persons "responsibly connected" with the corporation to be adversely affected by the disciplinary order, is irrelevant.

In *In re Reeves Produce, Inc.*, PACA Docket No. 2-6213, decided by the Judicial Officer on August 26, 1985 (25 pages), the Judicial Officer affirmed Judge Baker's decision publishing the finding that respondent has committed repeated and flagrant violations of § 2 of the Perishable Agricultural Commodities Act by failing to pay promptly for produce. The requirement that an informal complaint be filed is a "useless," but required, "technicality." Anyone licensed as a dealer is subject to the disciplinary provisions of the Act while licensed irrespective of whether he is actually a dealer. Where a corporation assumes the liabilities of a person previously operating as an individual, and fails to pay for the individual's transactions, the corporation has violated the Act. Complainant's cross appeal contending that additional violations should have been found is denied since the ALJ's findings are supported by evidence which she found credible, based on her observation of the witness. This case was properly treated as "no pay" rather than "slow-pay" in view of the Gilardi decision.

In *In re Apex Meat Co.*, FMIA Docket No. 78, decided by the Judicial Officer on September 5, 1985 (43 pages), the Judicial Officer affirmed Judge Weber's decision withdrawing inspection service indefinitely from respondent because respondent's president, Aaron Magidow, was convicted of 23 felonies. The felony convictions involved Aaron Magidow's participation as an outlet (fence) for meat purchased by criminal associates on credit, with intent not to pay the

suppliers. Mitigating circumstances such as community activities, charitable contributions, employee hardship, and tax consequences have been considered, but are not sufficient to avoid the sanction imposed here. Aaron Magidow took the Fifth Amendment to every question other than his name and business occupation and, therefore, I infer that his testimony would have been adverse to respondent's position. Since respondent offered evidence of its good character, it is appropriate to take into consideration the prior felony convictions of respondent and its president for bribing meat graders and an inspector. The ALJ properly refused to receive in evidence and consider the evidentiary record in the criminal proceeding involving Aaron Magidow. Respondent's request to reopen the hearing to introduce new evidence as to respondent's present compliance with the inspection program is denied since it would not change the result in this case. Most respondents comply with the relevant regulatory program during the course of the litigation. The record indicates that the administrative officials would be willing to reinstate inspection service at respondent's plant if Aaron Magidow disassociates himself from the plant, or if his life and integrity change.

In In re Tutt (Decision as to Becknell), HPA Docket No. 187, decided by the Judicial Officer on September 11, 1985 (2 pages), the Judicial Officer issued a consent decision assessing a civil penalty of $2,000 under the Horse Protection Act.

In *In re Saylor*, P&S Docket No. 5753 (Decision on Remand), decided by the Judicial Officer on September 20, 1985 (547 pages), the Judicial Officer affirmed Judge Weber's order suspending respondent for 8 months and assessing a $10,000 civil penalty for adding arbitrary amounts of weight by pencil to sales based on respondent's purchase weights, and charging commissions greater than the agreed-upon rates. Complainant need only prevail by a preponderance of the evidence. Individual facts are not considered in isolation, but, rather, the totality of facts is considered as a whole. Circumstantial evidence is enough to prove violations. Press releases are routinely issued in P&S cases. An agent owes the highest degree of loyalty to his principal. Laws of statistical probability relied upon. Arbitrarily adding weight by pencil is a blatant violation of law. Pencil shrink described. Printing scale tickets that include "shrink" would have been an outrageous violation of law. Recordkeeping violations are serious violations of law. Technicalities of court pleading are not applicable. Failing to print all scale tickets required to prove transfer weights would have been an outrageous violation of law. Adverse inference drawn against respondent for not calling key witness. No adverse inference drawn against complainant for failing to call auditor who did not play major role in investigation. Gentry's testimony as to what records Kostelecky requested would not be hearsay when offered only to show that Kostelecky made the request. It is not unusual for a person engaged in weight fraud to vary the amount of weight added or subtracted considerably. The ALJ's determination of the credibility of witnesses is entitled to considerable weight. The fact that respondent's customers were satisfied is irrelevant. Whether an 8-month suspension order will affect respondent's ability to continue in business is irrelevant. When a provision is included in one section of a statute, but omitted in another, it should not be implied where omitted. USDA's severe sanction policy explained. A respondent must introduce evidence that he is unable to pay a civil penalty. Affirmative action cease and desist orders should be issued in future cases.

In *In re Eastern Airlines, Inc.*, P.Q. Docket No. 97, decided by the Judicial Officer on September 23, 1985 (9 pages), the Judicial Officer affirmed Judge Weber's order assessing a civil penalty of $2,000 against respondent because official seals placed by an inspector were broken without authorization and respondent failed to fumigate imported flowers, as required. Default decision properly issued because respondent failed to file an answer within the time period. Complainant was not required to send courtesy copy of complaint to respondent's attorneys. Due process is met if the notice of the proceeding is sent in a manner reasonably calculated to notify respondent of the action.

In *In re Veg-Mix, Inc.*, PACA Docket No. 2-6612, decided by the Judicial Officer on September 25, 1985 (2 pages), the Judicial Officer dismissed respondent's petition to reconsider and to reopen the hearing. Since respondent's arguments raise no points that would have any possibility of reducing the violations to a de minimis status, detailed discussion of respondent's contentions is not necessary. A petition to reopen for newly discovered evidence must be filed prior to the issuance of the Judicial Officer's decision.

Fiscal Year 1986

In *In re Sequoia Orange Co.*, AMA Docket No. F&V 907-6, etc., decided by the Judicial Officer on October 1, 1985 (2 pages), the Judicial Officer dismissed the Department's interlocutory appeal since interlocutory appeals are not permitted.

In *In re Anesi*, AWA Docket No. 267, decided by the Judicial Officer on October 2, 1985 (14 pages), the Judicial Officer affirmed Judge Palmer's order revoking respondent's license as a dealer and assessing a (suspended) $1,000 civil penalty, because of violations of sanitary and other requirements relating to dog kennels. Respondent was not entitled to a hearing before a federal judge nor to a public defender. Respondent's violations were willful and therefore written notice was not required. Respondent's consent to photographs was not required. Warrantless inspections are permitted. Complainant need only prevail by a preponderance of the evidence.

In *In re Upton*, P&S Docket No. 6196, decided by the Judicial Officer on October 2, 1985 (35 pages), the Judicial Officer reversed Judge Baker's order suspending respondent for 7 days and assessing a $500 civil penalty for weighing violations. The Judicial Officer suspended respondent for 28 days and assessed a penalty of $2,500. The Judicial Officer can reverse as to the facts where documentary evidence or inferences to be drawn from the facts are involved. Since a warning letter was sent, there is no need to prove willfulness. Respondent's misweighing of hogs was caused by careless weighing rather than a defective scale. Complainant need only prevail by a preponderance of the evidence. False weighing is a serious violation. Respondent must show that he is unable to pay a civil penalty (Bosma is erroneous). Cease and desist orders should be omitted in cases where there is no reasonable likelihood that the Department would ever seek to collect the civil penalty imposed by the Act for violating a cease and desist order.

In *In re Kaplan's Fruit and Produce Co.*, PACA Docket No. 2-6681, decided by the Judicial Officer on October 7, 1985 (7 pages), the Judicial Officer affirmed Judge Palmer's order revoking respondent's license for failure to pay for produce. The collateral effects of an order on responsibly connected persons is not relevant. The fact that only 1 or 2 individuals caused respondent's violations (causing innocent responsibly connected individuals to suffer) is not relevant.

In *In re Lopez*, P.Q. Docket No. 59, decided by the Judicial Officer on October 7, 1985 (15 pages), the Judicial Officer reversed Judge McGrail's order imposing a (suspended) $250 civil penalty for importing sugarcane from Mexico. The Judicial Officer assessed a $250 civil penalty, holding that there were no relevant mitigating circumstances. A violation occurs when the prohibited article is brought into any part of the United States, including a Customs station. Ignorance of law is not a mitigating circumstance. The facts that only a small amount of the prohibited article was brought into the United States, and that respondent had a good reason for bringing it into the United States, are not mitigating circumstances, nor is poor financial condition. Where a person unintentionally violates a quarantine regulation, and does not declare the article at Customs, the minimum civil penalty in a formal case is $250. If the article is declared, the minimum civil penalty in a formal case is $125. If the respondent files an answer that unreasonably requires a hearing, the minimum civil penalties will be twice as high.

In *In re B. G. Sales Co.*, PACA Docket No. 2-6790, decided by the Judicial Officer on October 9, 1985 (28 pages), the Judicial Officer affirmed Judge Baker's order revoking respondent's license for failure to pay promptly for produce. Official notice properly taken of respondent's bankruptcy pleadings. No hearing required where bankruptcy documents and answer show that there is no material issue of fact.

In *In re Haring Meats and Delicatessen, Inc.*, FMIA Docket No. 88, decided by the Judicial Officer on October 17, 1985 (42 pages), the Judicial Officer reversed in part the order by

Judge Weber continuing the indefinite withdrawal of meat inspection service from respondent (until respondent destroyed adulterated pork head meat, pork sausage and hams). The order of the Judicial Officer continues the withdrawal of inspection service until adulterated braunschweiger, salami, Polish Sausage and wieners are also destroyed. Review of a meat inspector's condemnation of a product is limited to review by supervisory meat inspection officials. "Shall" is ordinarily the language of command. If judicial review of an inspector's condemnation is available, it should be limited to determining whether the inspector's action was arbitrary, capricious, or an abuse of discretion. Adverse inference drawn because of respondent's failure to call key witnesses. Respondent's attempt to reconstruct records not produced until 5½ weeks after the inspector's detention of the produce is rejected.

In *In re Anesi*, AWA Docket No. 267, decided by the Judicial Officer on October 29, 1985 (1 page), the Judicial Officer denied a petition for reconsideration.

In *In re Beef Nebraska, Inc.*, P&S Docket No. 6094, decided by the Judicial Officer on November 26, 1985 (66 pages), the Judicial Officer affirmed Judge Weber's order ordering respondent to cease and desist from issuing checks on remote banks. Delaying the check collection process violates the 1976 prompt payment legislation. Where different words are used in the same sentence, it is presumed Congress used the words to express different ideas. The word "or" is to be given its normal disjunctive meaning. In construing a statute, courts look to the historical events which prompted the Act. There is no need to cross-examine with respect to legislative facts. Legislative history involving discussions at congressional hearings is not as weighty as legislative reports and floor debates. Intent is not an element of prompt payment violation. "Any" is a broad and comprehensive term. A delay in the check collection process is unfair even if the check is mailed on the same day as the purchase. The seller has the option as to how payment should be made under prompt payment legislation. Discovery is not available under Packers and Stockyards Act or rules of practice.

In *In re Upton*, P&S Docket No. 6196, decided by the Judicial Officer on December 4, 1985 (9 pages), the Judicial Officer ruled on reconsideration that cease and desist orders will be issued in P&S cases. The Eighth Circuit's opinion in *Farrow*, setting aside a 45-day suspension order as to two buyers who agreed not to compete, is erroneous and will not be followed in future cases. A violation is willful if a person intentionally does an act irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements.

In *In re Sequoia Orange Co.*, AMA Docket No. F&V 908-2, decided by the Judicial Officer on January 15, 1986 (1 page), the Judicial Officer remanded the proceeding to the ALJ for further proceedings since the question certified to the Judicial Officer as to whether petitioner's counsel should not be permitted to participate in the proceeding because of his prior work and responsibilities as assistant general counsel in the Department is now moot (since petitioner's counsel withdrew from the proceeding).

In *In re Leo*, P.Q. Docket No. 114, decided by the Judicial Officer on January 27, 1986 (4 pages), the Judicial Officer affirmed Judge McGrail's order assessing a $250 civil penalty against respondent for importing pork salamis that had not been fully cooked as required from Italy to the United States. Respondent's violation, although inadvertent, was a very serious violation warranting a $250 civil penalty.

In *In re Top Quality Fruits & Produce Distributors, Inc.*, PACA Docket No. 2-6910, decided the Judicial Officer on January 27, 1986 (3 pages), the Judicial Officer affirmed Judge Weber's order revoking respondent's license for failure to pay for produce. Respondent's admitted failures to make payment constitute willful, flagrant and repeated violations of § 2(4) of the PACA.

In *In re Tri-County Wholesale Produce Co.*, PACA Docket No. 2-6300, decided by the Judicial Officer on January 27, 1986 (50 pages), the Judicial Officer reversed Judge Baker's order requiring respondent to cease and desist from permitting Robert Ferwerda from being in respondent's office or performing other duties for respondent. The Judicial Officer revoked respondent's license for continuing to employ Robert Ferwerda after respondent was advised that he could only be employed if an appropriate bond were filed (since Robert Ferwerda failed to pay reparation awards). Interpretation and legislative history of employment restrictions discussed. The harsh "employment" restrictions are consistent with the general pattern of imposing severe sanctions against persons who fail to pay for produce, irrespective of what excuses they offer. The Judicial Officer gives great weight to ALJ findings, but has reversed as to the facts, where appropriate. The word "any" is a broad and comprehensive term. Complainant need only prevail by a preponderance of the evidence. There is no showing that the Secretary unreasonably delayed in setting the amount of the bond, but that would not be a good defense in any event. Respondent cannot collaterally attack the determination as to the amount of the bond by way of defense in a disciplinary proceeding. The failure to publish the bond determination factors in the Federal Register would not be a valid defense, but even if the issue could be raised here, the factors considered in determining a bond are not substantive rules of general applicability or statements of general policy and, therefore, they are not required to be published. Actual notice of the bond determination factors would preclude reliance on any failure to comply with publication requirements, even if publication were required. Respondent's violations were willful, but willfulness is not required since respondent had received a warning letter. The definition of willful in *TWA v. Thurston* is inapplicable in our Department's disciplinary proceedings. The ALJ's cease and desist order is unlawful since there is no statutory authority in PACA for a cease and desist order, and, also, the statutory restriction as to employment of a restricted person is applicable only within 2 years after the issuance of a reparation award. Respondent's petition to reopen the hearing to take further evidence with respect to the meaning of "employment" and as to the determination of respondent's bond is denied.

In *In re Grady*, A.Q. Docket No. 54, decided by the Judicial Officer on January 31, 1986 (75 pages), the Judicial Officer affirmed Judge McGrail's order assessing civil penalties totalling $29,000 for violating the regulations governing the interstate movement of cattle to prevent the spread of brucellosis. Respondents failed to have a statement or other document showing prescribed information accompanying their cattle moved interstate, failed to have a health certificate, and failed to have cattle identified by a backtag or other approved identification. Intrastate health certificates lack the the detail required for interstate movement. Respondents' failure to testify gives rise to the inference that their testimony would have been adverse. Even if respondents could have shown that the regulations were not scrupulously followed in other cases, that would not be a defense here.

In *In re Gentle Jungle, Inc.*, AWA Docket No. 271, decided by the Judicial Officer on February 10, 1986 (28 pages), the Judicial Officer affirmed Judge Palmer's order revoking respondent's license and assessing a civil penalty of $15,300 for numerous violations of the Animal Welfare Act. Complainant need only prevail by a preponderance of the evidence. A corporation is responsible for the acts or failures of its employees or other persons acting for it. Question left open as to whether anesthetizing animals solely for the purpose of making the animals appear dead while exhibited, or dyeing the animals, is unlawful.

In *In re Perfect Potato Packers, Inc.*, PACA Docket No. 2-6553, decided by the Judicial Officer on February 14, 1986 (35 pages), the Judicial Officer affirmed Judge Weber's decision revoking respondent's license because the application for the license was false and misleading. Complainant need only prevail by a preponderance of the evidence. The ALJ, who saw and heard the witnesses testify, was in the best position to resolve conflicts in testimony. The Judicial Officer may, when necessary, take official notice of a license on file in the Department. The corporate veil may be pierced when one person is the beneficial owner of 100% of the stock

of the corporation. A license which has been allowed to expire can, nonetheless, be revoked or suspended.

In *In re Echo Spring Dairy, Inc.*, AMA Docket No. M 124-2, decided by the Judicial Officer on February 25, 1986 (30 pages), the Judicial Officer affirmed Judge Palmer's order sustaining the determination by the Market Administrator of Order No. 124 that petitioner did not qualify as a "producer-handler" under the Order, and that petitioner is obligated to pay $432,973.06 to the Market Administrator because petitioner's operation of a leased dairy farm was not the personal enterprise and the personal risk of petitioner. Petitioner had a joint checking account with the lessor of the dairy farm under which petitioner was able to utilize the financial resources of the lessor and other entities participating in the joint bank account. The producer-handler exemption must be strictly construed. Petitioner has the burden of proving that the Market Administrator's determinations are "not in accordance with law." Great weight is given to the Market Administrator's interpretation of the order.

In *In re Farmers & Ranchers Livestock Auction, Inc.*, P&S Docket No. 6483, decided by the Judicial Officer on February 27, 1986 (43 pages), the Judicial Officer affirmed Chief Judge Campbell's decision suspending respondent Jerry Millspaugh as a registrant for 5 years and ordering him to cease and desist from various practices, including misusing a custodial account, issuing insufficient funds checks, failing to pay for livestock, failing to remit to consignors when due the net proceeds from the sale of consigned livestock, exchanging drafts or checks to create a false "float" or balance in a checking account, and purchasing livestock out of consignments for speculation, all of which were held to be unfair practices under the Act. Respondent's records failed to meet the requirements of the Act since purchases by respondent out of consignments were not identified as such to the consignors. Respondent Millspaugh is responsible for the corporate respondent's violations since he was one-third owner, vice president, and one of the three members of the board of directors of the corporate respondent. He is also responsible for violations of Cattleman's Commission Company, which was a continuation of the corporate business. Although respondent Millspaugh's registration is inactive, it may be suspended. Complainant need only prevail by a preponderance of the evidence. Respondents' failure to testify gives rise to an inference that their testimony would have been adverse. A check-kiting scheme is a serious and flagrant violation of the Act because of its potential for harm. Severe sanction policy explained. That portion of the order providing that respondent Millspaugh may be employed as an auctioneer after 1 year of his 5-year suspension is authorized by the Act since it is a relaxation of the sanction that would normally be in effect. Under the regulations, a suspended registrant cannot be employed by persons subject to the Act. The P&S Act adopts by reference the rule making authority of the Federal Trade Commission. The employment regulation has the force and effect of law. Auction market operators could be required to register as market agencies or dealers.

In *In re Ennes*, AWA Docket No. 269, decided by the Judicial Officer on March 3, 1986 (21 pages), the Judicial Officer reversed Judge Baker's order, which assessed a suspended $200 civil penalty against respondent for selling dogs in commerce without a license. The Judicial Officer assessed a penalty of $1,000. Civil penalties under the Act must be based on the size of the business, gravity of the violation, the person's good faith, and previous violations. Operating without a license strikes at the heart of the regulatory program. A moderate-sized facility is assessed a more modest penalty than a large-sized facility. Although the Judicial Officer gives great weight to findings of ALJ's because they have the opportunity to see and hear the witnesses testify, the ALJ's finding that respondent did not know that she could not sell her dogs without a license during the period her license application was pending is set aside as "hopelessly incredible." Although there were no previous violations, the numerous violations here warrant a severe sanction.

In *In re Daul*, AWA Docket No. 360, decided by the Judicial Officer on March 6, 1986 (16 pages), the Judicial Officer affirmed Chief Judge Campbell's order assessing a $3,000 civil penalty and a cease and desist order because respondent sold guinea pigs without a license and refused to permit an inspection of his premises. Failure to file an answer within 20 days constitutes an admission of the allegations in the complaint and a waiver of hearing. A document is not filed with the Hearing Clerk until it reaches the Hearing Clerk. Respondent has shown no basis for setting aside the default decision here. It is unlawful to act as a dealer without a license and to refuse to permit an inspection. Respondent cannot present new facts for the first time on appeal. Agencies should be free to fashion rules of procedure to enable them to discharge their multitudinous duties. Respondent's oral statement that he did not plan to file an annual report and pay the renewal license fee did not automatically terminate his license.

In *In re Blackfoot Livestock Commission Co.*, P&S Docket No. 6107, decided by the Judicial Officer on March 7, 1986 (99 pages), the Judicial Officer affirmed Judge Weber's decision requiring respondent to cease and desist from engaging in business while insolvent; misusing its custodial account for shippers' proceeds; exchanging drafts or checks to create a false "float" in its account; permitting owners, etc., to buy out of consignment for speculation; and paying for livestock with a draft which is not a check without permission from the seller. However, the Judicial Officer *sua sponte* increased the suspension period from 35 days, which was requested by complainant and issued by the ALJ, to 6 months, primarily because of the seriousness of the check-kiting violations. The fact that the principal violator is now deceased is not a mitigating circumstance. A principal is responsible for the acts of its agents. Check kiting is serious because of potential for great harm. Severe sanction policy explained. Although complainant advised respondent prior to the hearing that it was seeking a 35-day suspension order, respondent should know that that is only a recommendation not binding on the Judicial Officer. Where previous sanctions have not been adequate, a more severe sanction is issued in the present case rather than merely an announcement made that in future cases the sanction will be increased. Harm to consignors is not considered in determining the sanction against an auction market. Consent decisions given no weight in determining sanctions in litigated cases. Complainant's investigation report is not producible under Jencks Act, and respondent's request for the report does not require the ALJ to perform an *in camera* examination.

In *In re Mooney*, A.Q. Docket No. 139, decided by the Judicial Officer on March 12, 1986 (27 pages), the Judicial Officer affirmed Judge McGrail's order assessing civil penalties totalling $3,000 for violations of the Brucellosis Eradication Program involving the transportation of cattle interstate that were not accompanied by the required owner's statement or other document; that were not accompanied by a health certificate and a permit for entry; and brucellosis reactors were not moved directly to a recognized slaughtering establishment. Complainant need only prevail by a preponderance of the evidence. Respondent's actions in connection with four cattle involved three separate violations and, therefore, a $3,000 civil penalty may be assessed. Severe sanction policy explained. Violations of the Brucellosis Eradication Program are very serious violations.

In *In re Toscony Provision Co.*, FMIA Docket No. 40, decided by the Judicial Officer on March 18, 1986 (1 page), the Judicial Officer denied respondent's petition for reconsideration since it was not timely filed, and denied respondent's motion for a 3-month extension of the deadline for Henry Dei to disassociate himself from respondent.

In *In re Walter Gailey & Sons, Inc.*, PACA Docket No. 2-6876, decided by the Judicial Officer on April 8, 1986 (7 pages), the Judicial Officer affirmed Judge Palmer's order revoking respondent's license for failure to pay promptly for about $1½ million of produce. The Bankruptcy Code does not bar the bringing of an administrative disciplinary action. There is no applicable statute of limitations. The argument that creditors will suffer if respondent's license is revoked is routinely rejected in PACA cases.

In *In re Farmers Livestock Auction, Inc.*, P&S Docket No. 6266, decided by the Judicial Officer on April 15, 1986 (1 page), the Judicial Officer dismissed respondent's appeal at respondent's request, making Chief Judge Campbell's initial decision the final Decision and Order in the proceeding.

In *In re Daul*, AWA Docket No. 360, decided by the Judicial Officer on April 29, 1986 (1 page), the Judicial Officer denied the petition for reconsideration for the reasons set forth in the Decision and Order previously filed.

In *In re Corn State Meat Co.*, P&S Docket No. 6427, decided by the Judicial Officer on May 8, 1986 (59 pages), the Judicial Officer reversed Judge McGrail's civil penalty determination, and increased the civil penalty assessed jointly and severally against respondents from $25,000 to $50,000. The ALJ's cease and desist order was affirmed, as were the findings that respondents engaged in commercial bribery from 1979 to 1981, primarily by splitting their profits on resale with three employees of two firms from which respondents bought meat products. Responsible hearsay is admissible in USDA proceedings. Where there are closely held corporations, the disciplinary order can be made applicable to the officers and stockholders who operated the corporation. Commercial bribery violates the P&S Act. Complainant need only prevail by a preponderance of the evidence. The failure of the individual respondents to testify gives rise to the inference that their testimony would have been adverse to their position. Proof of injury or likelihood of injury is not required in commercial bribery cases. Severe sanction policy explained. The *Bosma* decision, requiring the Department to produce evidence that the penalty will not affect the person's ability to continue to do business, is erroneous, but, in any event, that issue is irrelevant here since respondent corporation is already out of business. In addition, commercial bribery is so inimical to the meat packing industry that a civil penalty for commercial bribery adversely affecting the person's ability to continue in business would be in the public interest.

In *In re Holiday Food Services, Inc.*, P&S Docket No. 6488, decided by the Judicial Officer on May 8, 1986 (31 pages), the Judicial Officer reversed Chief Judge Campbell's civil penalty determination, and increased the civil penalty assessed jointly and severally against respondents from $25,000 to $50,000. The ALJ's cease and desist order was affirmed, as were the findings that respondents engaged in commercial bribery from 1977 to 1982 by making payments to buyers for four firms in connection with meat, meat food products, poultry and poultry products sold by respondents to the firms. Commercial bribery violates §§ 202(a) and (b) of the Act. The civil penalty may be applied against the corporation and the person who was its chief executive officer, a director, and a 50% shareholder of the corporation. Severe sanction policy explained. The *Bosma* decision, requiring the Department to produce evidence as to the effect of the penalty on the person's ability to continue to do business, is erroneous. But *Bosma* is irrelevant because respondent corporation is out of business. Commercial bribery is so inimical to the meat packing industry that it would be in the public interest to impose a civil penalty that would adversely affect the person's ability to continue in business. Consent orders are given no weight in determining the sanction to be imposed in a litigated case. Any damage resulting from an agency's press release is not considered in determining the sanction to be imposed.

In *In re Bushelle Cattle Co.*, P&S Docket No. 6639, decided by the Judicial Officer on May 14, 1986 (1 page), the Judicial Officer denied a late appeal filed after the initial decision had become final. Even if the appeal had been timely filed, it would have been dismissed because respondent failed to file a timely answer.

In *In re H & J Brokerage, Inc.*, PACA Docket No. 2-6437, decided by the Judicial Officer on May 22, 1986 (89 pages), the Judicial Officer affirmed Judge Baker's decision denying respondent's application for a license on the ground that Mr. Scharf, respondent's president,

treasurer, and 75% stockholder, played a major role in the failure of Fresh World, Inc., to pay 20 shippers for over $331,000 worth of produce. Although Mr. Scharf was not solely responsible for Fresh World's failures to pay, he was general manager of Fresh World and was primarily responsible for its sales to Central Produce, whose failure to pay $342,000 to Fresh World was a major factor in Fresh World's failure to pay its suppliers. It is immaterial that Mr. Scharf was not "responsibly connected" with Fresh World, as that term is defined in the Act. Explanation as to when a "responsibly connected" determination is relevant. It is only necessary for complainant to show that Mr. Scharf engaged in practices of the character prohibited by the Act. The inclusion of a term in one section of the Act, while omitting it in another, emphasizes that it should not be implied in the place where it was omitted. The Act has been interpreted in a tough and harsh manner, with the support of the industry. Excuses are routinely rejected in failure to pay and failure to pay promptly cases. Once complainant establishes that Mr. Scharf engaged in practices of the character prohibited by the Act, the burden of proof is on respondent to show that it is fit to receive a license. It is only necessary that the complaint in an administrative proceeding reasonably apprise the litigant of the issues in controversy. In a hearing conducted at intervals, there is little or no basis for respondent's complaint as to the adequacy of the administrative complaint. The ALJ should require the parties to number the pages of multi-page exhibits.

In *In re Vallalta*, P.Q. Docket No. 138, decided by the Judicial Officer on June 17, 1986 (5 pages), the Judicial Officer affirmed Judge Weber's decision and order assessing a civil penalty of $250 against respondent for importing one cacao pod from El Salvador into the United States in violation of the Plant Quarantine Act and regulations. Respondent's request for a hearing to show that a relative had placed the article in his bags without his knowledge was properly denied since a $250 civil penalty would still be appropriate under *In re Lopez*, 44 Agric. Dec. ____ (Oct. 7, 1985).

In *In re Gutman Brothers, Ltd.*, A.Q. Docket No. 225, decided by the Judicial Officer on June 17, 1986 (9 pages), the Judicial Officer affirmed Judge Palmer's decision and order assessing civil penalties totalling $2,500 because respondent violated the brucellosis regulations governing the interstate movement of cattle. On two occasions, respondent moved cattle from Maryland to Pennsylvania that were not accompanied by an owner's or shipper's statement, or other acceptable document, and by a certificate, as required. On one of the occasions, the cattle were not properly identified by backtags or eartags, as required. Respondent's answer failed to deny or otherwise respond to the material allegations of the complaint, and, therefore, respondent is deemed to have admitted the facts and waived a hearing.

In *In re Garver*, P&S Docket No. 6449, decided by the Judicial Officer on June 19, 1986 (25 pages), the Judicial Officer affirmed that part of Chief Judge Campbell's order requiring respondent to cease and desist from failing to pay for livestock and issuing insufficient funds checks, and suspending respondent's registration for 2 years and thereafter until he is no longer insolvent, but reversed that part of the order holding all but 30 days of the suspension period in abeyance. The fact that insufficient funds checks were issued when the bank lawfully and unilaterally terminated respondent's over-draft protection without notice is not a defense. A violation is willful if respondent intentionally does an act which is prohibited, or acts with careless disregard of statutory requirements. The test of insolvency is whether current liabilities exceed current assets. Once insolvency has been established, it is considered as continuing until a respondent demonstrates that he is no longer insolvent. The failure to pay promptly and in full for livestock and the issuance of insufficient funds checks violate sections 312(a) and 409 of the Act. Severe sanction policy explained. To permit respondent to continue in the livestock industry after a 30-day active suspension period would seriously undercut the deterrent value of the 2-year suspension order. The fact that respondent's creditors would receive a token repayment of the indebtedness if he remains in business is outweighed by the national interest in having fair and competitive conditions in the livestock industry.

In *In re Midas Navigation, Ltd.*, P.Q. Docket No. 170, decided by the Judicial Officer on July 9, 1986 (9 pages), the Judicial Officer affirmed Judge McGrail's order assessing a civil penalty of $500 against respondent, who failed to file a timely answer, for a violation of the Plant Quarantine Act, the Federal Plant Pest Act, and the Act of February 2, 1903.

In *In re Schwartz*, VA Docket No. 38, decided by the Judicial Officer on August 12, 1986 (10 pages), the Judicial Officer affirmed Chief Judge Campbell's Default Decision and Order revoking respondent's accreditation as a veterinarian authorized to perform official duties under State-Federal Disease Eradication Programs for a period of 6 months. Respondent's failure to file an answer constitutes an admission of the allegations in the complaint and a waiver of hearing. The requirement that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner.

In *In re Great American Veal Co.*, FMIA Docket No. 71, decided by the Judicial Officer on September 9, 1986 (164 pages), the Judicial Officer reversed Judge Baker's order withdrawing meat inspection service from respondent under the Federal Meat Inspection Act for 36 months, but suspending such withdrawal, except for 30 days, under certain conditions of compliance for 3 years. The Judicial Officer withdrew inspection indefinitely from respondent, but suspended the withdrawal if Mr. Burke, respondent's president and chief operating officer, becomes disassociated from respondent within 90 days and sells his stock within 1 year, and respondent is in compliance for 5 years. The order was issued under 21 U.S.C. § 671 as a result of Mr. Burke's conviction of 23 counts of contributing and supplementing the salary of the veterinarian medical officer of USDA assigned to respondent's plant, in connection with his official duties as the certified inspector. Convictions under 18 U.S.C. § 209(a) of supplementing the salary of the meat inspector assigned to a packing plant are necessarily based upon "fraud in connection with transactions in food," thereby affording a jurisdictional basis under 21 U.S.C. § 671 for a finding that the plant is "unfit" to receive meat inspection. Such convictions strike at the heart of the meat inspection program and *per se* render the plant "unfit" to receive meat inspection, regardless of any mitigating circumstances, unless the convicted individual is disassociated from the plant. USDA's *per se* approach is similar to the *per se* approach followed by the courts under the Sherman Act, under which price fixing and other antitrust violations are illegal *per se*. Prior cases involving the withdrawal of inspection or grading services summarized. Although the Judicial Officer believes that he correctly decided *In re Utica Packing Co.*, 43 Agric. Dec. ____ (Nov. 18, 1982) (decision on remand), in view of the subsequent *Utica* court decisions, he will construe the court of appeals' first *Utica* decision as requiring a consideration of the mitigating circumstances merely because the court was not sure whether the USDA proposition underlying its *per se* approach is correct or not. Assuming that the facts must be considered, the facts here show "fraud in connection with transactions in food" which render the plant "unfit" to receive meat inspection. Even if an inspector or grader used language that led the convicted individual to believe that a bribe was being solicited, that would not be significant in determining whether the packing plant is unfit to receive inspection.

In *In re Northwest Orient Airlines*, PQ Docket No. 157, decided by the Judicial Officer on September 9, 1986 (10 pages), the Judicial Officer affirmed Chief Judge Campbell's decision assessing a civil penalty of $1,000 against respondent under the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations, because respondent failed to present two pieces of passenger baggage which were in its possession at Honolulu, Hawaii, International Airport for inspection. Respondent's failure to file an answer within 20 days after service of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. If respondent had been permitted to demonstrate that its violation was not intentional, that would not have lessened the civil penalty since unintentional violations could cause billions of dollars of damage and eradication expenses of tens of millions of dollars.

In *In re Blaser*, AQ Docket No. 246, decided by the Judicial Officer on September 9, 1986 (10 pages), the Judicial Officer affirmed Judge Weber's order assessing civil penalties totalling $2,000 against respondent for moving cattle interstate on four occasions that were not accompanied by a certificate, as required, in violation of the regulations governing the interstate movement of cattle to prevent the spread of brucellosis (9 C.F.R. § 78.9(a)). Respondent's answer, which failed to deny or otherwise respond to the allegations of the complaint as to the violations, constitutes an admission of the allegations in the complaint and a waiver of hearing. Accordingly, the default decision was properly issued. Importance of Brucellosis Eradication Program explained.

In *In re Capistrano*, PQ Docket No. 179, decided by the Judicial Officer on September 9, 1986 (4 pages), the Judicial Officer affirmed Chief Judge Campbell's order assessing a civil penalty of $250 against respondent for importing plantains from the Philippines into the United States in violation of the Act of August 20, 1912, as amended, and the regulations. This case is governed by *In re Lopez*, 44 Agric. Dec. ____ (Oct. 7, 1985), notwithstanding the fact that respondent's friend placed the prohibited plantains in respondent's luggage without respondent's knowledge.

In *In re Welch*, P&S Docket No. 6537 (decision as to Michael Benson), decided by the Judicial Officer on September 25, 1986 (38 pages), the Judicial Officer affirmed Judge Weber's order barring respondent Benson from engaging in business subject to the Act for 1 year and assessing a $10,000 civil penalty. The Judicial Officer amended the order, however, to require payment of the civil penalty in equal payments each month over a 3-year period, rather than at the end of 2 years. The Judicial Officer affirmed the cease and desist order requiring Benson to cease and desist from engaging in practices that would operate as a fraud or deceit upon any person in connection with the purchase or sale of that person's livestock; cooperating in any arrangement with a livestock selling agency in (i) purchasing consigned livestock at less than fair market value, (ii) enabling the selling agency to operate as a fraud or deceit upon consignors to the selling agency, or (iii) sharing in the profits derived from the resale of livestock purchased from consignments to such selling agency; or cooperating with any market agency buying livestock on a commission basis or its employees or agents in engaging in any act or practice which operates as a fraud or deceit upon the market agency or its principals. Benson, a hog salesman for commission firms operating at a terminal stockyard, violated §§ 307 and 312(a) of the Act by splitting the profits made by a dealer (Welch) buying livestock from Benson's commission firm or selling livestock to Benson's commission firm and in transactions where Benson transferred purchase orders received by Benson's employer to Welch to fill. Proof by a preponderance of the evidence is all that is required. The ALJ's determination as to the veracity of the witnesses is controlling. Such profit-sharing is particularly odious at a terminal stockyard where livestock is sold by private treaty. Selling consigned livestock to a dealer at less than full market value violates one of the main objectives of the P&S Act, which is to safeguard farmers and ranchers against receiving less than the true market value of their livestock. A commission firm employee is in a fiduciary relationship to the firm's principals, and should not be involved in a conflict-of-interest situation. Benson's conduct was willful even if he did not know that it was unlawful. Severe sanction policy explained. Benson was not given an increased sanction because he went to a hearing, but merely was not afforded the opportunity to accept a decreased sanction that was given to the other parties, including Welch, who consented to the issuance of a decision and order without a hearing. Examples of severe sanctions issued under Packers and Stockyards Act in recent years. Since Benson is not the owner of a business, the gravity of the offense should largely determine the civil penalty, but it should be paid over 3 years since he has limited earning ability.

In *In re Garver*, P&S Docket No. 6449, decided by the Judicial Officer on September 29, 1986 (6 pages), the Judicial Officer denied respondent's petition for reconsideration. Where a firm fails to pay for livestock, it makes no difference why its bank terminated its line of credit. A

severe sanction is imposed in nonpayment cases even though the nonpayment did not occur because of fraud. Where a person does not pay his bills because of a lack of funds, a severe sanction has a deterrent value.

Fiscal Year 1987

In *In re Guffy*, AQ Docket 234, decided by the Judicial Officer on October 20, 1986 (13 pages), the Judicial Officer affirmed Chief Judge Campbell's order assessing civil penalties totalling $2,000 against respondent for moving seven cattle interstate without a certificate or a permit for entry, as required under the regulations governing the interstate movement of cattle because of brucellosis. Respondent's answer was filed after the 20-day time limit, did not deny the allegations of the complaint, and did not request a hearing. Accordingly, a default decision was properly issued. Importance of Brucellosis Eradication Program explained. Even if respondent's answer had been timely filed, respondent argues only that he signed a statement admitting that he was in technical violation of the regulations after he was assured that the matter would end at that point. However, even if equitable estoppel would be applicable to those facts if private litigants were involved, it does not apply to the exercise of the Secretary's disciplinary authority under regulatory statutes.

In *In re Landeen*, P&S Docket No. 6626, decided by the Judicial Officer on October 21, 1986 (4 pages), the Judicial Officer ruled in response to a question certified by Judge Weber that adequate service was made on the respondent of the complaint and proposed default decision. The documents were sent to respondent's last known address by certified mail, but were returned as unclaimed. Thereafter, the documents were sent by regular mail to the same address, and were again returned unclaimed. This method of service complies with the Department's rules of practice and meets the requirement of due process of law, even though respondent did not actually receive the documents.

In *In re Henson*, A.Q. Docket No. 264, decided by the Judicial Officer on November 4, 1986 (11 pages), the Judicial Officer affirmed the default order issued by Judge Weber assessing a civil penalty of $500 against respondent for moving 1 cow that was not individually identified on an owner's or shipper's statement or other document, as required by the regulations governing the interstate movement of cattle to prevent the spread of brucellosis. Respondent's answer fails to request a hearing and does not deny the allegations of the complaint. Accordingly, a default decision was properly issued.

In *In re Pieszko*, P.Q. Docket No. 82, decided by the Judicial Officer on November 12, 1986 (10 pages), the Judicial Officer affirmed the default decision issued by Judge Palmer assessing a civil penalty of $250 because respondent violated the regulations governing the importing of meat products into the United States by importing cooked meat pies with pork from the Philippines, that were not accompanied by a certificate containing prescribed information. Respondent failed to file a timely answer, and, therefore, a default decision was properly issued. Although the ALJ did not refer to respondent's objections filed with respect to complainant's proposed decision and order, there is no requirement in the regulations that the ALJ answer such objections. Mitigating circumstances raised for the first time in respondent's appeal come too late to be considered, but, in any event, they would not reduce the sanction here. *In re Lopez*, 44 Agric. Dec. ____ (Oct. 7, 1985).

In *In re Hamilton*, PACA Docket No. 2-7166, decided by the Judicial Officer on November 20, 1986 (3 pages), the Judicial Officer denied a late appeal filed on the day the initial decision had become final. However, even if respondents' appeal had been timely filed, it would have been to no avail because respondents' argument that an expired license cannot be revoked is without merit. Furthermore, if a timely appeal had been filed, the Judicial Officer would have included a finding that respondents have committed repeated and flagrant violations of § 2(4) of the Act, which would have the same effect on respondents and all persons responsibly connected with respondents as a revocation order.

In In re Mayes, P&S Docket No. 6591, decided by the Judicial Officer on November 24, 1986 (10 pages), the Judicial Officer affirmed Chief Judge Campbell's default order assessing an $8,000 civil penalty and ordering respondent to cease and desist from failing to pay, when due, the full purchase price of livestock. Since respondent failed to file an answer to the complaint, the default decision was properly issued.

In *In re George County Livestock, Inc.*, P&S Docket No. 6659, decided by the Judicial Officer on December 4, 1986 (20 pages), the Judicial Officer affirmed Judge McGrail's order suspending respondent George County Stockyard, Inc., as a registrant for 28 days, prohibiting respondent M. H. Pitts from engaging in business subject to the Act for 28 days, and ordering respondents to cease and desist from various practices, including not properly maintaining a "Custodial Account for Shippers' Proceeds"; failing to pay, when due, the full purchase price of livestock; and engaging in business without maintaining a reasonable bond or its equivalent, as required. Respondents are jointly and severally assessed a $4,000 civil penalty, and are required to keep complete and accurate records. Custodial account violations, failing to maintain the proper bond or bond equivalent, failing to pay, when due, the full purchase price of livestock, and failing to maintain accurate records have long been recognized as serious violations of the Act. It is the policy of this Department to impose severe sanctions for serious violations, irrespective of whether the violations were intentional. The sanction imposed here is not nearly as severe as numerous sanctions that have been issued in recent years under the P&S Act (numerous cases cited).

In *In re McDaniel*, A.Q. Docket No. 257, decided by the Judicial Officer on December 8, 1986 (15 pages), the Judicial Officer affirmed Judge Baker's order assessing civil penalties totaling $4,000 ($1,000 per violation) for violations of the Act and regulations governing the interstate movement of cattle to prevent the spread of brucellosis. Respondent's failure to file an answer constitutes an admission of the allegations in the complaint and a waiver of hearing. Accordingly, a default decision and order was properly issued. Although respondent's appeal was filed 2 days late, it is the practice of this Department to accept late appeals filed before the initial decision becomes final. Even if respondent had filed a timely answer, it would not have changed the result in this case. Respondent's understanding that the case had been settled (when he incurred financial hardship by having to take his cattle to the sale barn for branding) is not supported by the record and would not signify a "settlement" to an adult person of reasonable understanding. Assessing a civil penalty because respondent failed to have the required certificate and assessing a separate civil penalty because respondent failed to have the required permit for entry, in the same transaction, does not violate the Double Jeopardy Clause. The Clause applies to criminal proceedings. It protects against a second prosecution for the same offense after acquittal or conviction, and against multiple punishments for the same offense. But a single transaction may contain distinct offenses without violating the Clause. Two offenses are not the same for double jeopardy purposes if one requires proof of a fact that the other does not. Respondent's unsupported claim that a $4,000 civil penalty will impose a financial hardship on him is not a circumstance that mitigates the sanction in view of the importance of the Brucellosis Eradication Program.

In *In re Mayes*, P&S Docket No. 6591, decided by the Judicial Officer on January 21, 1987 (1 page), the Judicial Officer denied respondent's petition for reconsideration for the reasons previously stated in the original decision.

In *In re Apex Meat Co.*, FMIA Docket No. 78, on January 28, 1987, the Judicial Officer filed an order (13 pages) conditionally lifting the stay order previously imposed. Complainant filed a document purporting to withdraw its motions to lift the stay, but a party does not have the right to withdraw a motion filed with the Hearing Clerk. In accordance with the Department's prior policy, under which an individual who is convicted of a felony that makes his meat plant unfit to receive meat inspection is given 90 days to become disassociated from the plant and 1

year in which to sell his stock, in which event meat inspection is not withdrawn from the plant, the stay order in this case is conditionally lifted to accomplish that purpose.

In *In re Harry Klein Produce Corp.*, PACA Docket No. 2-6992, decided by the Judicial Officer on February 6, 1987 (61 pages), the Judicial Officer affirmed Judge Palmer's order revoking respondent's license for failure to account truly and correctly and make full payment to its principals and joint account partners in fiduciary transactions. Respondent kept a double set of books, and accounted to its principals and joint account partners on the basis of fictitious prices recorded in the false record. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or carelessly disregards the statute. ALJ's should require that each page of multi-page exhibits be separately numbered. Respondent had the burden of showing that it came within the exception to the prohibition in the regulations against averaging or pooling of sales. Averaging or pooling explained. Where averaging or pooling is permitted, the regulations require the consignee's records and accountings to be complete and accurate. Private parties do not have the power to annul an act of congress or valid regulations. Complainant's use of an average sales price to estimate respondent's receipts, where respondent's records are incomplete, is "approved" (in a limited sense) notwithstanding the fact that it tends to maximize estimates of underpayments. Estimates made in similar circumstances have been approved on appeal from decisions by this Department and the Internal Revenue Service. It was not necessary to publish the average-sales-price approach in the Federal Register, in addition to the regulations that were published requiring respondent to keep accurate books and records. Unsworn statements (presumably prepared by respondent's counsel) have no probative value. Severe sanction policy explained. Violations of a fiduciary duty are particularly serious. Recordkeeping violations are serious since accurate records are essential to effective enforcement of a federal regulatory program. Evidence of current compliance with the Department's regulatory program is totally irrelevant in determining the sanction for past violations. This Department routinely denies requests for a lenient sanction based on the interests of respondent's customers, community or employees.

In *In re Anthony Tammaro, Inc.*, PACA Docket No. 2-7006, decided by the Judicial Officer on February 17, 1987 (9 pages), the Judicial Officer affirmed Judge Palmer's order revoking respondent's license for failure to pay promptly and in full for over $400,000 worth of produce. This case is identical to *In re B.G. Sales Co.*, 44 Agric. Dec. ____ (Oct. 9, 1985), which held that official notice is properly taken of bankruptcy pleadings, and no hearing is required were bankruptcy documents and the answer show that there is no material issue of fact. Excuses why full payment could not be made are routinely rejected. The Department imposes severe sanctions in the case of serious violations even though the violator's creditors will suffer, since the Department must consider the broader public interest, which is best served by imposing severe sanctions to serve as an effective deterrent to future violations.

In *In re McDaniel*, AQ Docket No. 257, decided by the Judicial Officer on February 25, 1987 (1 page), the Judicial Officer modified the original order issued in the proceeding, by agreement of the parties, to provide for monthly payment of the $4,000 civil penalty.

In *In re Carter*, AQ Docket No. 271, decided by the Judicial Officer on March 3, 1987 (16 pages), the Judicial Officer affirmed Judge McGrail's order assessing a civil penalty of $2,500 against respondent for transporting seven bulls interstate that were not accompanied by the proper documents or (as to one bull) not subjected to two official tests for brucellosis prior to movement. Respondent's failure to file a timely answer constitutes an admission of the allegations in the complaint and a waiver of hearing. Respondent's untimely answer would have been to no avail even if timely filed because the answer admits the violations, but contends that they were not willfully or knowingly committed. Willfulness and knowledge of unlawfulness are not elements of the violations. Appropriate service was made when respondent's mother signed

the service receipt card, even if she did not forward the complaint to respondent. Due process requires only that the method of service is reasonably calculated to give notice, irrespective of whether actual notice of the complaint is received. Respondent's financial situation has no bearing on the civil penalty to be assessed. Further, an unsubstantiated, alleged inability to pay a civil penalty is not relevant. The civil penalty imposed here is modest considering the importance of the Brucellosis Eradication Program.

In *In re Collins*, VA Docket No. 27, decided by the Judicial Officer on March 4, 1987 (53 pages), the Judicial Officer reversed Judge Baker's order dismissing the complaint. The Judicial Officer suspended respondent's veterinary accreditation for 60 days for signing Official Health Certificates stating that animals were negative according to the brucellosis test results before respondent had received the results from the State-Federal laboratory. The Judicial Officer revoked respondent's veterinary accreditation for failing to personally draw blood on another occasion, which was sent to the State-Federal laboratory with official brucellosis test records. As to other counts, the Judicial Officer held that there was insufficient evidence to overturn the ALJ's findings that respondent submitted copies of five health certificates, as required, to the State animal health official, and that respondent did not violate the standards by submitting blood samples drawn from nine animals other than the nine listed on a brucellosis test record. When an agency adopts findings of fact by an ALJ, the findings should not be overturned on appeal unless they are hopelessly incredible or flatly contradict a law of nature or undisputed documentary evidence. However, an agency may differ with the conclusions of the ALJ even on a question of the credibility of contradictory witnesses. It is a violation of the Standards for Accredited Veterinarians for a veterinarian to sign a certificate that is incomplete or inaccurate even though he does not permit the certificate to be used. The word "or" is to be given its normal disjunctive meaning. The formalities and technicalities of court pleadings are not applicable in administrative proceedings. Responsible hearsay evidence is admissible in administrative proceedings and may be sufficient to support a finding of fact. The procedural and evidentiary rules in effect in court proceedings are not applicable in the Department's administrative proceedings, and it is the Department's policy to make no effort to follow them. The Brucellosis Eradication Program is of national importance, and respondent's violations were serious. Revocation of a veterinarian's accreditation is not as serious as revocation of a license. Respondent's violations were willful, and therefore there would have been no need to give notice under the APA for a license revocation. But the notice provisions of the APA are inapplicable since no federal license is being revoked.

In *In re Spencer Livestock Comm'n Co.*, P&S Docket No. 6254, decided by the Judicial Officer on March 19, 1987 (264 pages), the Judicial Officer affirmed Judge Weber's order suspending respondents' registration for 10 years, assessing a $30,000 civil penalty, and ordering respondents to cease and desist from various practices relating to their collecting payment from principals (for whom they bought livestock on a commission basis) on the basis of falsely increased prices and weights, and destroying records that were required to be kept under the Act, the regulations and two prior cease and desist orders. Complainant must prevail by a preponderance of the evidence. The evidence proves clearly that respondents were purchasing livestock for their principals on a 50c/ per cwt commission basis and, therefore, they were required to account to their principals on the same prices and weights (including shrink) at which respondents purchased the livestock. The fact that the figures under the heading "PRICE" on respondents' invoices to the principals are not really the price that was charged per cwt, but are, rather, the average cost of the livestock, is strongly indicative of an agency arrangement. Respondents will not be relieved from stipulations filed before and during the hearing merely because they did not know how they would be used by the Judicial Officer. To reopen the hearing for additional evidence, respondents must show that the evidence was newly discovered. Where there is an express agreement for an agency relationship, there is no need to consider whether other circumstances point in the direction of an agency relationship. Large advances by the principals to respondents, daily telephone contact with the principals, and pricing livestock in

"odd" amounts, e.g., $60.64 per cwt, are indicative of an agency relationship. An order buyer's commission is not separately stated in about half of the livestock commission transactions. The fact that the principals charged back to respondents for death loss occurring during transit is not indicative of a dealer arrangement since respondents had no real financial risk, but merely handled the paperwork incident to the insurance. The fact that respondents paid for the livestock and expenses and were reimbursed by the principals is not inconsistent with an agency relationship. The ALJ's determination as to the credibility of the witnesses is entitled to great weight. A person who buys livestock on commission is a market agency; the dictum in *Solomon Valley Feedlot v. Butz*, that such person is a dealer, is erroneous. Respondents' past history of similar violations supports a 10-year suspension here. Defrauding principals in fiduciary transactions is one of the most serious violations of the P&S Act. It is impossible even for an experienced feedlot operator to compare in a precise manner the prices of livestock purchased for him and those described in market news reports. If a violator's customers are satisfied, that does not reduce the sanction for violations. At least some types of violations require no proof of predatory intent or proof that the practice is likely to result in injury to competition. Where Congress has not imposed any maximum limit on the suspension period, other than the standard of reasonableness, no maximum limit should be imposed by interpretation. Since judges have widely divergent views as to what punishment should be imposed in criminal cases, they should not substitute their views for that of the agency as to what suspension period is "reasonable." The statutory criteria for determining civil penalties should not be used in determining suspension periods. Severe sanctions imposed under Act in recent years summarized. Respondents knowingly violated the Act, but ignorance of the law is not a mitigating circumstance. USDA sanction policy clarified and expanded. USDA sanction policy clarified to make *Farrow v. USDA*, which set aside a 45-day suspension order, moot, since it is made clear that the Department imposes severe sanctions for repeated violations or violations regarded by the administrative officials and the Judicial Officer as serious, irrespective of whether they are in fact serious (i.e., regarded by a reviewing court as serious). The sanction is the same irrespective of whether unlawful conduct was done intentionally. A respondent has the burden of introducing evidence to show that a civil penalty would affect his ability to remain in business. If the violation is serious enough, a civil penalty may be imposed that would adversely affect the violator's ability to continue in business. If the civil penalties are increased because the court sets aside the 10-year suspension order, respondents would be permitted to pay the penalties over a period of years.

In *In re Carpenito Bros., Inc.*, PACA Docket No. 2-6846, decided by the Judicial Officer on March 26, 1987 (29 pages), the Judicial Officer reversed Judge Baker's order, which imposed a 30-day (suspended) suspension order because respondent failed to pay promptly 22 sellers $209,339.32 for 523 lots of produce purchased from February 1983 through December 1984. The Judicial Officer revoked respondent's license on the basis of *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. ____ (Jan. 27, 1984). The ALJ should require counsel to separately number each page of a multi-page exhibit. Respondent's evidence shows that respondent had only implied agreements for delayed payment terms, while the regulations require express agreements. Unsworn letters signed by respondent's suppliers, which were prepared by respondent's attorney, stating that they had express agreements for delayed payment, have no probative value. Respondent had burden of proving that it had express agreements for delayed payment. A party should call at least 2 or 3 witnesses handling a substantial number of transactions to prove the presence or absence of express agreements for delayed payment. If parties had express agreements for payment within a "reasonable" time, prior to the Secretary's new regulations effective December 20, 1984, the Judicial Officer would have held that any payment beyond 45 days (or at least beyond 60 days) was not made within a "reasonable" time. After the new regulations, he would hold that a "reasonable" time for credit does not exceed 30 days, unless there are other provisions in the agreement shedding light on the meaning to be attributed to the term "reasonable." Under *Gilardi*, respondent's license should be revoked for the slow-payment violations unless by the time of the hearing, respondent had made full payment

and was in present compliance with the payment provisions of the Act and regulations. The ALJ erroneously excluded evidence showing that respondent was not in present compliance with the payment provisions. Respondent was notified that its present compliance would be at issue by the *Gilardi* decision and also by the general allegations of the complaint that respondent "has engaged in, is engaging in, and will continue to engage in, a course of conduct which involves failure to make full payment promptly. . . ." Complainant's offer of proof as to respondent's noncompliance at the time of the hearing was received as evidence in the case. Respondent admittedly had no written agreements for delayed payment and, therefore, during the period immediately prior to the hearing, respondent was in violation of the prompt-payment provisions because it was bound by the 10-day rule. Although the existence of implied agreements for delayed payment is a mitigating circumstance with respect to violations specifically alleged in the complaint, the existence of implied agreements are irrelevant in determining present compliance with the payment provisions for the purpose of reducing a sanction from revocation to suspension under the *Gilardi* holding. The ALJ erred in concluding that complainant should have introduced respondent's balance sheets, profit and loss statements, and a cash flow analysis in order to determine whether a revocation order should be issued under the *Gilardi* holding. The Judicial Officer announced a new policy that in future cases involving repeated and flagrant slow-payment violations, respondent's license will be revoked, rather than suspended, unless full payment has been made by the opening of the hearing, together with present compliance with the payment provisions, and respondent's present compliance must not involve credit agreements for more than 30 days.

In *In re Warner*, P.Q. Docket No. 271, decided by the Judicial Officer on April 1, 1987 (2 pages), the Judicial Officer ruled on a question certified by Judge Weber that complainant's motion for summary decision on the pleading should be granted because respondent's answer does not deny the allegations of the complaint, but merely explains that any violation occurred because of a language or communication misunderstanding between herself and the Oriental Inspector. In order to prevent the importation into the United States of items that could be disastrous to the agricultural community, violators must be held responsible for any violation irrespective of lack of evil motive or intent to violate the quarantine laws.

In *In re Saulsbury Orchard and Almond Processing*, AMA Docket No. F&V 981-4, decided by the Judicial Officer on April 1, 1987 (1 page), the Judicial Officer denied petitioners' application for interim relief inasmuch as interim relief is not available under the Agricultural Marketing Agreement Act of 1937.

In *In re A.W. Schmidt & Son, Inc.*, P&S Docket No. 6791, decided by the Judicial Officer on April 6, 1987 (12 pages), the Judicial Officer affirmed Judge McGrail's order assessing a $3,000 civil penalty and ordering respondent to cease and desist from engaging in business without an adequate bond or its equivalent, purchasing livestock while insolvent without paying at the time of purchase with cash, certified check or wire transfer, and failing to pay, when due, the full purchase price of livestock. Respondent's failure to file a timely answer and deny the allegations of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. However, even if respondent's defense had been timely filed, it would have been to no avail. Respondent's alleged present compliance with the Act is irrelevant in determining the sanction for past violations. The fact that respondent is allegedly not now operating subject to the Act does not prevent the issuance of a cease and desist order or the imposition of sanctions for respondent's past violations.

In *In re Roman Crest Fruit, Inc.*, PACA Docket No. 2-6576, decided by the Judicial Officer on April 7, 1987 (28 pages), the Judicial Officer affirmed Judge Weber's order finding that respondent has committed willful, flagrant and repeated violations of section 2 of the Perishable Agricultural Commodities Act. Respondent failed to make full payment promptly to four consignors for 93 lots of produce from March through June 1983, totaling over $380,000,

and failed to make full payment promptly to 17 sellers for 99 lots of produce totaling over $525,000. Much of those amounts remains unpaid. Official notice was taken of respondent's voluntary petition in bankruptcy and various supporting documents and proofs of claims filed by creditors. Respondent admitted all of the violations that occurred after March 31, 1983, the date its former president and major stockholder, Mr. Levatino, allegedly became unaffiliated with respondent. As to the four transactions at issue in the case, the ALJ held that they were not due and payable until after March 31, 1983, and that they had been paid in full. Complainant's contention that the evidence does not support the ALJ's findings and conclusions as to the four transactions is without merit. Complainant argues on appeal that the ALJ erred in not granting his petition to reopen the hearing to permit testimony by the supplier in the four transactions to contradict Mr. Levatino's testimony. However, complainant should have interviewed the supplier in advance, so that complainant would have known at the time of the hearing that Mr. Levatino's testimony was false (according to the supplier). Since complainant did not request a continuance to procure rebuttal testimony, complainant is bound by the newly discovered evidence rule, and there is no good reason why complainant failed to have the supplier testify at the hearing. Although complainant is reluctant to inconvenience trade witnesses by making them testify at a hearing, such inconvenience (for at least 2 or 3 trade witnesses, in the typical case, from firms handling a substantial number of transactions) is a necessary price that must be paid to attain the benefits of the regulatory program.

In *In re Rotches Pork Packers, Inc.*, P&S Docket No. 6458, decided by the Judicial Officer on April 13, 1987 (23 pages), the Judicial Officer affirmed Judge McGrail's decision assessing a $50,000 civil penalty against the individual respondent and ordering both respondents to cease and desist from failing to pay, and failing to pay when due, for meat and meat food products purchased. The corporate veil is pierced to impose a sanction on the responsible individual, who owned 100% of the stock of respondent corporation and was responsible for its day-to-day operation. Complainant need only prevail by a preponderance of the evidence. Complainant was under no obligation to explore affirmative defenses available to respondents. Although respondents contend that they failed to pay for meat products because they had been cheated by the supplier, respondents failed to prove that such cheating occurred. The evidence shows that the individual respondent agreed with his bank that payment on checks to the supplier should be stopped, but even if the bank had unilaterally decided to stop payment, that would not have excused respondents' failure to pay for the meat products. Complainant originally recommended a $210,000 civil penalty, based on 10% of the amount estimated to be due to the supplier, but that was properly reduced by the ALJ in view of mitigating circumstances. Severe sanction policy explained.

In *In re Cal-Almond, Inc.*, AMA Docket No. F&V 981-2, decided by the Judicial Officer on April 13, 1987 (8 pages), the Judicial Officer affirmed Judge Weber's order dismissing the complaint. The petition was filed under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended, seeking to modify and exempt petitioner from the Marketing Order for Almonds Grown in California. However, the petition does not comply in form or content with the rules of practice, which require a full statement of the facts. Without a factual foundation spelled out in the pleadings, from which to create the issues, the ALJ would not be able to rule properly on evidentiary issues or control the development of the record.

In *In re A.W. Schmidt & Son, Inc.*, P.&S. Docket No. 6791, decided by the Judicial Officer on April 29, 1987 (1 page), the Judicial Officer denied a petition to reconsider, stating that the $3,000 civil penalty is quite modest considering civil penalties recently imposed under the Act.

In *In re Wileman Bros. & Elliott, Inc.*, AMA Docket No. F&V 916-1, decided by the Judicial Officer on May 6, 1987 (1 page), the Judicial Officer denied an application for interim relief on the basis of prior cited decisions.

In *In re Britton Bros., Inc.*, P.&S. Docket No. 6631, decided by the Judicial Officer on May 7, 1987 (1 page), the Judicial Officer ruled on a question certified by Judge Weber that complainant has shown "good cause" for amending the pleadings, after a settlement agreement had been reached as to all issues except the effective date of the suspension order.

In *In re Wileman Bros. & Elliott, Inc.*, AMA Docket No. F&V 916-1, decided by the Judicial Officer on May 18, 1987 (1 page), the Judicial Officer denied a petition for reconsideration on the ground that interim relief is not available irrespective of whether an enforcement action has been filed by the Department.

In *In re Peters*, P.Q. Docket No. 227, decided by the Judicial Officer on May 20, 1987 (2 pages), the Judicial Officer ruled on a question certified by Judge Weber that due process requirements were satisfied when a copy of a complaint was sent by regular mail to respondent's address after certified mail to the same address was returned marked "UNCLAIMED."

In *In re Parchman*, P.&S. Docket No. 6602, decided by the Judicial Officer on May 28, 1987 (79 pages), the Judicial Officer affirmed Judge McGrail's order requiring respondents to cease and desist from several practices, including weighing livestock at other than their true and correct weights. The order suspends respondents as registrants for 90 days and assesses a $10,000 civil penalty. Although record-keeping violations are also involved, the suspension order is based only on the weighing violations because the violations are intertwined. Although willfulness is not an issue since respondents received a prior warning letter, willfulness includes acts with careless disregard of statutory requirements. The ALJ's citation of 7 U.S.C. § 205, rather than 7 U.S.C. § 204, as the authority for suspension is harmless error. Although respondents receive $7 per head regardless of weight, auction markets have innate reasons to short weigh. Each animal short weighed was short weighed separately and, therefore, each instance of short weighing an animal is a separate violation. The sanction in this case is appropriate. Department's severe sanction policy explained. Although the suspension order will close respondents' auction market at another location not involved in the violations, that fact was considered in suspending respondents for only 90 days.

In *In re Moore Marketing International, Inc.*, PACA Docket No. 2-7088, decided by the Judicial Officer on June 8, 1987 (1 page), the Judicial Officer ruled on a question certified by Judge Weber that a decision should be entered on the pleadings revoking respondent's license since respondent's answer does not actually deny that it failed to pay for at least a substantial portion of the produce involved in the complaint. This Department is not interested in respondent's excuses for its failures to pay.

In *In re Zedric*, P.&S. Docket No. 6778, decided by the Judicial Officer on June 10, 1987 (14 pages), the Judicial Officer affirmed Judge Palmer's order suspending respondent's registration for 28 days and thereafter until he demonstrates that the deficit in his "Custodial Account for Shippers' Proceeds" has been eliminated, and ordering respondent to cease and desist from improperly maintaining his custodial account, issuing insufficient funds checks, and failing to remit, when due, the full amount of the proceeds due consignors from the sale of their livestock. Respondent's failure to file a timely answer constitutes an admission of the allegations in the complaint and a waiver of hearing. It is the practice of this Department to refuse to receive a tardy answer even if a clearly meritorious defense is alleged in a tardy answer. Even if respondent were permitted to raise the issues presented in his tardy answer, it would be to no avail. Respondent contends that his bank wrongfully took $30,000 from his custodial account, but that would not explain why respondent transferred $260,000 from his custodial account to his trading account or general account. If the case had gone to a hearing, respondent's registration might have been suspended for more than 28 days.

In *In re Bejarano*, A.Q. Docket No. 292, decided by the Judicial Officer on June 22, 1987 (13 pages), the Judicial Officer affirmed Judge McGrail's order assessing civil penalties of $2,500 for violations of the Act of February 2, 1903, and regulations (9 C.F.R. Part 92) involving the movement of 1 horse from Zaragoza, Chihuahua, Mexico, into the United States at a location that was not a designated port of entry, without delivering to the veterinary inspector an application for inspection, without delivering copies of a declaration of import to the collector of customs, without having the horse inspected, and without having an inspection certificate. Respondent's failure to file a timely answer constitutes an admission of the allegations in the complaint and a waiver of hearing. The complaint was validly served on respondent notwithstanding his contention that his sister signed the certified receipt card when he was out of town and she forgot to give it to him. Due process of law requires only that the method of service be reasonably calculated to give notice to the respondent.

In *In re Charton*, P&S Docket No. 6782, decided by the Judicial Officer on July 13, 1987 (11 pages), the Judicial Officer affirmed Acting Chief Judge Palmer's order requiring respondent to cease and desist from engaging in business without an adequate bond or its equivalent, suspending respondent's registration until he complies with the bonding requirements, and assessing a $500 civil penalty. Respondent's failure to file an answer constitutes an admission of the allegations of the complaint and a waiver of hearing.

In *In re Prentice*, PQ Docket No. 161, decided by the Judicial Officer on August 12, 1987 (27 pages), the Judicial Officer reversed Judge Palmer's decision, which had assessed a civil penalty of $250 against respondent for failing to present one piece of baggage in his possession at Honolulu International Airport for the required inspection. The Judicial Officer dismissed the complaint with prejudice. The regulation merely states that all baggage "shall be subject to an examination by an inspector." Although the words "subject to" do not normally connote a personal obligation, in view of the weight to be attached to the Administrator's interpretation of his own regulation, and the fact that respondent knew that the Administrator construed the regulation to require respondent to present his baggage for inspection, I am willing to construe the regulation to impose a requirement that airline crew members present their baggage at a designated baggage check-in station prior to departure. However, respondent had his baggage inspected at the public's inspection station, before he entered the "sterile" area, since he came to the airport about 4 hours before the flight departed, when he was not on duty. He also presented his baggage for inspection about 45 minutes before departure, after he was paged by the inspector. Hence he complied with the regulation. The regulation cannot be construed as requiring him to present his baggage for inspection a certain number of minutes prior to departure, or to prohibit him from entering the "sterile" area by means of the public's inspection station, when he comes to the airport (off duty) 4 hours before departure time. Respondent may be entitled to an award of fees and expenses under the Equal Access to Justice Act, even though the Department's regulations erroneously state that the Act is not in effect as to actions instituted after September 30, 1984, and the regulations do not include the Plant Quarantine Act in the list of statutes under which awards of fees and expenses may be made.

In *In re Murfreesboro Livestock Market, Inc.*, P&S Docket No. 6646, decided by the Judicial Officer on August 13, 1987 (40 pages), the Judicial Officer affirmed Judge Weber's order suspending respondent Murfreesboro Livestock Market, Inc., as a registrant for 1 year, prohibiting respondent Carlton Reeves from engaging in business subject to the Act for 1 year, jointly and severally assessing a $10,000 civil penalty against respondents, and ordering respondents to cease and desist from various practices, including not properly maintaining a "Custodial Account for Shippers' Proceeds"; failing to pay, when due, the full purchase price of livestock; converting consigned livestock to their own use, substituting other livestock for the converted livestock, and paying the consignors on the basis of the sale price of the substituted livestock; representing to consignors that consigned livestock had died when, in fact, the livestock was sold through the market and the proceeds from the sale of such livestock were

converted to the use of the market, its owners, officers, agents or employees; and failing to disclose an ownership or financial interest in the market on accounts of sale issued to consignors when the market or other individuals associated with the market purchase livestock out of consignment at the market. The failure of a market agency to maintain its custodial account in accordance with requirements of the regulations is a violation of §§ 307 and 312(a) of the Act. The existence of a line of credit from a bank does not relieve a market agency of its legal obligation to strictly maintain its custodial account. Willfulness defined. Respondents violated § 312(a) of the Act when the market's president failed to deposit an amount equal to the proceeds receivable from his own purchases to the respondents' custodial account. Switching consigned cattle with other cattle and falsely reporting one consigned head as dead violates § 312(a) of the Act. Failure to disclose to the consignor that the market's president purchased consigned livestock for speculation violates § 312(a) of the Act. Respondents' failure to call the wife of the market's president as a witness gives rise to an inference that her testimony would have been adverse, since she handled the paperwork involved in transactions at issue in this case. The custodial account violations are serious even though there was no injury, since it is the duty of P&S to prevent potential injury by stopping unlawful practices in their incipiency. Severe sanction policy explained, and severe sanctions imposed under the P&S Act in recent years summarized.

In *In re Borden, Inc.*, AMA Docket No. 126-9, decided by the Judicial Officer on September 30, 1987 (276 pages), the Judicial Officer reversed Chief Judge Palmer's decision, which (i) held that the 18c/ per cwt increase in the location adjustment for Zone 8 plants under the Texas Milk Order is unlawful, and (ii) required the Market Administrator to restore petitioners to the circumstances which would have applied without the increase in the location adjustment (amounting to over $1 million per year). Petitioners have the burden of proof in a § 8c(15)(A) proceeding, which is not to "second guess" the Secretary's policy judgments. Different types of location adjustments explained. The Secretary's principal intent in increasing the location adjustment applicable to Zone 8 handlers was to make the order's pricing structure more equitable by requiring handlers in Zone 8 to compensate producers for providing the economic service of transporting milk to Zone 8, an extremely deficit area. Petitioners do not challenge the Secretary's findings that the increased location adjustment does not exceed the additional transportation costs involved in transporting milk a substantial distance to Zone 8, Zone 8 has the largest population center in Texas, it is rapidly growing, and it is an extremely deficit milk production area. The Act authorizes such a location adjustment, and the Act's legislative history is supportive of the Secretary's action. The plain language of the statute is controlling even though the precise factual situation involved here may not have been contemplated by Congress when it enacted the Act. Location adjustments recognize the location value of milk. The Secretary's determinations to apply the 3c/ per cwt per 10 miles hauling rate only to Zones 8 and 9, and to refine the alignment of prices by considering alternative outlets for milk and changes in the location of milk production, were not arbitrary or capricious. In considering the level of the location adjustment for Zone 8, the Secretary properly considered broad purposes of the Act other than the purpose to compensate producers for providing the economic service of transporting milk to that deficit area, *viz.*, to establish equity among producers, to establish equity among handlers, to eliminate disorderly marketing conditions, and to establish order prices that will assure an adequate supply of milk for that deficit area without over-order premiums. The Act is designed to benefit producers (and consumers), rather than handlers, and it is particularly designed to benefit cooperative associations. The Secretary's findings as to the location adjustment are not inconsistent with those made the prior year in his partial final decision, or with his 1975 merger decision. The Act states that the Secretary "shall" fix such prices as will insure a sufficient quantity of pure and wholesome milk. The word "shall" is the language of command. The word "insure" means to make certain. Prior cases relating to location adjustments analyzed. The notice of proposed rule making adequately advised petitioners as to the proposed changes in location adjustments.

Fiscal Year 1988

In *In re Holiday Food Services, Inc.*, P&S Docket No. 6488, the Judicial Officer issued a remand order to the ALJ on January 6, 1988 (3 pages), pursuant to directions from the United States Court of Appeals for the Ninth Circuit, to determine whether the $50,000 civil penalty, payable at the rate of $12,500 per year, would interfere with Nat Rocker's ability to continue in business as a packer. Complainant will be required to delve into every aspect of Nat Rocker's business and personal life that has any bearing on his ability to pay the civil penalty.

In *In re White*, P&S Docket No. 6472, decided by the Judicial Officer on January 11, 1988 (128 pages), the Judicial Officer affirmed Judge McGrail's order requiring respondent to cease and desist from several practices, including weighing livestock at other than their true and correct weights; paying the sellers of livestock on the basis of false and incorrect weights; failing to deposit in any "Custodial Account for Shippers' Proceeds," within the time prescribed, amounts equal to the proceeds receivable from the sale of consigned livestock; failing to otherwise maintain any "Custodial Account for Shippers' Proceeds" in strict conformity with the regulations; and charging livestock sellers commission and yardage on livestock purchased on a dealer basis. The order also suspends respondent as a registrant under the Act for 9 months and assesses a $10,000 civil penalty. Respondent's violations were willful irrespective of whether he acted with evil motive. The ALJ's findings and conclusions are abundantly supported by the record. Complainant's cross-appeal as to the ALJ's dismissal of ¶ IV of the complaint was timely filed and is meritorious, but complainant does not ask for any increase in the sanction. The formalities and technicalities of court pleading are not applicable in administrative proceedings, and it is only necessary for the complaint to reasonably apprise the litigant of the issues in controversy. A person buying livestock on a commission basis for a principal, or selling livestock as a dealer on the dealer's purchase weights, must pass on to the principal (or to the buyer from the dealer) any pencil shrink received. Buying or selling on another's purchase weights explained. Unless otherwise agreed, an agent who makes a profit in connection with transactions conducted for a principal is under a duty to give the profit to the principal. It is not necessary for complainant to allege and prove precisely who was injured by an unlawful practice. It is the practice of the Judicial Officer to give great weight to the credibility determinations by ALJ's. The Judicial Officer can reopen a hearing, where the public interest is involved, even if the Department's attorney erroneously failed to introduce the evidence sought to be elicited. Evidence involving statistical probability would be relevant on a reopened hearing. A single violation may be an unfair and deceptive practice. Severe sanction policy explained. Even slight false weighing is a serious violation. Violations of fiduciary agreements are exceptionally flagrant offenses. Recordkeeping violations are serious violations of the Act. Where complainant can prove careless or deliberate false weighing, no prior warning letter is sent. Evidence of current compliance is irrelevant in determining the sanction for past violations. Damaging publicity from agency press releases is irrelevant in determining the sanction. The statutory criteria for imposing civil penalties are not applicable in determining suspensions. When a respondent's wholly-owned entities violate the Act, the corporate veil is routinely pierced.

In *In re Wileman Bros. & Elliott, Inc.*, AMA Docket Nos. F&V 916-1, 917-3, and *In re Kash, Inc.*, AMA Docket Nos. F&V 916-2, 917-2, decided by the Judicial Officer on January 15, 1988 (2 pages), the Judicial Officer ruled in response to a question certified by Judge Baker that collection and enforcement of 1987 assessments for plums and nectarines should not be stayed pending the hearing and determination of the administrative petitions filed in this proceeding, since petitioners' motion is a plea for interim relief, which should be denied under settled precedent.

In *In re Golden Star Citrus and Produce, Inc.*, AMA Docket No. F&V No. 907-14, 908-5, decided by the Judicial Officer on January 25, 1988 (2 pages), the Judicial Officer ruled in

response to a question certified by Judge Palmer that the petition under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 should be dismissed because petitioner seeks to be relieved from compliance with an investigatory subpoena, which is a matter that should be decided by a United States District Judge.

In *In re Golden Star Citrus and Produce, Inc.*, AMA Docket No. F&V No. 907-14, 908-5, decided by the Judicial Officer on January 25, 1988 (2 pages), the Judicial Officer denied petitioners' motion to stay service of a subpoena duces tecum approved by a United States District Judge on the grounds that he has no such power. If he had such power, he would not deem it appropriate to exercise the power.

In *In re Apex Meat Company*, FMIA Docket No. 78, the Judicial Officer filed an Order Continuing Stay Order on January 28, 1988 (6 pages), explaining why Aaron Magidow should be given the same 90-day time period in which to become disassociated from the plant, and the same 1-year time period within which to dispose of his stock, as has been afforded to numerous other persons who have been convicted of felonies warranting the withdrawal of meat inspection from the plant. If the Judicial Officer had known that complainant intended to change the 90-day and 1-year provisions in this case, he would have rejected complainant's argument and issued the customary order, expressly including those customary provisions. The Judicial Officer intended to ensure that the usual 90-day and 1-year provisions would apply through his control of the stay order.

In *In re Apex Meat Company*, FMIA Docket No. 78, the Judicial Officer filed Supplemental Views with Respect to Order Continuing Stay Order on January 29, 1988 (3 pages), explaining that the lifting of a stay order has never been regarded as a ministerial, nondiscretionary act, and that careful thought is given as to when a stay order should be lifted, balancing the interests of the respondent and the respondent's customers and employees, as well as the interest of the Department. The Judicial Officer requested the parties to submit a briefing schedule, so that this matter may be promptly resolved.

In *In re Sequoia Orange Co.*, AMA Docket No. F&V 907-6, 907-8, 907-9, 907-10, decided by the Judicial Officer on January 29, 1988 (278 pages), the Judicial Officer reversed Judge Palmer's Decision and Order, which held that the regulations under Marketing Order 907, which imposed flow-to-market restrictions on petitioners' handling of District 1, California-Arizona navel oranges, from 1979 to January 31, 1985, were not in accordance with law because the Secretary (1) failed to comply with the notice and comment requirements of the Administrative Procedure Act with respect to the Department's annual position papers and volume regulations, (2) failed to preserve equity of marketing opportunity for handlers in District 1, and (3) failed to take the hard look at challenged recommendations of the Navel Orange Administrative Committee (NOAC) needed to independently determine whether the proposed volume regulations would be efficacious. The Judicial Officer held that the Department's actions and regulations were valid. The ALJ properly refused to receive evidence as to whether the order achieved, or would achieve, parity prices, because parity is a goal, not a requirement. The Secretary's decision not to terminate an order is a discretionary, nonreviewable function. The Secretary's determinations that volume regulations would tend to effectuate the declared policy of the Act were not arbitrary, capricious, or an abuse of discretion. Congress restated its support for marketing order programs in the Food Security Act of 1985. The primary purpose of the Act is to protect the purchasing power of farmers and the value of agricultural assets. NOAC's annual marketing policies and the Secretary's annual position papers are not subject to the notice and comment provisions of the APA because they are not rules. If they were rules, they would be general statements of policy, exempt from the notice and comment provisions. The weekly volume limitation regulations are not subject to the notice and comment and delayed effective date provisions of the APA because of insufficient time between the date when information becomes available upon which the regulations are based and the effective date

necessary to effectuate the declared policy of the Act. The Act authorizes the Secretary to issue volume limitation regulations limiting permissible marketing to only a portion of the total available crop. Petitioners' argument that volume regulation is more restrictive and binding on District 1 than District 2, because of District 2's inherent advantage in shipping to the nonregulated export market, can be addressed only in a rulemaking proceeding. The Act and the order require *equal* treatment of District 1 and District 2 handlers, even if that gives District 2 handlers an advantage (because of District 2's export advantage). Section 8c(11)(C) of the Act has nothing to do with recognizing differences between production or marketing conditions between different districts within the same marketing order, but, rather, relates to differences between different orders. There are a number of reasons why volume regulation can lawfully be imposed in one district when it is not imposed in one or more of the other districts. But even if the Secretary erred by restricting District 1 more than he restricted Districts 3 and 4, the error was so small as to be *de minimis*. The regulatory program does not involve an unconstitutional delegation of congressional authority. The ALJ erred in permitting inquiry into the mental processes of the administrative decisionmakers, but, nonetheless, the record shows proper administrative decisionmaking which did not merely rubber-stamp NOAC's recommendations. The Act contemplates a cooperative venture among the Secretary, handlers and producers, and the Secretary is not to substitute his judgment for that of the industry as to how best to market a crop in ordinary circumstances. Even if petitioners had proven that alternative industry views were kept from the Division Director, who issued the weekly volume regulations, I would have remanded the matter to the Director to make a determination at the present time as to whether the additional information would have altered the regulations. The Act is particularly designed to benefit cooperative associations. Where issues can only be decided on the basis of the rulemaking record, ALJ's should not permit petitioners to subpoena or introduce evidence relating to the wisdom of the program, or purporting to show that petitioners have been damaged or disadvantaged by activities undertaken in accordance with the provisions of the order. The ALJ's should dismiss any allegation showing on its face that petitioners are going to attempt, in effect, to invalidate an order provision, from an evidentiary standpoint, based on *de novo* evidence to be introduced at the § 8c(15)(A) hearing.

In *In re Saulsbury Orchard and Almond Processing*, AMA Docket No. F&V 981-4, decided by the Judicial Officer on February 2, 1988 (5 pages), the Judicial Officer held that petitioners' appeal from the Judge McGrail's order dismissing the petition is moot, inasmuch as petitioners filed an amended petition. The ALJ dismissed the original petition because (1) the petition is not sufficiently clear and concise, and (2) allegations relating to constitutional questions involving the regulations and administrative practices under the regulations are beyond the competency of an administrative agency to hear and determine. However, since the Judicial Officer disagrees with the ALJ's constitutional views, he set forth contrary views by way of dicta for the guidance of the ALJ. An agency has no authority to question the constitutionality of a *statute* under its jurisdiction. But the doctrine of exhaustion of administrative remedies is applicable in proceedings under the Agricultural Marketing Agreement Act of 1937, even as to constitutional issues. It is permissible for this agency to question the constitutionality of its own *regulations* under the Act. The ALJ's order is vacated so that his ruling will not be *res judicata*. The ALJ should follow the principles set forth in *In re Sequoia Orange Co.*, 47 Agric. Dec. ____ (Jan. 29, 1988) (validity of an order's provisions can only be attacked, from an evidentiary standpoint, on the basis of a formal rulemaking record--not on the basis of evidence adduced at the § 8c(15)(A) hearing).

In *In re Chastain*, P&S Docket No. 6606, decided by the Judicial Officer on February 22, 1988 (50 pages), the Judicial Officer affirmed Judge Palmer's Decision and Order. The order requires respondents to cease and desist from paying the sellers of livestock on the basis of false or incorrect weights, and related offenses. The order suspends respondent Chastain as a registrant under the Act for 3 months, prohibits both defendants from registering within the same 3 months, and assesses civil penalties of $2,000 against respondent Chastain and $1,000 against

respondent Lewis. The evidence supports the ALJ's findings and conclusions that respondents short-weighed the steers found by the ALJ to have been short-weighed, except where there was only a 5-pound weight difference, which could be attributed to the "break of the beam." It is the practice of the Judicial Officer to give great weight to the credibility determinations of the Department's ALJ's. The sanctions imposed by the ALJ are in accordance with the Department's severe sanction policy. I infer that respondents' short weighing was intentional, but the sanction would be the same even if it were not intentional. False weighing defeats the primary purpose of the Act. Although respondents have no prior history of weighing violations, where careless or deliberate false weighing can be proved, a formal action is instituted without sending a prior warning letter.

In *In re Johnson-Hallifax, Inc.*, P&S Docket No. 6910, decided by the Judicial Officer on February 22, 1988 (10 pages), the Judicial Officer affirmed Judge McGrail's order requiring respondents to cease and desist from failing to pay, when due, the full purchase price of livestock. The order also assesses a $1,500 civil penalty against respondents, jointly and severally. Respondents' failure to file a timely answer constitutes an admission of the allegations in the complaint and a waiver of hearing. Even if respondents were permitted to present a defense, it would be to no avail. It is the consistent practice of this Department to issue a disciplinary order even though the violator ceases violating or discontinues business. In closely held corporations, the corporate veil is pierced in order to make the order applicable to the responsible owners and officers of the corporation.

In *In re Morgantown Produce, Inc.*, PACA Docket No. 2-7572, decided by the Judicial Officer on February 22, 1988 (9 pages), the Judicial Officer affirmed Judge Baker's order finding that respondent has committed willful, flagrant and repeated violations of § 2 of the Perishable Agricultural Commodities Act by failing to make full payment promptly to 10 sellers for 185 lots of produce from August 1985 through June 1986, totaling $145,751.04. Much of those amounts remains unpaid. Respondent's failure to file an answer within 20 days constitutes an admission of the allegations in the complaint and a waiver of hearing. Even if respondent were permitted to present a defense, it would be to no avail. The fact that 2 of the 10 sellers filed suit to preserve their statutory trust rights does not preclude the Department from filing a disciplinary complaint, even as to those 2 sellers. This is not an action to render judgment against respondent in favor of unpaid sellers.

In *In re Hilliard*, ERCIA Docket No. 8, decided by the Judicial Officer on February 24, 1988 (17 pages), the Judicial Officer affirmed Judge Weber's cease and desist order requiring respondent to cease and desist from violating the Order and regulations issued under the Egg Research and Consumer Information Act by failing to file handler reports and remit assessment obligations to the American Egg Board on a timely basis. However, the Judicial Officer reversed that part of Judge Weber's order that also assessed civil penalties against respondent totaling $20,500 ($500 for each of 41 violations). Respondent's violations were willful, even though he was unaware of his duties under the Act and regulations, but willfulness is not required in order to impose civil penalties. However, civil penalties are not automatic upon complainant's proof of violations. The Act and regulations authorize producers to obtain a refund of their assessments upon request made within 90 days after the end of the month in which the assessments are due and collectable. Respondent promptly paid all of his assessments and obtained refunds as soon as he was made aware of the existence of the program. The American Egg Board could easily have learned of respondent's existence through the Georgia authorities, to whom respondent paid applicable monthly state assessments, but the Board did not do so. Based on all the circumstances of the case, a cease and desist order is the appropriate sanction.

In *In re Johnson*, P&S Docket No. 6677, decided by the Judicial Officer on February 29, 1988 (21 pages), the Judicial Officer affirmed Judge Palmer's order requiring respondent to cease and desist from engaging in business without the required bond or its equivalent, but the Judicial

Officer reversed Judge Palmer's decision not to impose a civil penalty. The Judicial Officer agreed with complainant's recommendation for a $4,000 civil penalty. Operating without a bond is an unfair and deceptive practice in violation of § 312(a) of the Act. Complainant's recommendation for a $4,000 civil penalty is based on 5% of the amount of the required bond. The sanction imposed here is modest, and more severe sanctions for bonding violations may be imposed in future cases.

In *In re Suhr*, AQ Docket No. 222, decided by the Judicial Officer on March 3, 1988 (17 pages), the Judicial Officer affirmed Judge Baker's order assessing a civil penalty of $2,000 against respondent for moving six cows interstate from Colorado to Iowa that were not brucellosis tested prior to the movements, and were not accompanied by certificates containing prescribed information. The record supports the ALJ's findings and conclusions, and the civil penalty is modest considering the importance of the brucellosis eradication program.

In *In re Johnson-Hallifax, Inc.*, P&S Docket No. 6910, decided by the Judicial Officer on March 7, 1988 (1 page), the Judicial Officer denied a petition to reconsider for the reasons previously stated in the original decision.

In *In re Sequoia Orange Co.*, AMA Docket No. F&V 910-8, decided by the Judicial Officer on March 7, 1988 (8 pages), the Judicial Officer ruled that a question certified by Judge Baker, as to the validity of her proposed rulings on petitioner's application for a subpoena and subpoena duces tecum, is moot, because petitioner withdrew its application for a subpoena duces tecum, and its allegations relating to the subpoenaed documents were dismissed with prejudice. However, the Judicial Officer ruled on the certified question to give guidance to the ALJ's. Where petitioner does not challenge the lawfulness of the loan and forfeiture provision of the lemon marketing order, petitioner is not entitled to subpoena documents to try to prove that Sunkist is using the valid loan and forfeiture provisions in a manner that favors Sunkist over smaller competitors. Sunkist is under no duty to loan allotments in an equitable manner, and Sunkist can lawfully forfeit allotments for the sole purpose of preventing its smaller competitors from using them. ALJ's who have previously granted applications for subpoenas duces tecum contrary to the views set forth in this order should correct their actions.

In *In re Post*, AWA Docket No. 295, decided by the Judicial Officer on March 15, 1988 (11 pages), the Judicial Officer affirmed Judge Palmer's order suspending Hank Post's and Kirby Van Burch's licenses as exhibitors for 30 days, directing respondents (other than Robert Hansberry, Jr.) to cease and desist from handling animals for exhibit in any way that is not in compliance with the Animal Welfare Act, regulations and standards thereunder, and assessing a civil penalty of $1,000 against Kirby Van Burch. However, the ALJ's separate $1,000 civil penalties assessed against Hank Post and his corporation, Stagecoach Productions, Inc., were changed to a single civil penalty of $1,000 assessed jointly and severally against Hank Post and Stagecoach Productions, Inc. Robert Hansberry, Jr., accidentally killed a leopard by using excessive force while attempting to load it into a box in connection with Mr. Van Burch's performance at a Las Vegas, Nevada, show. Post's company, Stagecoach Productions, Inc., owned and housed the leopard, and Post participated in its training for Van Burch's stage show. Post hired Hansberry to handle the leopard. Both Post and Van Burch were exhibitors of the leopard. The statute provides that the act of any person "acting for or employed by" an exhibitor shall be deemed the act of the exhibitor as well as that of the employee. Accordingly, both Post and Van Burch are responsible for Hansberry's actions. The record abundantly supports the ALJ's findings and conclusions. The ALJ properly pierced the corporate veil and made the order applicable to Post and Stagecoach Productions, Inc. However, there is no regulatory need to impose separate civil penalties of $1,000 against Post and his corporation, in view of the 30-day suspension order.

In *In re Sabo*, AWA Docket No. 370, decided by the Judicial Officer on March 15, 1988 (12 pages), the Judicial Officer affirmed Judge Weber's order suspending respondent's license as an exhibitor for 30 days, and thereafter until he demonstrates that he is in compliance with the Animal Welfare Act, regulations and standards, assessing a civil penalty of $4,000 against respondent, and directing respondent to cease and desist from failing to (1) allow USDA inspectors access to his facilities; (2) provide garbage cans with adequate lids; (3) provide ample light for inspection and cleaning; (4) maintain interior surfaces without cracks, holes and crevices; (5) provide adequate sanitation and cleaning procedures; and (6) remove trash and debris from the premises, and properly store chemicals and food. The ALJ's findings and conclusions are abundantly supported by the record. Photographs taken after the last date charged in the complaint were properly received in evidence because complainant's veterinary medical officer testified that the photographs substantially depict what he saw on the dates of the inspections alleged in the complaint. Respondent's violations were willful, irrespective of evil motive or reliance on erroneous advice. The sanction is consistent with the Department's sanction policy. The 12 housekeeping violations reach a medium significance, considered together, since they were carried on for a long period of time. The refusal to permit an inspection was a very serious violation.

In *In re Kaplinsky*, P.Q. Docket No. 191, decided by the Judicial Officer on March 30, 1988 (33 pages), the Judicial Officer affirmed Judge McGrail's order assessing a civil penalty of $250 against respondent for importing into the United States approximately four peaches and five plums, in violation of Plant Quarantine Act regulations. A default Decision and Order is properly issued where a respondent fails to file a timely answer or fails to deny the material allegations of the complaint. Service on a respondent is properly made where the person who signs the certified receipt card fails to give the complaint to the respondent in time to file a timely answer. Such service satisfies due process requirements. Sanction policy for Plant Quarantine Act violations explained.

In *In re Craig*, P.Q. Docket No. 277, decided by the Judicial Officer on March 30, 1988 (2 pages), the Judicial Officer affirmed Judge Baker's order assessing a civil penalty of $375 against respondent under the Plant Quarantine Act on the basis of *In re Kaplinsky*.

In *In re Foundas*, P.Q. Docket No. 206, decided by the Judicial Officer on March 30, 1988 (2 pages), the Judicial Officer reversed Judge Palmer's order assessing a civil penalty of $375 against respondent under the Plant Quarantine Act, and assessed a civil penalty of $125, on the basis of *In re Kaplinsky*.

In *In re Continental Airlines, Inc.*, P.Q. Docket No. 328, decided by the Judicial Officer on March 30, 1988 (2 pages), the Judicial Officer affirmed Judge Kane's order assessing a civil penalty of $375 against respondent under the Plant Quarantine Act on the basis of *In re Kaplinsky*.

In *In re Porter*, P&S Docket No. 6538, decided by the Judicial Officer on April 28, 1988 (52 pages), the Judicial Officer affirmed Judge Baker's order requiring respondent to cease and desist from engaging in business without maintaining a reasonable bond or its equivalent; purchasing his own livestock out of consignments to fill an order, for the purpose or with the effect of increasing the price of such livestock to his principals; using his own livestock to fill an order without disclosing his financial interest in such livestock and without disclosing such other facts as may be necessary to show fully the true nature of the transaction to the principal; and failing to pay, when due, the full purchase price of livestock. The order suspends respondent as a registrant under the Act for 6 months, and thereafter until he complies with the bonding requirements, and assesses a civil penalty of $5,000. An act is willful if the violator intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements. Operating without the required bond is a

violation of the Act, and unsuccessful efforts to obtain adequate bonding do not mitigate from the violation. Damage to a respondent from the agency's press release is given no weight in determining the sanction. Severe sanction policy explained. Complainant need only prevail by a preponderance of the evidence. It is unlawful for an agent to make a secret profit in transactions for principals. An agent is not permitted to have a secret interest in conflict with that of his principals. Where respondent made a secret profit, it is irrelevant that his principals were happy with his prices. Violations of a fiduciary duty are particularly serious.

In *In re Victor L. Kent & Sons, Inc.*, P&S Docket No. 6783, decided by the Judicial Officer on April 29, 1988 (76 pages), the Judicial Officer reversed Judge Palmer's Decision and Order, which had accepted, subject to certain publishing, posting and filing requirements, respondent's tariff. Respondent's tariff deleted the selling charge previously assessed against sellers of slaughter livestock, and assessed the charge against the packer buyers. Although the Judicial Officer gives great weight to findings of fact by ALJ's, he is free to substitute his judgment for that of the hearing officer on all questions. An agent is under a duty to sell at a price most favorable to his principal. If the agent has improperly received a bonus for making a sale, the amount which the agent has so received belongs to the principal. The law of agency is routinely applied under the Packers and Stockyards Act to protect farmers and ranchers. Violation of a fiduciary duty defeats the primary purpose of the Act. Although the legislative history of the Act requires rate competition, rather than ratemaking by the Department, the Secretary must determine if a rate is unjust, unreasonable or discriminatory. Respondent's tariff must be rejected under this standard. It is immaterial that respondent's customers are happy with his tariff. Complainant is not required to allege and prove precisely who was injured by an unlawful practice, or that an injury has in fact already occurred. New York State law, which permits an auctioneer to receive his fee from the buyer, is not controlling. Respondent's position is not aided by the fact that a livestock tariff apparently filed with complainant in 1964, without objection, shifts a small portion of the seller's fee to the buyer, since there was no proceeding in which that tariff was held to be valid.

In *In re Cumberland Farms Food Stores, Inc.*, AMA Docket No. MM-4, decided by the Judicial Officer on May 10, 1988 (31 pages), the Judicial Officer affirmed Judge Campbell's Decision and Order denying the relief requested by petitioners. Petitioners are "handlers" of milk subject at times to Order No. 13 (7 C.F.R. Part 1013) or Order No. 6 (7 C.F.R. Part 1006), which regulate the handling of milk in Florida marketing areas. Petitioners instituted this action to challenge amendments to the Orders which partially eliminated the benefit petitioners had received under the Orders from a large, negative location adjustment. The amendments left the large, negative location adjustment in effect only for that portion of petitioners' milk that petitioners actually transported from Delaware to Florida. Previously, petitioners received the identical location adjustment on that portion of petitioners' milk transferred from Delaware to New Jersey. The Secretary may, under § 8c(5)(A) and § 8c(7)(D), limit a negative location adjustment to that portion of the milk which is actually transported in a manner to earn the location adjustment. The Secretary's decision is supported by *In re Borden, Inc.*, 46 Agric. Dec. ____ (Sept. 30, 1987), *appeal docketed*, No. 87-2820 (D.D.C. Oct. 20, 1987).

In *In re Reefer Express Lines Pfy, Ltd.*, P.Q. Docket No. 342, decided by the Judicial Officer on May 27, 1988 (2 pages), the Judicial Officer affirmed Chief Judge Palmer's order assessing a civil penalty of $750 against respondent under the Act of February 2, 1903, as amended, and the Federal Plant Pest Act, as amended, on the basis of *In re Kaplinsky*.

In *In re Duani*, P.Q. Docket No. 288, decided by the Judicial Officer on May 27, 1988 (2 pages), the Judicial Officer affirmed Judge Baker's order assessing a civil penalty of $375 against respondent under the Plant Quarantine Act on the basis of *In re Kaplinsky*.

In *In re Hickey*, AWA Docket No. 369, decided by the Judicial Officer on May 27, 1988 (25 pages), the Judicial Officer affirmed Chief Judge Palmer's order suspending respondents' license for 25 years, assessing a civil penalty of $40,000, and directing respondents to cease and desist from numerous practices involving the care and housing of dogs and cats, from failing to allow inspection of respondents' records, and from failing to keep and maintain adequate records as to the acquisition and disposition of dogs and cats. To better prevent the sale of stolen pets, the Act requires animal dealers to keep detailed records. Respondents' deceptive and false records facilitated trafficking in stolen pets, obscured the identity of such animals and compounded the difficulties pet owners and law enforcement officers faced when attempting to trace the movement of stolen animals. The evidence supports the ALJ's findings and conclusions. The procedural and evidentiary rules applicable in court proceedings are not applicable in administrative proceedings, and it is the Department's policy to make no effort to follow them. Issues not raised in a timely manner before the ALJ cannot be raised on appeal. The formalities and technicalities of court pleading are not applicable in administrative proceedings. A jury trial is not required in an administrative disciplinary proceeding. It is not the practice of this Department to reduce sanctions imposed for past violations because of present good conduct. Severe sanction policy explained.

In *In re Robertson*, P&S Docket No. 6945, decided by the Judicial Officer on May 27, 1988 (10 pages), the Judicial Officer affirmed Chief Judge Palmer's order requiring respondent to cease and desist from engaging in business without filing and maintaining an adequate bond or its equivalent. The order also suspends respondent as a registrant under the Act until he complies with the bonding requirements, and assesses a $500 civil penalty. A respondent's failure to file a timely answer or deny the allegations of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Even if respondent were permitted to file a late answer, it would not affect the outcome of this proceeding. Continued operation without a bond, even though active efforts were being made to obtain the bond, is a serious violation of the Act.

In *In re Rodman*, P&S Docket No. 6607, decided by the Judicial Officer on May 27, 1988 (68 pages), the Judicial Officer affirmed Judge Baker's order requiring respondents to cease and desist from various custodial account violations, including failing to deposit to their Custodial Accounts for Shippers' Proceeds, within the time prescribed, amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock, and using funds received as proceeds from the sale of consigned livestock for purposes of their own. However, the Judicial Officer increased the ALJ's suspension order from 28 days to 35 days, and affirmed that part of the order continuing the suspension until the deficits in the custodial accounts have been eliminated. The custodial account regulations from 1921 through 1982 are summarized, along with the interpretive administrative and judicial decisions. Proof of injury or likelihood of injury is not required in custodial account violation cases. *Stare decisis* applies only to the facts actually decided. The 1982 custodial account regulations have substantive effect because they were issued as legislative rules having the force and effect of law, or, alternatively, because of their long-standing acceptance. A violation is willful if a person intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements. Violations of a fiduciary duty are particularly serious violations of the Act. Severe sanction policy explained. The sanctions imposed under the P&S Act in recent years have been much more severe than during earlier years. Ignorance of the law is never an excuse or even a mitigating circumstance, under this Department's sanction policy. The statutory criteria applicable to civil penalties are not applicable to suspension orders.

In *In re Brown*, PACA Docket No. D 88-504, decided by the Judicial Officer on June 20, 1988 (1 page), the Judicial Officer ruled in response to a question certified by Judge Palmer that the Perishable Agricultural Commodities Act does not authorize revocation of a license, even with the consent of the respondent, without making findings as to repeated or flagrant violations.

In *In re Western States Cattle Co.*, P&S Docket No. 6592, decided by the Judicial Officer on June 23, 1988 (104 pages), the Judicial Officer affirmed Judge Palmer's order requiring respondents jointly or severally (except Brown), to cease and desist from: engaging in a course of business of obtaining money by false or deceptive pretenses in connection with livestock purchases or sales; entering into agreements with any other person for the same purpose; misrepresenting to principals, or any others, the true nature of purchase prices or weights, or buying service charges; preparing and issuing false livestock marketing documents and accounts; inserting or omitting information in records causing a false record of livestock transactions; collecting payment, or aiding others to collect, from purchasers of livestock on the basis of false accounts; and misrepresenting to buyers the terms and conditions of sale. Additionally, respondent Brown was ordered to cease and desist from misrepresenting livestock sales terms and conditions; while the other respondents were ordered to keep and maintain true and accurate accounts under the Act. The ALJ had suspended the corporate respondent as a registrant under the Act, and prohibited the other respondents from operating subject to the Act, for a period of 6 months. The Judicial Officer extended the 6-month suspension order to include both the corporate respondent and its two alter egos (Crowl and DeHaan), while continuing in effect the 6-month prohibition against all of the individual respondents from operating subject to the Act for 6 months. Respondents violated the Act when they increased weights and prices when buying livestock on commission for principals, and by increasing the weight in one dealer transaction. The proof surpasses the preponderance of the evidence, which is all that is required. ALJ's findings of fact are given great weight by the Judicial Officer, but may be reversed. Individual respondents who are the alter egos of a registered corporation may be suspended along with the corporation. Market agencies and dealers defined. Respondents were market agencies since they held themselves out as agents buying on commission. In the absence of an express agreement to the contrary, pencil shrink must be passed along by a market agency or dealer. There is no need to prove actual injury or predatory intent when a fiduciary defrauds principals with respect to prices or weights. Even slight false weighing is a serious violation, and one false weighing violation can be considered a "practice." Since false weights always involve record-keeping violations, in addition to trade- practice violations, and the violations are intertwined, any suspension order is based on the trade-practice violations only. Complainant's investigators are not prohibited by the regulations from showing respondents' records to respondents' principals. The criteria in the statute relating to imposing civil penalties are not applicable to suspension orders. Violations of a fiduciary duty are regarded as particularly serious violations of the Act. Severe sanction policy summarized. Ignorance of the law is never an excuse or even a mitigating circumstance in a disciplinary proceeding under the Act.

In *In re Hickey*, AWA Docket No. 369, decided by the Judicial Officer on June 27, 1988 (1 page), the Judicial Officer denied a petition for reconsideration for the reasons set forth in the original decision.

In *In re Wileman Bros. & Elliott, Inc.*, AMA Docket Nos. F&V 916-3 and 917-4, decided by the Judicial Officer on July 8, 1988 (1 page), the Judicial Officer denied an application for interim relief based on settled precedent.

In *In re Wileman Bros. & Elliott, Inc.*, AMA Docket Nos. F&V 916-3 and 917-4, decided by the Judicial Officer on August 3, 1988 (1 page), the Judicial Officer denied a petition to reconsider the order denying interim relief on the ground that it is not appropriate to grant interim relief in any case under the Agricultural Marketing Agreement Act of 1937.

In *In re Stebane*, AWA Docket No. 410, decided by the Judicial Officer on August 16, 1988 (17 pages), the Judicial Officer affirmed Chief Judge Campbell's decision and order suspending respondent's license for 20 days and thereafter until he demonstrates to APHIS that he is in full compliance with the Act, regulations and standards, assessing a civil penalty of $1,500, and directing respondent to cease and desist from numerous practices involving the care

and housing of dogs and cats, from failing to allow inspection of respondent's records, and from failing to allow inspection of respondent's facilities. The violations were willful, as that term is used in the Administrative Procedure Act. Respondent's housekeeping violations were mostly trivial, but warrant a sanction because of the continuous nature of the violations. If there had not been extenuating circumstances as to respondent's refusals to permit inspections of records and facilities, the sanction would have been more severe.

In *In re Zoological Consortium of Maryland, Inc.*, AWA Docket No. 401, decided by the Judicial Officer on August 16, 1988 (19 pages), the Judicial Officer affirmed Chief Judge Campbell's decision and order suspending respondents' license for 20 days, and thereafter until compliance is achieved, assessing a civil penalty of $1,000, and directing respondents to cease and desist from numerous practices involving the care and housing of exhibited animals, including sanitation, structures, and housekeeping functions at respondents' facilities. The proof here surpasses the preponderance of the evidence, which is all that is required. Respondents' violations were willful, but willfulness is not required because respondents had received a prior warning letter. Respondents' violations were mostly trivial, but are serious because of the continuous nature of the violations. The sanction proposed by the Chief ALJ is appropriate to deter future violations.

In *In re McQueen Brothers Produce Co.*, PACA Docket No. 2-6956, decided by the Judicial Officer on September 8, 1988 (12 pages), the Judicial Officer affirmed Judge McGrail's decision and order finding that respondent has committed willful, flagrant and repeated violations of § 2 of the Act by failing to make full payment promptly to 20 sellers for 71 lots of produce from February 1985 through April 1985, totaling $395,687.18, and by failing to maintain sufficient assets in trust to meet its obligations. The evidence shows that respondent is subject to license under the PACA because the majority of the purchases totaled 1 ton or more in weight, and the transactions were in interstate commerce. Respondent's bankruptcy documents, received in evidence, show that the payment failures of Al McQueen & Sons are the debts of respondent. When transportation charges are implicit in a transaction, the payment of such charges becomes an undertaking in connection with the transaction, within the meaning of § 2(4) of the Act. Responsible hearsay is admissible in administrative proceedings. Payment within 10 days is required in the absence of a written agreement. Only if full payment is made before the hearing, along with present compliance with the PACA, will payment be considered a mitigating circumstance. The proof far surpasses the preponderance of the evidence, which is all that is required. The ALJ's findings of fact are given great weight by the Judicial Officer. Respondent's arguments are similar to those rejected in *In re B.G. Sales Co.*, 44 Agric. Dec. 2021 (1985).

In *In re Moore Marketing International, Inc.*, PACA Docket No. 2-7088, decided by the Judicial Officer on September 8, 1988 (15 pages), the Judicial Officer dismissed the appeal and denied a motion for a stay. Chief Judge Palmer filed a consent Decision and Order on August 1, 1987, suspending respondent's license for 30 days, and providing that if respondent does not pay all known produce creditors by November 1, 1988, its license shall be revoked. The order further provides that respondent shall file a $100,000 bond with the Secretary by September 1, 1988, which shall remain in effect for 4 years, and that any failure to maintain the bond as required shall result in the automatic suspension of its license, which suspension shall continue until an appropriate bond is posted. Respondent appealed the consent order because it was unable to obtain the bond, but a consent decision becomes "final" upon issuance, and there is no right of appeal. This is analogous to the situation where appeals are not permitted on or after the 35th day after service of a decision because it has become final. A respondent acts at his peril if he relies on erroneous advice from a government official. Settlement agreements should not be lightly overturned. Once a question is certified to the Judicial Officer by an ALJ, the ALJ cannot rule on the matter, and, therefore, Judge Kane erroneously denied complainant's motion for the issuance of a decision on the pleadings, revoking respondent's license, after the Judicial Officer had ruled to that effect based on Judge Weber's certification to the Judicial Officer. Failure to

pay for more than a *de minimis* amount of produce results in a license revocation. Excuses for failure to pay are irrelevant in determining willfulness or the sanction since the Act calls for payment--not excuses.

In *In re Rodman*, P&S Docket No. 6607, decided by the Judicial Officer on September 22, 1988 (20 pages), the Judicial Officer denied respondents' petition for reconsideration. Severe sanctions are imposed for serious violations irrespective of hardship to respondents' community, customers or employees. The Judicial Officer's holding that the custodial account regulations are substantive, rather than advisory, did not change the sanction. The criteria for civil penalties in § 312(b) of the Act are irrelevant in determining suspension orders. Respondents' charge that the Judicial Officer seeks to have his former agency (P&SA) always prevail is unfounded. Similar claims of bias have been rejected in a number of decisions. Ignorance of the law is not a mitigating circumstance. Examples given as to cases decided by the Judicial Officer against P&SA and other Department agencies.

In *In re Veg-Mix, Inc.*, PACA Docket No. 2-6612, decided by the Judicial Officer on September 22, 1988 (8 pages), the Judicial Officer remanded the proceeding to Chief Judge Palmer for a determination as to whether the violations occurring during Mr. Harris' association with respondent are "flagrant or repeated," in view of the remand from the court of appeals as to this issue. Newly discovered evidence, offered for the first time after the Judicial Officer's decision was issued, cannot be considered on remand. This is analogous to the situation where the Department routinely denies requests for a hearing, after respondents have failed to file timely answers explaining or denying the allegations of the complaint.

Fiscal Year 1989

In *In re Veg-Mix, Inc.*, PACA Docket No. 2-6612, decided by the Judicial Officer on October 11, 1988 (2 pages), the Judicial Officer denied respondent's petition for reconsideration of the Judicial Officer's remand order for the reasons previously stated by the Judicial Officer.

In *In re McQueen Brothers Produce Co.*, PACA Docket No. 2-6956, decided by the Judicial Officer on October 19, 1988 (3 pages), the Judicial Officer denied respondent's petition for reconsideration for the reasons previously stated. Since respondent called no witnesses to rebut complainant's damaging testimony, an inference is drawn that respondent's testimony would have been adverse to respondent's interests here.

In *In re Tiemann*, P&S Docket No. 6780, decided by the Judicial Officer on October 20, 1988 (40 pages), the Judicial Officer reversed Judge McGrail's sanction, substituting the more severe sanction requested by complainant. The Judicial Officer ordered respondent to cease and desist from engaging in business without filing and maintaining an adequate bond or its equivalent; from issuing checks drawn on insufficient funds for payment for livestock; from failing to pay when due for livestock purchases; and from failing to pay for livestock purchased. The Judicial Officer also suspended respondent for 5 years, provided that after 180 days, the suspension may be terminated if respondent demonstrates that all unpaid livestock sellers have been paid in full and that he is in compliance with the bond requirements. Also, after 180 days, the order may be modified to permit respondent's salaried employment by another registrant. Operating without the required bond is an unfair and deceptive practice. Issuing insufficient funds checks is in violation of the Act. Failure to pay, when due, the full purchase price of livestock is an unfair and deceptive practice. Respondent's claimed mitigating circumstances are not sufficient to warrant reducing the sanction requested by complainant. If a seller agrees to accept less than full and prompt payment, where there was no such agreement prior to the payment violation, that does not constitute full and prompt payment. It is the duty of P&S to stop unlawful practices in their incipiency. Severe sanction policy summarized.

In *In re Prentice*, P.Q. Docket No. 161, decided by the Judicial Officer on October 27, 1988 (53 pages), the Judicial Officer awarded attorney fees and other expenses under the Equal Access to Justice Act in the amount of $4,834.44. The Equal Access to Justice Act provides for an award of attorney fees (not to exceed $75 per hour unless authorized by the agency's regulations) and other expenses to the prevailing party only if the position of the agency was not "substantially justified," and there are no "special circumstances" that make an award unjust. Complainant's position was not substantially justified for the reasons set forth in the original decision herein filed August 12, 1987. Under the Administrative Procedure Act (APA), before a regulation is adopted imposing requirements on members of the public, the agency must engage in notice-and-comment rulemaking, giving the public an opportunity to be heard (unless one of the exceptions apply, or more formal rulemaking is required, which is not the case here). Respondent's defense was not so unique that complainant could reasonably have proceeded with the case, not thinking of such a defense. There are no special circumstances that make an award of attorney fees and expenses unjust.

In *In re Saulsbury Orchards & Almond Processing, a California Corporation*, AMA Docket No. F&V 981-4, decided by the Judicial Officer on October 27, 1988 (2 pages), the Judicial Officer ruled in response to questions certified by Judge Bernstein that it is inappropriate to rule on petitioners' request for a declaratory order, in advance of any determination as to their position on the merits. Petitioners seek a declaratory order as to whether advertising assessments petitioners have been required to pay under the Federal Marketing Order for Almonds Grown in California will be returned, if petitioners ultimately prevail, and as to the source of such funds, if any. The "Secretary" has not issued a final decision as to the constitutionality of the specific brand advertising assessments, since the Judicial Officer has not yet ruled as to this matter.

In *In re Meacham*, AWA Docket No. 299, decided by the Judicial Officer on November 23, 1988 (2 pages), the Judicial Officer ruled, contrary to Judge Kane's recommended ruling, that complainant has the absolute right to amend the complaint notwithstanding respondents' request set forth in their answer for an oral hearing, since their request for a hearing, authorized by 7 C.F.R. § 1.141(a), is not the same as a motion for a hearing, referred to in 7 C.F.R. §§ 1.137 and 1.141(b). But even if the matter had been discretionary, it would have been an abuse of discretion for the ALJ to have denied complainant's request to amend the complaint.

In *In re Saulsbury Orchards & Almond Processing, a California Corporation*, AMA Docket No. F&V 981-4, decided by the Judicial Officer on January 10, 1989 (1 page), the Judicial Officer denied petitioners' motion for reconsideration of the Judicial Officer's ruling on certified question, for the reasons previously stated. In addition, it would not be in the public interest to issue a declaratory order in view of the large backlog of pending cases in the Office of the Judicial Officer.

In *In re Great American Veal, Inc.*, P&S Docket No. 5998, decided by the Judicial Officer on January 19, 1989 (59 pages), the Judicial Officer affirmed Chief Judge Palmer's order requiring respondents to cease and desist from purchasing livestock while insolvent unless the full purchase price is paid at time of purchase; failing to pay, when due, the full purchase price of livestock; issuing checks in payment for livestock without sufficient funds available in the account; and giving any unreasonable preference or advantage to any person in connection with payment for livestock purchased in cash sales, and requiring respondents to keep full and accurate accounts and records. However, the Judicial Officer reversed the ALJ's civil penalties totaling $39,000, and assessed civil penalties totaling $129,000, as requested by complainant. Complainant originally requested $5,000 in civil penalties for the payment violations, and $60,000 for alleged trust-dissipation violations. After the Judicial Officer agreed with the ALJ that no trust-dissipation violations occurred (because respondents had adequate funds to pay all cash sellers of livestock, even though they did not use their cash to make such payments), the Judicial Officer *sua sponte* increased the civil penalties for the payment violations to $65,000. In addition, the Judicial Officer increased the civil penalties of $30,000 imposed by the ALJ to $60,000, because respondents took over the inventory of another packing company and sold it for their own account, creating false documents to facilitate the inventory takeover, when respondents knew that the inventory was subject to the statutory trust provisions of the Act. The corporate veil is pierced so that the individual who is the president and sole owner of the corporate respondent is subject to the requirements of the order and the civil penalties. The Judicial Officer inferred that respondents are able to pay the civil penalties since the individual respondent failed to comply with the ALJ's subpoena duces tecum as to a current financial statement and income tax returns. Severe sanction policy explained. Ignorance of the law is not a mitigating circumstance under USDA's sanction policy. Since respondents failed to testify, inference is drawn that their testimony would have been adverse to their position. The ALJ properly refused respondents' request under the Jencks Act provisions of the rules of practice to require complainant to turn over investigative report material to the ALJ for an *in camera* examination. Where the ALJ improperly admitted an exhibit for only a limited purpose, the Judicial Officer considered the exhibit as evidence for all purposes relevant to the proceeding. Similarly, the Judicial Officer treated as evidence an exhibit refused by the ALJ, containing pleadings in a bankruptcy proceeding of which respondents had knowledge, since the pleadings give rise to the inference that respondents were aware of the trust requirements under the P&S Act.

In *In re HGS Corporation*, P&S Docket No. D 88-16, decided by the Judicial Officer on January 27, 1989 (7 pages), the Judicial Officer affirmed Chief Judge Palmer's order requiring respondents to cease and desist from: purchasing livestock while insolvent, unless the livestock is paid for at purchase by cash, cashier's check or wire transfer of funds; issuing checks drawn on insufficient funds for payment for livestock; and failing to pay when due for livestock purchases.

The order also assesses respondents, jointly and severally, a civil penalty in the amount of $3,500.

In *In re Charles Crook Wholesale Produce and Grocery Co.*, PACA Docket No. D 88-506, decided by the Judicial Officer on January 27, 1989 (11 pages), the Judicial Officer affirmed Judge Baker's order revoking respondent's license for failure to make full payment to 24 sellers for 153 lots of produce from January 1986 through August 1986, totaling $273,227.85. The argument that produce creditors will suffer if respondent's license is revoked is rejected because the Secretary must consider the broader public interest, involving thousands of suppliers and licensees throughout the country.

In *In re John A. Pirrello Co., Inc.*, PACA Docket No. D 88-524, decided by the Judicial Officer on January 27, 1989 (10 pages), the Judicial Officer affirmed Chief Judge Palmer's order revoking respondent's license for failure to make full payment to 11 sellers for 115 lots of produce totaling $397,197.39. Section 4(a) of the Act (7 U.S.C. § 499d(a)), which requires the Secretary to examine the circumstances of a bankruptcy to determine whether such circumstances warrant termination of the bankrupt's license, is not relevant in a disciplinary proceeding to revoke respondent's license for failure to pay for produce. Respondent's argument that produce creditors will suffer if its license is revoked is rejected because the Secretary must consider the broader public interest involved. Complainant is not required to prove not only that respondent failed to pay for produce, but, also, that it failed to account correctly.

In *In re Casey*, A.Q. Docket No. 275, decided by the Judicial Officer on January 31, 1989 (15 pages), the Judicial Officer affirmed Judge McGrail's order assessing civil penalties of $9,000 because respondent moved cattle interstate on three occasions without having the required owner's statement (or other document) and health certificate, and because the cattle were not subjected to an official test for brucellosis within 30 days prior to the interstate movement. The facts do not support respondent's contention that the cattle were moved in the course of normal ranching operations without change of ownership to premises belonging to the same owner. Findings of fact by ALJs are given great weight by the Judicial Officer. The importance of the Brucellosis Eradication Program is explained.

In *In re Cobb*, P&S Docket No. 6587, decided by the Judicial Officer on February 13, 1989 (81 pages), the Judicial Officer affirmed Judge Baker's order requiring respondents (Crockett Livestock Sales Company, Inc. (Crockett), and its owner and president, Danny Cobb) to cease and desist from engaging in business without maintaining a reasonable bond or its equivalent; failing to deposit in their custodial account, within regulatorily-imposed times, amounts equal to the proceeds due consignors for livestock purchased by respondents, and amounts equal to outstanding proceeds receivable due from other purchasers of livestock; failing to otherwise maintain their custodial account in strict conformity with the regulations; and permitting employees engaged in actual conduct of respondents' auction sales to purchase livestock out of consignment for speculative resale. The order requires respondents to keep and maintain true and correct records. The order suspends respondent Crockett for 6 weeks, and thereafter until it demonstrates that the custodial account shortage has been eliminated; provided, that when this shortage is eliminated, a supplemental order will be issued terminating the suspension, after the 6-week period. The order suspends respondent Cobb as a registrant under the Act for 6 weeks. The order assesses a civil penalty of $5,000, jointly and severally, upon respondents Crockett and Cobb. Complainant's proof surpasses the preponderance of the evidence, which is all that is required. Operating without an adequate bond is a violation of the Act, and efforts to obtain a bond do not mitigate from the violation. Proof of particular injury is not required, since it is the duty of the agency to stop unlawful practices in their incipiency. A violation is willful if the respondent intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts in careless disregard of the statutory requirements. The Judicial Officer has authority to consider an offer of proof as evidence,

without a remand, in appropriate circumstances, but complainant failed to show appropriate circumstances to support the admission of a proffered exhibit concerning the premature release of pledge collateral from the trust fund at respondents' bank, since it would not affect the sanction. The Act's provision prohibiting an unfair "practice" refers to a practice in the regulated industry, and does not require that the respondent in an individual case indulge in the activity long enough to amount to a course of conduct. Failure to maintain a custodial account as required is a violation of the Act, irrespective of a market's line of credit. The criteria applicable to civil penalties under 7 U.S.C. § 213(b) are not applicable to suspension orders. Findings of fact by ALJs are given great weight by the Judicial Officer. Severe sanction policy explained. The Department's adjudicatory procedures do not violate due process, since the Judicial Officer is not both an investigator and an adjudicator. Claims of bias on the part of the Judicial Officer have been routinely rejected on judicial review. A recordkeeping order is appropriate irrespective of whether respondents' records are false and inaccurate, or whether they merely do not fully and correctly disclose the correct nature of the transactions.

In *In re Francisco*, P.Q. Docket No. 88-21, decided by the Judicial Officer on February 13, 1989 (2 pages), the Judicial Officer vacated Judge Baker's order assessing a civil penalty of $375 against respondent for violating the Plant Quarantine Act on the ground that the respondent did, in fact, pay a $50 penalty to the United States Customs Service, based on complainant's motion and respondent's appeal, both to the same effect.

In *In re Central Packing Co., Inc.*, P&S Docket No. 6898, decided by the Judicial Officer on February 14, 1989 (41 pages), the Judicial Officer affirmed Judge Kane's order requiring respondents to cease and desist from failing to pay, and failing to pay when due, for their purchases of meat and meat food products, and issuing checks in payment for meat and meat food products without sufficient funds available in the account. The order against respondents assesses, jointly and severally, civil penalties totalling $39,000, but all but $5,000 is held in abeyance for 10 years on condition that respondents do not violate the cease and desist order. Legislative history subsequent to the original enactment of a statute is relevant in construing the original congressional purpose. Legislative history of Act outlined. Failure to pay promptly for livestock or meat is a violation of the Act. The exercise of foreclosure rights by respondents' creditor bank does not exculpate the violations. The order should apply to the individual who is half owner, executive vice president and secretary, and responsible for the management of the respondent packing company, under the alter-ego theory. The civil penalty is authorized under the criteria in 7 U.S.C. § 193(b). State laws are not controlling in determining whether the corporate veil should be pierced. Complainant need not prove that conduct is likely to produce injury to competition where the practice is clearly unfair. It is the duty of the agency to stop unlawful practices in their incipiency.

In *In re Floyd*, A.Q. Docket No. 88-9, decided by the Judicial Officer on February 14, 1989 (6 pages), the Judicial Officer affirmed Judge Baker's order assessing civil penalties of $4,000 for violating the Act of February 2, 1903, and regulations governing the interstate movement of cattle. Intent is not an element of respondent's violations. The penalties are modest considering the importance of the Brucellosis Eradication Program.

In *In re Hennessey*, P&S Docket Nos. 6717 and 6851, decided by the Judicial Officer on February 15, 1989 (14 pages), the Judicial Officer affirmed Judge Baker's order requiring respondent to cease and desist from engaging in business without having an adequate bond (or its equivalent), failing to pay, when due, for livestock purchases, and issuing checks in payment for livestock without sufficient funds available in the account. The order suspends respondent as a registrant for 28 days and assesses a civil penalty of $750. Willful defined. Failure to pay when due for livestock, and the issuance of insufficient funds checks, are violations of the Act. Operating without the required bond is a violation of the Act. Severe sanction policy explained.

In *In re H.M. Shield, Inc.*, PACA Docket No. 2-7660, decided by the Judicial Officer on February 16, 1989 (15 pages), the Judicial Officer affirmed Chief Judge Palmer's order finding that respondent has committed flagrant and repeated violations of § 2 of the Act by failing to make full payment promptly of the net proceeds of $68,447.97 collected as a grower's agent, but not paid to the supplier, and failing to make full payment promptly to 28 sellers for 313 lots of produce from November 1985 through March 1986, totaling $356,213.60. A large portion of these sums remains unpaid. The evidence supports the finding that the transactions were in interstate commerce. Adverse interest drawn against respondent because it did not have an officer or employee testify as to whether the transactions were in interstate commerce. Willful defined. The same order would be entered as long as the violations are not *de minimis*.

In *In re Watson*, AWA Docket No. 416, decided by the Judicial Officer on February 27, 1989 (1 page), the Judicial Officer granted respondent's motion, concurred in by complainant, to withdraw the appeal.

In *In re Ferguson*, P&S Docket No. 6826, decided by the Judicial Officer on March 1, 1989 (61 pages), the Judicial Officer affirmed Chief Judge Palmer's order requiring respondent to cease and desist from various practices relating to his billing and collecting payment from principals (for whom he bought livestock on a commission basis) on the basis of falsely increased prices or expenses. The order requires respondent to keep full and accurate accounts and records, suspends his registration for 6 months, and assesses civil penalties (held in abeyance for 5 years on condition that the cease and desist order is not violated) totaling $25,000. However, the Judicial Officer made the civil penalty, if effectuated, payable over 5 years. Findings of fact by ALJs are given great weight by the Judicial Officer, but can be overruled in appropriate circumstances (which do not appear here). A person charging a commission in a livestock transaction subject to the Act is, by statutory definition, a market agency. Itemization of a commission, on each of the invoices involved in this case that respondent sent to customers, shows that respondent was acting as a market agency. The fact that respondent's invoices do not show a true price per hundredweight (but, rather, show only the average cost of the livestock) shows that respondent was acting as a market agency. The fact that some of respondent's invoices show the price in "odd" amounts, e.g., $57.97 per hundredweight, is strong evidence of a market agency arrangement. Willful defined. Complainant need not prove that respondent knew of the regulatory requirements, to prove willfulness. Violations of a fiduciary duty are particularly serious. Severe sanction policy explained. The sanction is the same irrespective of whether violations are intentional. The fact that customers were generally satisfied is irrelevant in determining the sanction.

In *In re Vermont Meat Packers, Inc.*, FMIA Docket No. 102, PPIA Docket No. 18, decided by the Judicial Officer on March 8, 1989 (1 page), the Judicial Officer held that withdrawal of an appeal is not a matter of right, but that there is no reason not to permit respondent to withdraw its appeal here.

In *In re Cal-Almond, Inc.*, AMA Docket No. F&V 981-5, decided by the Judicial Officer on March 8, 1989 (1 page), the Judicial Officer denied an application for interim relief based on established precedent.

In *In re Belridge Packing Corp.*, AMA Docket Nos. F&V 907-13, 908-4 and 910-9, decided by the Judicial Officer on March 10, 1989 (68 pages), the Judicial Officer affirmed Judge Palmer's order dismissing the petition on the ground that it fails to state a claim upon which relief can be granted. Petitioners contend that the orders regulating Arizona and California navel oranges, Valencia oranges, and lemons, which treat Canada as part of the domestic market subject to regulation, are based on stale hearing records, and that the Secretary was arbitrary and capricious in refusing to hold a hearing to consider changed conditions. The Secretary's determinations not to hold a hearing, not to amend an order, or not to terminate an order, are

discretionary, nonreviewable determinations. Assuming the reviewability of the Secretary's determination not to hold a hearing, such a determination is reviewable in district court, rather than here. Assuming that the Secretary's determination not to hold a hearing is reviewable here, the Secretary's decision, based on lack of sufficient industry interest, is not arbitrary or capricious. If a hearing were to be held, petitioners would not be permitted to probe the mental processes of the Assistant Secretary. Marketing orders are cooperative ventures in which the Secretary and industry jointly determine the best marketing strategy. The primary purpose of the Act is to protect the purchasing power of producers, particularly cooperative associations. Petitioners' burden of proof, and the narrow scope of review under the arbitrary and capricious standard, explained.

In *In re Finger Lakes Livestock Exchange, Inc.*, decided by the Judicial Officer on March 14, 1989 (28 pages), the Judicial Officer affirmed Judge Bernstein's order requiring respondents to cease and desist from various custodial account violations, including failing to deposit to their Custodial Account for Shippers' Proceeds, within the time prescribed, amounts equal to the proceeds receivable from the sale of consigned livestock, and engaging in business subject to the Act while their current liabilities exceed their current assets. The ALJ's order also suspends respondents as registrants under the Act for 21 days, and thereafter until Finger Lakes Livestock Exchange, Inc., demonstrates that any deficits in its Custodial Account for Shippers' Proceeds have been eliminated, and that its current liabilities no longer exceed its current assets. The test of insolvency under the Act is whether current liabilities exceed current assets. Failure to maintain a custodial account in accordance with the regulations violates the Act, irrespective of whether any consignor went unpaid. Willfulness defined. P&S regulations were not held to be substantive until the Federal Trade Commission's regulations were held to be substantive in 1973. It is immaterial that custodial account shortages resulted from buyers failing to pay the market promptly for livestock. Severe sanction policy explained. Ignorance of the law is not a mitigating circumstance. The civil penalty criteria in 7 U.S.C. § 213(b) are irrelevant in determining suspensions. Complainant is not estopped because of complainant's delay in bringing this action or complainant's failure to seek a temporary restraining order.

In *In re Mendicoa*, P&S Docket No. 6796, decided by the Judicial Officer on March 16, 1989 (28 pages), the Judicial Officer affirmed Judge McGrail's order requiring respondents to cease and desist from weighing livestock at other than true and correct weights, and ordering respondent Mendicoa to cease and desist from engaging in business without an adequate bond or its equivalent, issuing insufficient funds checks, and failing to pay when due for livestock. Respondent Mendicoa is ordered to keep full and correct records and is suspended for one year, and thereafter until he meets the bonding requirements. Respondent Call is prohibited from registering or operating subject to the Act for one year. Both respondents are jointly and severally assessed a civil penalty of $10,000. Operating without an adequate bond, issuing insufficient funds checks, failing to pay when due, and shortweighing livestock are all violations of the Act. Adequate records must be kept of livestock transactions. An inference is drawn that the testimony of a respondent who did not testify would have been adverse to his position. Severe sanction policy summarized.

In *In re John A. Pirrello Co., Inc.*, PACA Docket No. D 88-524, decided by the Judicial Officer on March 20, 1989 (1 page), the Judicial Officer denied respondent's petition for reconsideration for the reasons previously set forth in the Decision and Order.

In *In re Hermiston Livestock Company*, P&S Docket No. D-89-46, decided by the Judicial Officer on April 6, 1989 (1 page), the Judicial Officer ruled in response to a question certified by Judge Kane that the Judicial Officer has no authority to entertain a motion to dismiss on the pleading, but that if he had such authority, he would deny the motion for the reasons stated by the ALJ.

In *In re Hutto Stockyard, Inc.*, P&S Docket No. 6933, decided by the Judicial Officer on April 19, 1989 (71 pages), the Judicial Officer affirmed Judge Bernstein's order requiring respondents to cease and desist from weighing livestock at other than true and correct weights (and various related practices), and from failing to issue scale tickets in conformity with the regulations. Respondents are suspended as registrants for 90 days and are jointly and severally assessed a civil penalty of $20,000. A suspension order should apply to the individual respondents who direct and control the corporate respondent, as well as to the corporate respondent. Complainant need only prevail by a preponderance of the evidence. Findings of fact by ALJs are given great weight by the Judicial Officer. Correct weighing procedure described. Check weighing and direct sales investigatory techniques described. Reweighing livestock is not ordinarily part of a direct sales investigation. Complainant is not required to prove a motive for short weighing, but any dealer buying hogs and reselling them to a packer on the original purchase weights has a motive for short weighing. I infer that respondents intentionally short weighed the hogs at issue here, but the sanction would be the same irrespective of whether respondents' violations were intentional. Serious nature of false weighing explained. Sanctions in false weighing cases summarized. Severe sanction policy explained, and recent severe sanctions under the Packers and Stockyards Act summarized. A reduced sanction is imposed here because the suspension order also affects respondents' auction yard, which was not involved in the weighing violations at respondents' buying station. The great number of prior warnings for similar violations is an aggravating circumstance, irrespective of whether prior violations actually occurred. The civil penalty criteria in 7 U.S.C. § 213(b) are not applicable in determining suspension orders. Willfulness is not required where warning letters were sent, but violations were willful irrespective of whether they were intentional.

In *In re Joe Phillips & Associates, Inc.*, PACA Docket No. D 88-545, decided by the Judicial Officer on April 21, 1989 (12 pages), the Judicial Officer affirmed Judge Palmer's Decision and Order finding that respondent has committed willful, flagrant and repeated violations of § 2 of the Perishable Agricultural Commodities Act by failing to make full payment promptly to 23 sellers for 147 lots of produce from July 1987 through December 1987, leaving $73,329.70 unpaid. Where a respondent who does not have a license in effect has failed to pay for produce, a finding is automatically made that respondent has committed flagrant and repeated violations of the Act. Where a seller agrees to accept partial payment of the purchase price in full satisfaction of a debt, e.g., because of the debtor's bankruptcy, that does not constitute full payment, and does not negate a violation of the Act. The exact amount that respondent failed to pay in full is not important since the same order would be entered in any event, as long as the violations were not *de minimis*. Whether the payment that was made was made promptly is irrelevant in view of respondent's failures to make full payment, as required by the Act.

In *In re Odom*, P.&S. Docket No. 6866, decided by the Judicial Officer on May 4, 1989 (33 pages), the Judicial Officer reversed Judge Baker's decision dismissing the complaint. The Judicial Officer ordered respondent to cease and desist from failing to pay when due for livestock and issuing insufficient funds checks, and suspended respondent for 5 years, but permitted a termination of the suspension order after 1 year if all livestock sellers are paid in full, and permitted respondent's employment by another registrant after 1 year. Adverse inference drawn because the respondent failed to testify and failed to offer any evidence on his behalf. Complainant established a prima facie case that respondent owed $285,000 for livestock. Statements made by respondent's attorney in the answer, in letters, and at the hearing that there were valid offsets to respondent's debt cannot be considered as evidence. Respondent's claim that the subject of respondent's indebtedness for the livestock involved in this case was settled (after the hearing) by an agreement in a civil action relating to the same transactions, is not entitled to be considered since respondent failed to seek to have the hearing reopened to consider newly discovered evidence. The seriousness of a failure to pay for livestock explained. Severe sanction policy explained.

In *In re Ferguson*, P.&S. Docket No. 6826, decided by the Judicial Officer on May 9, 1989 (1 page), the Judicial Officer denied respondent's petition for reconsideration for the reasons previously set forth in the Decision and Order.

In *Dennis Produce Sales, Inc. v. Carpenter Export Co., Ltd.*, PACA Docket No. R-88-225, decided by the Judicial Officer on May 9, 1989 (5 pages), the Judicial Officer denied respondent's Motion to Disqualify the Presiding Officer, which was certified to the Judicial Officer by Jory M. Hochberg, Presiding Officer. Respondent complains, among other things, that the Presiding Officer, in a telephone conversation, indicated his prejudicial view that respondent unnecessarily delayed and hindered the proceedings. However, the record shows that respondent refused to accept service of certified mail and Express Mail relating to a deposition hearing, and when the court reporter arrived 25 minutes before the scheduled deposition hearing, she was denied entrance to respondent's place of business and told that Mr. Carpenter, whose deposition was to be taken, would not be there and was no longer associated with respondent. It was quite appropriate for the Presiding Officer to emphasize to Mr. Carpenter that his procedure was not appropriate.

In *In re Finger Lakes Livestock Exchange, Inc.*, P.&S. Docket No. 6793, decided by the Judicial Officer on May 17, 1989 (1 page), the Judicial Officer denied respondents' petition for reconsideration for the reasons previously set forth in the Decision and Order.

In *In re Miller*, P.&S. Docket No. 6905, decided by the Judicial Officer on May 31, 1989 (1 page), the Judicial Officer affirmed Judge Bernstein's order, except that, by consent of the parties, the 28-day suspension begins on May 28, 1989, and respondent Gary Miller may be employed by a registrant at the end of the 28-day definite period of suspension.

In *In re The Caito Produce Company*, PACA Docket No. D 88-511, decided by the Judicial Officer on June 1, 1989 (77 pages), the Judicial Officer reversed Judge Kane's order, which suspended respondent's license for 30 days for failure to make full payment promptly to 24 sellers for 44 lots of produce from August 1986 through February 1987, totaling $124,197.09, but suspended that order during those times that the respondent is in full compliance with the Act, including those provisions requiring payment within 10 days, or having written express agreements as to payment. The Judicial Officer revoked respondent's license. Respondent's agreements for deferred payment were not written, and many were made after entering into the transactions. Accordingly, the payment terms of the regulations were applicable. Explanation of the reasons for requiring written agreements to be made before a transaction is entered into if payment terms are to be extended (to comply with the statutory amendments relating to the trust provisions, and to ensure that the parties have equal bargaining power). Explanation as to why the Department revokes the license of a respondent who repeatedly and flagrantly fails to pay for produce, irrespective of excuses. Where a seller agrees to accept partial payment of the purchase price in full satisfaction of a debt, e.g., because of the debtor's bankruptcy, that does not constitute full payment, and does not negate a violation of the Act. The mere fact that a respondent denies that its payment violations were flagrant and repeated does not require that a hearing be held if the record, including bankruptcy documents subject to official notice, shows that the respondent has failed to make full payment exceeding a *de minimis* amount. Even where a respondent argues correctly that it would be detrimental to its creditors if it were forced to discontinue business, as a result of a license-revocation order, such arguments (frequently made) are routinely rejected. Ignorance of the law has never been regarded as a mitigating circumstance in any of the Department's disciplinary proceedings. Explanation as to why a license is revoked where there are lengthy delays in making full payment in numerous produce transactions, unless full payment is made by the time of the hearing, and respondent is then in full compliance with the payment requirements, with no agreements for deferred payment beyond 30 days. Lengthy explanation as to the Department's interpretation of "willfulness," as that term is used in the

Administrative Procedure Act (5 U.S.C. § 558(c)). To prove willfulness, the Department is not required to prove that the respondent knew of the provisions of the regulations.

In *In re Gerawan Co., Inc.*, 89 AMA Docket No. F&V 917-6, decided by the Judicial Officer on June 2, 1989 (1 page), the Judicial Officer denied an application for interim relief based on established precedent.

In *In re Shasta Livestock Auction Yard, Inc.*, P.&S. Docket No. D 88-23, decided by the Judicial Officer on June 12, 1989 (2 pages), the Judicial Officer granted a joint motion filed by the parties to withdraw their respective appeals from the decision filed by Judge Kane, and to substitute for the ALJ's order an order requiring respondents to cease and desist from failing to pay when due the full purchase price of livestock and issuing drafts in payment for livestock purchased on a cash basis. The order jointly and severally assesses respondents civil penalties of $35,000.

In *In re Lincoln Meat Company*, FMIA Docket No. 88-12 and I&G Docket No. 88-3, decided by the Judicial Officer on June 30, 1989 (1 page), the Judicial Officer ruled in response to a question certified by Judge Baker that the rules of practice do not provide for discovery, and that complainant should not be compelled to produce any documents.

In *In re Burns*, A.Q. Docket No. 88-17, decided by the Judicial Officer on August 2, 1989 (5 pages), the Judicial Officer affirmed Chief Judge Palmer's order assessing civil penalties of $600 against respondent for violations of the Act of February 2, 1903, as amended, and the regulations governing the interstate movement of cattle. Respondent's cattle were not accompanied by the permit, as required, and were not "S" branded, as required. Although the violations were not intentional, intent is not an element of respondent's violations. The civil penalties assessed are modest considering the importance of the Brucellosis Eradication Program.

In *In re Charles Crook Wholesale Produce and Grocery Co.*, PACA Docket No. D 88-506, decided by the Judicial Officer on August 3, 1989 (3 pages), the Judicial Officer dismissed an untimely petition for reconsideration. The rules of practice provide no relief to a respondent who timely delivered a petition for reconsideration to a courier, who lost the petition. Furthermore, the Judicial Officer has no jurisdiction to take any action in a case after the original decision and order become final (on the 35th day after service on the respondent). In any event, if the petition had been timely filed, it would have been denied for the reasons set forth in the original decision.

In *In re Sequoia Orange Co.*, AMA Docket No. F&V 908-2, decided by the Judicial Officer on August 17, 1989 (85 pages), the Judicial Officer reversed Chief Judge Palmer's decision, which held that the Secretary's revised referendum order issued in 1984 under the Valencia orange order (Order 908) was not in accordance with law. The Secretary originally directed a referendum procedure under which producers would be required to vote favorably on an entire package of proposed amendments, or the order would be terminated. The Secretary later reversed himself, permitted line-by-line voting on individual proposals, and announced that the order would not be terminated if all or part of the proposals were defeated in a producer referendum. The ALJ held that the Secretary's reversal was because of political pressure, and political considerations, which can never be in accordance with law. However, the Judicial Officer held that under § 701(a)(2) of the Administrative Procedure Act, the Secretary's referendum procedure was "committed to agency discretion by law," because there was no law to apply. Accordingly, judicial review is not available. If, however, review is available, the Secretary's action was not arbitrary, capricious, or an abuse of discretion. The testimony of a former USDA official as to the Secretary's mental processes was inadmissible and is stricken because of the Executive Privilege Doctrine. In any event, congressional and cooperative pressure as to the proper referendum procedure was lawful. It occurred after the issuance of the

Secretary's final decision, and was not subject to the *ex parte* communication regulation. Marketing orders are for the purpose of aiding producers and cooperatives, and there is no reason why a vocal minority must prevail as to what provisions are included in marketing orders.

In *In re O & S Cattle Co.*, P&S Docket No. 6891, decided by the Judicial Officer on September 22, 1989 (20 pages), the Judicial Officer affirmed Chief Judge Palmer's order requiring respondent to cease and desist from failing to pay when due for livestock, suspending respondent for 28 days, unless he pays in full the amount still owed for livestock, and assessing a civil penalty of $10,000, except that the Judicial Officer suspended the civil penalty if full payment is made. Although respondent did not receive the cattle in question, and did not authorize their purchase, they were purchased by a person who previously had been authorized to purchase cattle as respondent's general agent, and respondent did not notify the market at which the cattle were purchased of the termination of the general agent's authority. Therefore respondent was liable for the purchases. Respondent's prior payment to the market in question for livestock purchased by its prior general agent over a long period of time established his apparent authority to act as a general agent for respondent. The market was not aware of any facts that should reasonably have put it on notice that the livestock purchaser was no longer respondent's agent.

In *In re Baker and Sons Dairy, Inc.*, AMA Docket Nos. 93-1; MM-6; MM-7; MM-8; MM-9; MM 46-6; M 7-2 Ga. (Consolidated), decided by the Judicial Officer on September 22, 1989 (68 pages), the Judicial Officer affirmed Chief Judge Palmer's Decision and Order dismissing the petitions filed by handlers of milk regulated under the 11 Federal milk marketing orders in the Southeastern United States. Petitioners instituted the action to challenge a temporary, emergency amendment to the 11 orders effective from September 1984 through February 1985, which increased by 20¢ per cwt the Class I milk price of the orders. The temporary price increase helped fund credits given to handlers of 3.3¢ per cwt for each 10 miles of movement (subject to some modifications) on milk purchased from pool plants of other Federal milk orders and allocated to Class I milk at plants in the Southeast area during a temporary, projected period of unusual shortage. Petitioners' claim is not barred by latches, as argued by an intervenor, because the 2-year limitation period in the regulation is controlling. The Secretary's rulemaking action is authorized as a market differential which may be added-on to handlers' milk prices, and, also, under the provisions of § 8c(7)(D) of the Act, authorizing incidental and necessary provisions that are not inconsistent with the Act. Inter-order price alignment justified a uniform price increase in the 11 orders. The Secretary's rulemaking action is consistent with the evidence and the Secretary's findings. The Secretary did not abuse his discretion by not terminating the temporary order amendments when the projected shortage was less than expected. The Secretary is required by the Act to set prices that will attract milk to the relevant area. The fact that the Act was subsequently amended to authorize expressly the type of rulemaking action involved in this case, without any legislative history showing that the amendatory action was clarifying in nature, is not fatal to the Secretary's action here. The fact that particular handlers are disadvantaged by a rulemaking action does not invalidate the Secretary's action, since absolute equality is not required. The Secretary's decision not to terminate an order or provision is not reviewable. If the Secretary's rulemaking action were found unlawful, the proper course would be to remand the matter to the Secretary for lawful action.

In *In re Lincoln Meat Co.*, FMIA Docket No. 88-12 and I&G Docket No. 88-3, decided by Judge Baker (ALJ) and the Judicial Officer on September 29, 1989 (4 pages), respondents' Motion for Reconsideration of Order Denying Motion to Vacate Consent Decree and for Stay of Enforcement Pending Ruling was denied. Mr. Mander, who is responsibly connected with respondents, agreed to a Consent Decision requiring that he divest himself of his interest in respondents, or close their operations. Mr. Mander's argument that he did not willfully and voluntarily sign the Consent Order, because he was under extreme physical and mental stress, is

not a sufficient ground for vacating the Consent Order. The Judicial Officer reaffirms and adopts the ALJ's Consent Decision and rulings in this proceeding, and will not grant a stay either at this time or in the event respondents seek judicial review.

Fiscal Year 1990

In *In re Valencia Trading Co.*, PACA Docket No. D 88-535, decided by the Judicial Officer on October 26, 1989 (16 pages), the Judicial Officer affirmed the order by Chief Judge Palmer (ALJ) finding that respondent has committed repeated and flagrant violations of the Perishable Agricultural Commodities Act by failing to make full payment promptly for 72 lots of produce from March through May 1988, totalling $308,936.40, and upholding the Department's refusal to issue a license to respondent under the Act because of the payment violations, and because Mr. Myers, who is the sole stockholder and officer of respondent, operated without a valid license and refused to allow the Department's employees full access to respondent's records. Oral agreements for deferred payment are ineffective to change the requirements for prompt payment. Complainant's proof surpasses the preponderance of the evidence, which is all that is required. The ALJ properly received newly discovered evidence offered by complainant. If a respondent does not have a license in effect when a disciplinary order is issued, the ALJs and the Judicial Officer have no authority to issue a "license," and then suspend that "license" for a slow-pay violation. If the ALJ and Judicial Officer find that such a person has committed flagrant or repeated violations of the Act, the effects of such a finding on responsibly connected persons are mandated by the Act, and cannot be changed by the ALJs and the Judicial Officer.

In *In re Lansing Dairy, Inc.*, 90 AMA M 40-1, decided by the Judicial Officer on November 22, 1989 (1 page), the Judicial Officer denied an application for interim relief based on established precedent.

In *In re Haley*, P&S Docket No. D-89-68, decided by the Judicial Officer on December 6, 1989 (1 page), the Judicial Officer denied a late appeal after the initial decision had become final and effective.

In *In re Wilkes County Stock Yard, Inc.*, P&S Docket No. 6807, decided by the Judicial Officer on December 19, 1989 (38 pages), the Judicial Officer affirmed Chief Judge Palmer's (ALJ) order requiring respondent to cease and desist from permitting its ringman or any other employees engaged in the actual conduct of auction sales to purchase livestock out of consignment to fill orders or for speculative resale; issuing accounts of sale which fail to show the true and correct names and relationship to respondent of any employee purchasing consigned livestock; and charging, demanding or collecting a greater, less or different compensation for stockyard services furnished by it as a posted stockyard than the rates and charges filed with the Secretary of Agriculture and in effect at the time such services are furnished. The Judicial Officer increased the ALJ's civil penalty of $3,000 to $5,000. But the Judicial Officer denied complainant's request for a 28-day suspension order. Permitting respondent's gateman, who performed duties comparable to that of a ringman, to purchase livestock to fill orders constituted an unfair trade practice. The ALJ's findings are supported by more than a preponderance of the evidence, which is all that is required. Great reliance is placed on the ALJ's determinations as to respondent's explanations for the transactions under scrutiny. Willfulness is not an issue where there is no suspension or revocation order. Duties of ringmen discussed. Severe sanction policy explained. Evidence as to the nature and effect of respondent's conduct involving the purchases by its gatekeeper should have been received, as well as submissions to the Department in connection with the notice and comment rulemaking as to the regulation at issue. The regulation prohibiting certain purchases from consignment is legislative in nature.

In *In re Feuerstein*, V.A. Docket No. 88-2, decided by the Judicial Officer on December 19, 1989 (2 pages), the Judicial Officer dismissed an interlocutory appeal from a ruling by Administrative Law Judge Edwin S. Bernstein (ALJ) (which denied respondent's motion to dismiss) on the ground that interlocutory appeals are not permitted under the rules of practice.

In *In re Riverbend Farms, Inc.*, 88 AMA Docket No. F&V 910-10, decided by the Judicial Officer on December 19, 1989 (6 pages), the Judicial Officer affirmed the initial decision by Chief Administrative Law Judge Victor W. Palmer (ALJ) dismissing the petition filed pursuant to § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 relating to the Federal Marketing Order Regulating the Handling of Lemons Grown in California and Arizona (7 C.F.R. Part 910). Petitioner contended that the Lemon Order and its weekly prorate allotments are not in accordance with law because they: (1) discriminate against petitioner and cause it to forfeit more prorate allotment than is forfeited by handlers of lemons grown in District 2; (2) are "enacted" by the Lemon Administrative Committee in contravention of restrictions upon delegation of power; (3) deny petitioner "equal protection of the laws"; (4) fail to either equally or equitably apportion the amount of lemons each handler in each district may market, as exemplified by the failure to adjust the prorate allotments of District l handlers in offset of the disproportionate ability of District 2 handlers to market their lemons in the export market where prorate limitations do not apply; (5) do not consider differences between districts in respect to handler picking patterns, and the growth habits and varietal characteristics of lemons; (6) arbitrarily and capriciously use the number of lemons "picked and delivered to the handler" to compute prorate base instead of counting the "tree crop" as the navel orange order does; and (7) have not complied with the notice and comment requirements of the Administrative Procedure Act. The ALJ and the Judicial Officer concluded that petitioner's contentions are governed by *In re Sequoia Orange Co.*, 47 Agric. Dec. 2 (1988), *aff'd in part and remanded sub nom. Riverbend Farms, Inc. v. Yeutter*, No. CV F-88-98 EDP (E.D. Cal. June 14, 1989).

In *In re Conesus Milk Producers*, 88 AMA Docket No. M-2-75, decided by the Judicial Officer on December 21, 1989 (14 pages), the Judicial Officer affirmed Judge Hunt's (ALJ) decision under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 holding valid the challenged actions by the Market Administrator of Order No. 2 regulating the handling of milk in the New York-New Jersey marketing area. Petitioner, a cooperative handler operating as a bulk tank unit carrier, filed erroneous reports stating that certain milk came from "producers" who were "qualified" under the order. Petitioner contends that if the Market Administrator had discovered the errors in a timely manner, petitioner could have corrected the error before any damage was done. However, the Market Administrator correctly billed petitioner based on the Market Administrator's audit. The Administrator is not estopped merely because the audit was not made promptly enough to prevent damage to petitioner. The Market Administrator properly applied the provisions of the order. The order (section 1002.70(c)) requires that "the quantity of pool milk received from dairy farmers" be multiplied by the "weighted average Column B differential computed pursuant to section 1002.51(d) applicable to the unit."

In *In re Williamsport Purveyors, Inc.*, PACA Docket No. D 88-540, decided by the Judicial Officer on December 21, 1989 (14 pages), the Judicial Officer affirmed Judge Kane's (ALJ) order denying respondent's application for a license on the ground that Harvey C. Boatman, who is effectively respondent's sole officer, director and shareholder, had engaged in acts of the character prohibited by the Act. Respondent erroneously argues that the ALJ's inquiry should have been limited to the conduct of Mr. Boatman as it relates to respondent. But there is no such limitation in the statute (7 U.S.C. § 499d(d)), and, therefore, the ALJ properly considered all of the conduct by Mr. Boatman of a character prohibited by the Act. Effie I. Boatman was the owner of 100% of the capital stock of respondent, and Mr. Boatman is her Executor. As such, Mr. Boatman is the sole officer of the respondent within the meaning of the Act (7 U.S.C. § 499d(d)).

In *In re Top Livestock Co.*, P&S Docket No. 6894, decided by the Judicial Officer on January 24, 1990 (22 pages), the Judicial Officer affirmed the order by Judge Bernstein (ALJ) ordering respondents to cease and desist from various practices relating to their collecting payment from principals (for whom they bought livestock on a commission basis) on the basis of falsely increased prices and weights, and ordering respondents to keep accurate records relating

to their livestock transactions. The order suspends respondents for 6 months, and assesses a civil penalty of $10,000. Invoices issued by respondents showing commissions are proof of a market agency arrangement, but the failure to separately show the commission in some transactions does not disapprove a market agency arrangement. Pricing in "odd" amounts (not a multiple of five) is strong evidence of an agency relationship. The failure to pass on pencil shrink is equivalent to arbitrarily adding weight to the true purchase weight. A violation is willful if committed intentionally or done with careless disregard of statutory requirements. Severe sanction policy explained.

In *In re Carlton Fruit Co.*, PACA Docket No. D-88-537, decided by Judicial Officer on January 24, 1990 (9 pages), the Judicial Officer affirmed the decision by Chief Judge Palmer (ALJ) revoking respondent's license for failure to make full payment to 17 sellers for 77 lots of produce, leaving $167,788.49 unpaid. This case is governed by numerous precedents summarized in *In re The Caito Produce Co.*, 48 Agric. Dec. ____ (June 1, 1989). Even if excuses such as those offered by respondent here were not routinely rejected, in determining the sanction, respondent's excuses would be rejected since respondent entered into the transactions involved here (November 1986 through March 1987) after the fraud which brought about respondent's collapse had already occurred.

In *In re Purvis*, V.A. Docket No. 43, decided by the Judicial Officer on January 24, 1990 (10 pages), the Judicial Officer affirmed the order by Judge Bernstein (ALJ) suspending respondent's accreditation as a veterinarian authorized to perform official duties under State-Federal disease eradication programs for a period of 6 months. Respondent violated 9 C.F.R. § 161.2(b) by completing and issuing an official health certificate which did not show the individual identification of each animal to be moved. Respondent violated 9 C.F.R. § 161.2(a) by completing and issuing an official health certificate covering animals which he had not personally inspected and thoroughly examined. There is more than a preponderance of the evidence supporting complainant's case, which is all that is required. The sanction is not too severe, considering respondent's prior warning and suspensions, and considering the importance of the Brucellosis Eradication Program.

In *In re Servair, Inc.*, P.Q. Docket No. 89-12, decided by the Judicial Officer on January 24, 1990 (2 pages), the Judicial Officer affirmed Chief Judge Palmer's order assessing a civil penalty of $375 against respondent under the Act of February 2, 1903, as amended, the Federal Plant Pest Act, as amended, and the Plant Quarantine Act of August 20, 1912, on the basis of *In re Kaplinsky*.

In *In re Stemilt Growers, Inc.*, PACA Docket No. D 88-502, decided by the Judicial Officer on January 26, 1990 (16 pages), the Judicial Officer affirmed the decision by Chief Judge Palmer (ALJ) finding that respondent shipped one lot of misbranded cherries in commerce, but the Judicial Officer reduced the suspension period from 30 days to 3 business days because of unique circumstances peculiar to this case. Complainant is not equitably estopped from suspending respondent's license merely because the inspection service changed its long-standing prior practice in this case. Innocence of mind or lack of intent to violate is not an element of a misbranding violation, and good faith does not prevent the imposition of a severe sanction in a misbranding case. However, the 3-day suspension during business days will cost respondent approximately $27,000, which is a sufficiently severe sanction to deter future violations. If the facts presented had been the same as the facts in *In re Magic Valley Potato Shippers, Inc.* (1981), or *In re Maine Potato Growers, Inc.* (1975), the suspension periods would have been 30 days and 60 days, respectively, just as in those cases.

In *In re Cox*, AWA Docket No. 434, decided by the Judicial Officer on January 29, 1990 (11 pages), the Judicial Officer affirmed the decision and order by Judge Bernstein (ALJ) suspending respondents' license for 90 days, and thereafter until respondents demonstrate

compliance with the Act and regulations, assessing a civil penalty of $12,000, and directing respondents to cease and desist from failing to retain possession and control of all dogs until they are at least 8 weeks of age and have been weaned, failing to hold dogs for not less than 5 business days after acquisition, failing to keep and maintain proper records, and failing to allow inspection of respondents' facility and records. The violations found here are serious violations of the Act and regulations. A violation is wilful where the violator either intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of the statutory requirements. There is much more than a preponderance of the evidence supporting the ALJ's findings, which is all that is required. Advance notice is not required to be given by the Department in order to make a record inspection of a regulated person. The 5-day holding period required by the Act and regulations consists of the first 5 full business days after the animals are acquired.

In *In re Windy City Meat Co.*, FMIA Docket No. 88-7, PPIA Docket No. 88-2, I&G Docket No. 88-1, decided by the Judicial Officer on January 30, 1990 (19 pages), the Judicial Officer affirmed the order by Judge Kane (ALJ) withdrawing inspection services indefinitely from respondent, and withdrawing meat grading and acceptance services for 10 years, because of the felony convictions of Seymour Sacks, respondent's president and owner, involving the giving of a thing of value to a meat grader, and causing mail to be delivered in furtherance of a scheme to defraud. The felony convictions of Seymour Sacks strike at the heart of the Federal programs to assure a safe and wholesome product, properly graded. The ALJ properly determined that even if all of the mitigating circumstances presented by respondent at the hearing are considered, respondent is still, nonetheless, unfit to engage in any business requiring inspection services and unfit to receive Federal meat grading and acceptance services.

In *In re Bellinger*, V.A. Docket No. 40, decided by the Judicial Officer on January 31, 1990 (14 pages), the Judicial Officer affirmed the order by Judge Hunt (ALJ) revoking respondent's accreditation as a veterinarian authorized to perform official duties under State-Federal disease eradication programs, because respondent permitted a Brucellosis Test Record and a United States Origin Health Certificate to be used before ascertaining that they were accurately and fully completed, and failed to immediately report the misuse of the Health Certificate and the Test Record to the veterinarian-in-charge or the State animal health official. Although the case was delayed over 5 years, there is no showing that the delay prejudiced respondent. The evidence exceeds a preponderance of the evidence, which is all that is required. The statute provides no subpoena power, and an ALJ can issue a subpoena only as authorized by the statute under which the proceeding is conducted. There is no showing that respondent was singled out for disciplinary action. The sanction is not too severe, considering respondent's serious violations and the importance of the Brucellosis Eradication Program.

In *In re Capital Produce Co.*, PACA Docket No. D-88-533, decided by the Judicial Officer on February 5, 1990 (42 pages), the Judicial Officer affirmed that part of the decision by Judge Hunt (ALJ) publishing the finding that respondent caused or permitted the substitution in the contents of onions and lettuce on May 21, 1987, after the produce had been officially inspected for grading and certification, in violation of § 2(7) of the Act (7 U.S.C. § 499b(7)). The Judicial Officer found, in addition, that respondent caused or permitted the substitution of oranges in the same shipment, after the oranges had been officially inspected. The ALJ did not issue a suspension order, but the Judicial Officer suspended respondent's license for 45 days. The Judicial Officer reversed the ALJ's determination that the violations were not flagrant and willful, holding that the violations were both flagrant and willful. A violation is willful if it is done intentionally or with careless disregard of statutory requirements. Complainant need only prevail by a preponderance of the evidence. The present case is closely akin to misbranding cases, in which suspension orders of 30 and 60 days have been issued. The sanction here would have been more severe, except for the facts that the violations were careless, rather than

intentional, and respondent's use of the inspection service (involved in the violations here) relates to only a tiny fraction of respondent's total business.

In *In re Boswell*, P.Q. Docket No. 331, decided by the Judicial Officer on February 6, 1990 (6 pages), the Judicial Officer reversed the decision by Judge Kane (ALJ) finding that respondent imported meat from Germany, in violation of 9 C.F.R. § 94.4 and the Act of June 17, 1930 (19 U.S.C. § 1306), but holding that the 1930 statute does not authorize civil penalties, and the 1903 statute was not alleged in the complaint. The Judicial Officer assessed a civil penalty of $250. The Judicial Officer held that the regulation (9 C.F.R. § 94.4) is based on the 1930 Act and the 1903 Act, and that it was harmless error not to refer in the complaint to the latter Act, which authorizes a civil penalty. The formalities and technicalities of court pleading are not applicable in administrative proceedings. It is only necessary that the complaint reasonably apprise the litigant of the issues in controversy. In publishing a regulation in the Federal Register, an agency is only required to set forth a complete citation of the authority under which the regulation is issued. The agency is not also required to publish the statutory authority for the imposition of a penalty for a violation of the regulation.

In *In re White*, AWA Docket No. 425, decided by the Judicial Officer on February 8, 1990 (42 pages), the Judicial Officer affirmed in part and reversed in part a Decision and Order by Judge Baker (ALJ) under the Animal Welfare Act and the regulations and standards issued thereunder. The ALJ suspended respondent Gus White III's license for 180 days, and thereafter until compliance is achieved, assessed a civil penalty of $1,000, and directed respondent Gus White III to cease and desist from a number of practices involving the care and housing of exhibited animals, including veterinary care, sanitation, structures, and housekeeping functions at the facilities owned by respondents. The ALJ dismissed the complaint as to respondent Betty White. The Judicial Officer made the order applicable to respondent Betty White, reduced the specific suspension period to 120 days (the period recommended by complainant to the ALJ), suspended the $1,000 civil penalty if there are no further violations for 5 years (in view of respondents' poor financial condition), and deleted from the cease and desist order provisions relating to veterinary care, since the ALJ found in respondents' favor as to those alleged violations. A violation is willful if the act is done intentionally or with careless disregard of regulatory requirements. The proof here surpasses a preponderance of the evidence, which is all that is required. Respondent Betty White is responsible for the violations, along with her husband, the other respondent, since she participated substantially in the activities of the regulated business.

In *In re Andersen Dairy, Inc.*, AMA Docket No. M 124-3, decided by the Judicial Officer on February 12, 1990 (29 pages), the Judicial Officer affirmed the order by Judge Baker (ALJ) holding that the actions of the Market Administrator of Order No. 124, regulating the handling of milk in the Oregon-Washington marketing area, challenged by petitioner, are valid, and dismissing the complaint. Petitioner, a fully regulated distributing plant under the Order, is owned 100% by Ronald A. Andersen, who also owns two retail stores that sell milk. Petitioner and the retail stores have interlocking officers. Since the milk received by the retail stores from a producer- handler (exempt from regulation) was "acquired for distribution" by petitioner, it must be accounted for to the pool. To carry out statutory objectives, it is frequently necessary to pierce corporate veils, even though the separate corporate entities may be retained for other purposes. Although the record does not support petitioner's contention that the Market Administrator advised petitioner in advance of the transactions that there would be no pool obligations as to the milk, a milk handler relies on erroneous advice by a Market Administrator at its peril.

In *In re Stull Meats, Inc. (Decision as to Globe Packing Co. and Reuben Krasn)*, P&S Docket No. 6669, decided by the Judicial Officer on February 15, 1990 (38 pages), the Judicial Officer affirmed an initial Decision and Order by Judge McGrail (ALJ) ordering respondents Globe Packing Co. and Reuben Krasn to cease and desist from various practices relating to

engaging in conduct to defraud a buyer of meat and giving money to an agent of another firm to influence the agent's performance of his duties with his principal. The order jointly and severally assesses a civil penalty of $50,000. The Department's market news report accurately and consistently reflected the prevailing prices of wholesale meats readily available in the Los Angeles, California, marketing area. Respondents' meat prices in sales to Foodland, in which the Stull respondents acted as agents of Foodland, were consistently higher than the highest market news price for the relevant product. The evidence gives rise to the strong inference that the Stull respondents and the Globe respondents entered into a conspiracy to defraud Foodland, with the Stull respondents, acting as agents for Foodland, authorizing payment of a price substantially higher than the prevailing market price in shipments from Globe to Foodland, and with Globe rebating a portion of the excess profits to the Stull respondents in the form of commissions. The existence of a conspiracy is ordinarily inferred from the things actually done, rather than from direct evidence of an agreement. The order should apply to the individual respondent who is president and manager of Globe, and owner of a substantial percentage of its stock, as well as to respondent Globe. The Department's severe sanction policy explained.

In *In re James D. Milligan & Co.*, PACA Docket No. D-89-538, decided by the Judicial Officer on February 15, 1990 (5 pages), the Judicial Officer affirmed the decision by Chief Judge Palmer (ALJ) revoking respondent's license for failure to make full payment to 24 sellers for 134 lots of produce, leaving $157,496.10 unpaid. This case is governed by numerous precedents summarized in *In re The Caito Produce Co.*, 48 Agric. Dec. ____ (June 1, 1989). *Caito* explains that a hearing is not required where respondent admits owing more than a *de minimis* amount for produce, and *Caito* explains why a license is revoked in failure to pay cases even though the particular creditors involved would recover larger sums if a respondent were permitted to remain in business.

In *In re American Airlines, Inc.*, P.Q. Docket No. 89-10, decided by the Judicial Officer on February 16, 1990 (2 pages), the Judicial Officer reduced the civil penalty of $2,000 imposed by Chief Judge Palmer (ALJ) under the Federal Plant Pest Act and the Plant Quarantine Act, and substituted a civil penalty of $1,000, under the doctrine set forth in *In re Kaplinsky*, 47 Agric. Dec. ____ (Mar. 30, 1988).

In *In re Farley & Calfee, Inc.*, PACA Docket No. D-88-509, decided by the Judicial Officer on February 21, 1990 (12 pages), the Judicial Officer affirmed that part of the initial decision by Judge Hunt (ALJ) finding that respondent has committed willful, repeated and flagrant violations of the Act by failing to make full payment promptly for 51 lots of produce totalling $110,128.90, leaving about $76,000 unpaid. The ALJ, however, backdated the effective date of the order by over 2 years so that the statutory consequences of the order would not apply to Mr. Farley, respondent's owner. The Judicial Officer reversed the backdating of the order, and made it effective 30 days after service on respondent. Under prior precedents, the effect of a disciplinary order on individuals responsibly connected to a respondent is irrelevant in the disciplinary proceeding against the respondent.

In *In re Ozark County Cattle Co.*, P&S Docket No. 6743 (Decision as to National Order Buying Company (NOB) and Thomas D. Runyan), decided by the Judicial Officer on March 19, 1990 (51 pages), the Judicial Officer affirmed that part of the decision by Judge Weber (ALJ) holding that respondents were insolvent on September 30, 1985, and until respondents establish otherwise, and that respondents engaged in an unfair and deceptive practice, i.e., a check kiting scheme with Abraham. The ALJ ordered respondents to cease and desist from such activities, suspended NOB for 6 months, and prohibited Runyan from operating under the Act for 6 months. The Judicial Officer suspended NOB and Runyan for 2 years, provided, however, that Runyan may be employed by a registrant after 6 months. In addition to the violations found by the ALJ, the Judicial Officer found that respondents willfully failed to pay, when due, for livestock, and willfully engaged in an unfair practice involving a check kiting operation by Ozark County Cattle

Company, in which respondents permitted Ozark to draw drafts on respondent NOB, and negligently failed to detect that there were no cattle involved in the transactions. Operating while insolvent and failing to pay, when due, are unfair and deceptive practices. Check kiting is an unfair and deceptive practice irrespective of whether cattle are involved in the transaction. A preponderance of the evidence is all that is required. A violation is willful if respondent does a prohibited Act intentionally, irrespective of evil motive, or acts with careless disregard of the statutory requirements. The principal purpose of the Act is to protect farmers and ranchers against receiving less than the true market value of their livestock. It is the Department's duty to prevent potential injury by stopping unlawful practices in their incipiency. Uniformity in sanctions is not required. The same sanction is imposed whether respondent knows that he is violating the law or not. Severe sanctions under P&S in recent years summarized. A single act may be an unfair "practice" under the Act. The criteria in § 312(b) of the Act relating to civil penalties are not applicable to suspensions. Any damage suffered from an agency press release is not considered in determining the sanction.

In *In re Lemmy Wilson Livestock, Inc.*, P&S Docket No. 6929, decided by the Judicial Officer on April 6, 1990 (49 pages), the Judicial Officer affirmed the Initial Decision filed by Administrative Law Judge Paul Kane (ALJ) as to respondents' violations of the Packers and Stockyards Act involving custodial account violations, purchasing livestock out of consignments for speculative resale purposes, and failing to pay, when due, for livestock purchases, and affirmed the $20,000 civil penalty assessed jointly and severally against respondents. However, the Judicial Officer reversed the ALJ's decision as to the scope of the cease and desist order. The ALJ issued a cease and desist order requiring respondents to cease and desist from the performance of any act or practice in violation of the Act, as expressed at 7 U.S.C. §§ 213(a) and 228b. The Judicial Officer granted complainant's appeal, and issued a cease and desist order relating to the specific unlawful practices involved in the proceeding. It is a violation of the Act and regulations for a market agency or its owners to purchase livestock from consignments for speculative resale, or for key employees, such as a ringman, to purchase livestock from consignments for speculation or to fill orders. Failure to pay promptly and failure to maintain a custodial account properly are violations of the Act and regulations. The civil penalty may properly be applied against the corporation and its principal officer and operator under the *alter ego* theory.

In *In re Wileman Bros. and Elliott, Inc., and Kash, Inc.*, AMA Docket Nos. F&V 916-1, 917-3, 916-2, 917-2 (Wileman I), and *In re Wileman Bros. and Elliott, Inc.*, AMA Docket Nos. F&V 916-3, 917-4 (Wileman II), decided by the Judicial Officer on April 6, 1990 (13 pages), the Judicial Officer granted respondent's Motion to Consolidate Wileman I and Wileman II, while directing Judge Baker (ALJ) to expeditiously issue a recommended decision in Wileman II, unless the Judicial Officer later decides to issue the recommended decision. The Judicial Officer denied petitioners' Motion to Recuse and/or Otherwise Disqualify the Judicial Officer. Under the Department's Rules of Practice and the Administrative Procedure Act, where an Administrative Law Judge has held a hearing, the Judicial Officer may issue the final decision for the agency, so long as a recommended decision is first issued either by the ALJ or by the Judicial Officer.

In *In re Farm Fresh, Inc.*, AMA Docket No. M 106-2, decided by the Judicial Officer on April 12, 1990 (73 pages), the Judicial Officer reversed the initial decision filed by Administrative Law Judge Paul Kane (ALJ) which held that the Secretary's Notice of Hearing as to a challenged amendment was insufficient, and that the rulemaking decision was not supported by substantial evidence. The ALJ awarded monetary relief, without interest, based on 18¢ per hundredweight multiplied by the amount of milk received by petitioner at its new plant in Lincoln County, Oklahoma. Petitioner, a "handler" of milk subject to Order No. 106, Milk in Southwest Plains Marketing Area, instituted this action to challenge an amendment to the Order which moved Lincoln County, Oklahoma, from Zone III (which had a negative 18-cent location adjustment) to Zone I, which had no location adjustment. Petitioner's plant was originally

located in Ponca City, Oklahoma, which was in Zone III, but petitioner started building a replacement plant in Lincoln County before the amendment process and completed the plant after the amendment process. The Judicial Officer held that the Notice of Hearing expressly stated that evidence would be received as to whether Lincoln County should be moved to Zone I, and, further, that an ALJ has no authority to raise *sua sponte* an issue as to the validity of the Notice of Hearing not raised by the petitioner. The Judicial Officer also held that the Secretary's decision to move Lincoln County to Zone I was rational and supported by substantial evidence at the rulemaking hearing. The applicable principles are set forth at length in *In re Borden, Inc.*, 46 Agric. Dec. 1315 (1987), *aff'd*, No. H-88-1863 (S.D. Tex. Feb. 13, 1990). A location adjustment does not have to ensure that a handler can compete competitively in every area that the handler chooses to market milk. The Secretary is required by the Act to price milk under the terms of an order, including the location adjustment provisions, in a manner that will insure that milk will move to all plants in the marketing area. In view of the divergent facts applicable in different marketing areas, the same criteria cannot be used in every order, or even in every zone within an order, in determining the level of a particular location adjustment. Complete equity is not required in a milk order. It is not necessary, in order to sustain the Secretary's action, to conclude that placing Lincoln County in Zone I was the only reasonable approach, or even that it was the wisest approach. If the petition were not dismissed, I would have remanded the proceeding for the Secretary to determine the appropriate remedy in his legislative capacity.

In *In re Britton Bros., Inc.*, P&S Docket No. 6631, decided by the Judicial Officer on April 18, 1990 (39 pages), the Judicial Officer affirmed that part of the decision by Administrative Law Judge Paul Kane (ALJ) suspending corporate respondent Britton Bros., Inc., as a registrant for 14 days and thereafter until demonstrated solvent; prohibiting respondents Donald J. Britton, Daniel L. Britton and Roberta Britton from registering under the Act for the period of the corporate respondent's suspension, and from operating as dealers or market agencies without being registered; ordering respondents to cease and desist from engaging in business while insolvent; from failing to deposit in the custodial account within the time prescribed proceeds receivable from consigned livestock; and from otherwise failing to properly maintain their custodial account; and ordering respondents to keep and maintain records which fully and correctly disclose the true nature of their operations. However, the Judicial Officer also assessed a $10,000 civil penalty, jointly and severally, against the individual respondents, payable in four annual installments. Operating while insolvent and failing to maintain properly a custodial account are unfair trade practices under the Act. The Secretary must consider the effect of the penalty on the person's ability to continue to do business, but it is inferred that the individual respondents, with $307,000 in assets, can pay a $10,000 civil penalty without affecting their ability to continue in business. Severe sanction policy summarized. Where the respondent corporation is the alter ego of the individual respondents, it is appropriate to pierce the corporate veil and make the sanction applicable to the individual respondents.

In *In re Farley & Calfee, Inc.*, PACA Docket No. D-88-509, decided by the Judicial Officer on April 24, 1990 (1 page), the Judicial Officer denied respondent's motion for reconsideration for the reasons previously set forth in the Judicial Officer's decision.

In *In re Good*, AWA Docket No. 88-17, decided by the Judicial Officer on June 22, 1990 (24 pages), the Judicial Officer affirmed that part of the order by Judge Kane (ALJ) directing respondent to cease and desist from failing to have water samples from a primary enclosure housing a dolphin taken and tested at least weekly for coliform count, but the Judicial Officer increased the $2,500 civil penalty assessed by the ALJ to $10,000. To be regulated as an exhibitor, a person must exhibit at least one animal to the public for compensation, which animal was purchased in commerce or the intended "distribution" of which affects commerce. Respondent's purchase of a lodge in Florida (which provides lodging and meals to interstate travelers), along with a dolphin exhibited at the lodge to attract business, was a purchase of the dolphin in commerce. In addition, respondent's "distribution" of the dolphin, i.e., his exhibition

of the animal, affects commerce, which also qualifies respondent as an exhibitor. The term "affecting commerce" embraces the fullest jurisdictional breadth permissible under the Commerce Clause. Respondent saved nearly $5,500 by not complying with the regulations during the period alleged in the complaint. A civil penalty of $10,000 is appropriate, considering the size of respondent's business, and the serious nature of the violations occurring over a 3-year period, despite warning letters.

In *In re SEMA, Inc.*, AWA Docket No. 89-02, decided by the Judicial Officer on June 28, 1990 (17 pages), the Judicial Officer affirmed the order by Chief Judge Palmer (ALJ) assessing a civil penalty of $2,500, and directing respondent to cease and desist from various practices involving interfering with inspectors during the course of an inspection. The Department's inspectors have authority to take whatever photographs they regard as appropriate during the course of an inspection. When the cause of death of animals is coded in respondent's records, respondent must supply the inspectors with the code key. Discovery is not available under the Department's rules of practice.

In *In re Edwards*, HPA Docket No. 88-2, decided by the Judicial Officer on June 29, 1990 (23 pages), the Judicial Officer affirmed the order of Judge Baker (ALJ) assessing civil penalties of $2,000 against each respondent, and disqualifying each respondent from showing or exhibiting any horse and from judging or managing any horse show, exhibition or auction for a period of 2 years, based on her findings that respondents entered two horses for the purpose of showing or exhibiting them at two shows, while the horses were sore. The Act does not require knowledge of the horse's soreness on the part of the owner or trainer. Intent is not an element of the offense. Although respondent Gary Edwards previously paid a $1,000 civil penalty as part of a Consent Decision, without admitting any violation, that does not trigger the minimum 5-year suspension period provided in the Act for a second violation. Ample precedent exists for finding that a horse was sore, based on the horse's reaction to palpation by the Department's veterinarians, without any thermovision evidence. It is not unusual to have a horse sored only on the posterior portion of the front legs.

In *In re Diamond Tomato Co.*, PACA Docket No. D-90-508, decided by the Judicial Officer on July 2, 1990 (5 pages), the Judicial Officer affirmed the Decision and Order by Judge Hunt (ALJ) publishing the finding that respondent has committed willful, repeated, and flagrant violations of section 2 of the Act, based on respondent's failure to make full payment promptly to six sellers for 23 lots of tomatoes, with a portion of that amount not paid at all or not paid in full. This case is governed by numerous precedents, summarized in *In re The Caito Produce Co.*, 48 Agric. Dec. ____ (June 1, 1989).

In *In re Shaw*, A.Q. Docket No. 88-19, decided by the Judicial Officer on July 3, 1990 (14 pages), the Judicial Officer affirmed the Decision and Order by Judge Kane (ALJ) assessing a civil penalty of $5,000 against respondent, suspending his license to operate a garbage treatment facility for 30 days (and thereafter until compliance is achieved under the Act and regulations), and requiring respondent to cease and desist from restricting access to his facilities for lawful inspection. Respondent's refusal to permit an inspection of his farrowing barn is a violation of the regulations, warranting the civil penalty imposed.

In *In re Lall*, P.Q. Docket No. 88-28, decided by the Judicial Officer on July 5, 1990 (2 pages), the Judicial Officer dismissed a purported appeal from the order of Judge Bernstein (ALJ) assessing a $10,000 civil penalty under the Federal Plant Pest Act and the Plant Quarantine Act. The purported appeal does not conform to the requirements of the Rules of Practice, and it is now too late to file an appeal.

In *In re Magnolia Fruit & Produce Co.*, PACA Docket No. D-89-509, decided by the Judicial Officer on July 6, 1990 (6 pages), the Judicial Officer affirmed the Decision and Order

by Judge Baker (ALJ) publishing the finding that respondent has committed willful, repeated, and flagrant violations of section 2 of the Act, based on respondent's failure to make full payment promptly to 19 sellers for 54 lots of produce, with a portion of that amount not paid at all or not paid in full. This case is governed by numerous precedents, summarized in *In re The Caito Produce Co.*, 48 Agric. Dec. ____ (June 1, 1989).

In *In re Wileman Bros. & Elliott, Inc.*, AMA Docket Nos. F&V 916-1, 917-3, 916-2, 917-2 (Wileman I), decided by the Judicial Officer on July 9, 1990 (129 pages), the Judicial Officer reversed the initial Decision and Order by Judge Baker (ALJ) under the Federal Marketing Orders Regulating the Handling of Nectarines Grown in California and Fresh Pears, Plums, and Peaches Grown in California. The ALJ held that the obligations imposed against petitioners under the Orders were not in accordance with law, in a number of respects, and that a further hearing should be held to determine petitioners' damages. The Judicial Officer held that the Act limits the scope of inquiry in this proceeding to the matters raised in the petitions filed by petitioners, and does not permit a review of discretionary determinations as to a particular lot of fruit or an award of monetary damages. The ALJ correctly held that the Secretary's budgetary approval of Committee advertising expenses is not subject to APA notice and comment requirements, but incorrectly ordered a return of that portion of the assessments used to pay the CTFA staff (the employees of the Nectarine and Plum Committees). The Secretary's maturity regulations are valid and were properly interpreted and applied. The Secretary's regulations, as amended in 1980, established a "higher" maturity level (a/k/a "well-matured"). It is appropriate to consider all of the legislative history in the rulemaking records before the Secretary. The regulations should be construed, insofar as possible, in accordance with the Secretary's intent. The contemporaneous and settled administrative construction is entitled to considerable weight. When a regulation is amended, it should be presumed that the amendment intended to make a change, and the amendatory language should be construed, insofar as possible, to effectuate the Secretary's intent in making that change. Changes in color chip designations for a particular variety did not change the "law," and were not subject to the rulemaking requirements of the Administrative Procedure Act. An agency may, without any admission of prior error, propose clarifying amendments to statutes or regulations, or engage in notice-and-comment rulemaking to gain information or eliminate controversy, even though such actions are not required. The "higher" maturity standard (a/k/a "well-matured") is not too vague. The Secretary intended for the Committees and Maturity Subcommittees to make changes in test levels to effectuate the Secretary's higher maturity standard, subject to the Secretary's right to disapprove of any action, and that delegation was valid. Regulatory schemes, which incorporate industry committees to assist the government in carrying out regulations, have long been upheld. The maturity requirements are not arbitrary and capricious. Even if the Act permitted review in a § 8c(15)(a) proceeding of discretionary determinations as to a particular lot of fruit, the determinations relevant here were in accordance with law. A handler is required to make all of the fruit reasonably accessible for sampling or inspection by the Federal-State Inspector. The Federal Advisory Committee Act is not applicable to the Committees administering the Marketing Order Programs.

In *In re Holt*, HPA Docket No. 88-28, decided by the Judicial Officer on July 11, 1990 (25 pages), the Judicial Officer reversed the Decision and Order by Judge Kane (ALJ) holding that no sanction could be imposed against the owner and trainer of a horse found to be sore, since complainant failed to show the effect of the requested $2,000 civil penalties on the ability of respondents to continue in business. The Judicial Officer assessed $2,000 civil penalties against each respondent and disqualified each respondent from participating in horse shows for one year. The term "sore" as expressed in the Act is not too vague. The finding of soreness is appropriate if a horse exhibits pain upon the palpation of each foreleg. Specific actions by administrative agencies are not necessarily voidable, simply because the law is applied unevenly in different actions. A $2,000 civil penalty is appropriate for the first offense of soring. Respondents have the obligation to come forward with some evidence indicating an inability to pay, or an inability

to continue to do business. The Department does not agree with *Bosma v. USDA*, 754 F.2d 804 (9th Cir. 1984). Even if complainant had the burden of introducing evidence as to respondents' ability to pay, the proceeding should have been reopened for the receipt of such evidence, or a civil penalty of $1.00 should have been assessed against each respondent, so that a disqualification order could be issued under 15 U.S.C. § 1825(c).

In *In re Liberty Produce, Inc.*, PACA Docket No. D-89-537, decided by the Judicial Officer on July 30, 1990 (1 page), the Judicial Officer denied a motion to vacate because the Decision and Order had previously become final and effective.

In *In re Hutto Stockyard, Inc.*, P&S Docket No. 6933, decided by the Judicial Officer on September 7, 1990 (18 pages), on remand by the Fourth Circuit to determine the amount of the civil penalty, the Judicial Officer determined that no civil penalty should be imposed under the facts and circumstances found by the court. However, the Judicial Officer explained why the court's decision is erroneous, and will not be followed in any other circuit. The court's view that respondent had no motive for shortweighing, since respondent was selling the hogs to a packer on respondents' purchase weights, ignores the record in this case, the economic realities of the marketplace, and numerous other decisions in which the motive to shortweigh in such circumstances was explained and relied on. In setting aside the Judicial Officer's inference that respondents intentionally short-weighed the hogs, the court apparently missed the significance of the back-balanced condition of the scale because of a misunderstanding as to how scales function and are balanced. As to the civil penalty originally imposed, the ALJ and the Judicial Officer relied on the respondents' 1986 financial statement, which shows the size of the business, and shows that a $20,000 civil penalty would not affect respondents' ability to continue in business. Although the court held that there was no violation of 7 U.S.C. § 221 (recordkeeping), the court affirmed the cease and desist order requiring accurate records, which is the only reason 7 U.S.C. § 221 was cited by complainant, the ALJ, and the Judicial Officer. The court's view that only one violation occurs when a person falsely weighs each of several drafts of livestock will not be followed because it is contrary to other cases holding that where a person engages in the same unfair practice in a number of separate transactions, each occurrence affords the basis for a civil penalty.

In *In re Lall*, P.Q. Docket No. 88-28, decided by the Judicial Officer on September 13, 1990 (2 pages), the Judicial Officer dismissed a purported appeal from the order of Judge Bernstein (ALJ) assessing a $10,000 civil penalty under the Federal Plant Pest Act and the Plant Quarantine Act because it was not filed before the ALJ's decision and order became final.

In *In re White*, AWA Docket No. 425, decided by the Judicial Officer on September 18, 1990 (2 pages), the Judicial Officer denied respondents' request for an order terminating the suspension order previously issued, or for a hearing to determine compliance with the regulations and standards, since the order previously entered requires respondents to demonstrate to APHIS that they are in full compliance with the Act, regulations and standards.

In *In re Sid Goodman & Company, Inc.*, PACA Docket No. 89-523, decided by the Judicial Officer on September 26, 1990 (31 pages), the Judicial Officer affirmed the decision of Judge Kane (ALJ) revoking respondent's license for reporting, accounting and payment violations arising out of respondent's surreptitious payments to the buying agents of respondent's customers, in violation of § 2(4) of the Perishable Agricultural Commodities Act. A licensee has an implied duty not to corrupt the employees of its customers, by making surreptitious payments to their buying agents. A negative inference may be drawn because officers and employees of respondent did not offer testimony in defense of their actions and invoked the protection of the Fifth Amendment. The complaint, together with complainant's later documents advising respondent of complainant's legal theories, adequately advised respondent of the matters of fact and law asserted by complainant. Respondent's violations were willful. Complainant's evidence

exceeds a preponderance of the evidence, which is all that is required. The Act and regulations are sufficiently definite to withstand a due process challenge. The sanction of revocation is not too severe, considering the serious nature of respondent's violations.

In *In re Chatham Area Auction Cooperative, Inc.*, P&S Docket No. D–88–88, decided by the Judicial Officer on September 28, 1990 (64 pages), the Judicial Officer affirmed that part of the decision by Judge Kane (ALJ) ordering respondents to cease and desist from weighing livestock at other than true and correct weights (and various related practices), and from failing to issue scale tickets in conformity with the regulations, and ordering respondents to keep and maintain records which fully disclose all transactions involved in business operations subject to the Act. However, the Judicial Officer increased the suspension period of 14 days applicable to the Cooperative to 90 days, and also ordered that respondent Harold Gilbert shall not be registered for 90 days or be permitted to work for another person subject to the Act for 90 days. Prior warning letters satisfied the requirements of the Administrative Procedure Act, but, in any event, respondents' violations were willful and involved the public interest, which requires accurate weights. Complainant proved its case by more than a preponderance of the evidence, which is all that is required. Checkweighing investigations are to determine whether the weighmaster properly operated the scale—not to determine whether the scale itself is accurate. A back-balanced scale is strong evidence of deliberate false weighing. Conduct that is merely negligent or careless can meet the willfulness standard of the Administrative Procedure Act. The Department routinely issues orders applicable to the owners and officers of corporations who were responsible for the corporate violations, including orders prohibiting the registration or employment in the regulated industry of the responsible owners and officers. Although complainant need not prove a motive to shortweigh animals, there always exists a motive to shortweigh. In ordering a suspension, the Secretary need not consider the criteria of 7 U.S.C. § 213(b) applicable to civil penalties.

Fiscal Year 1991

In *In re Saulsbury Orchards and Almond Processing, Inc.*, AMA Docket No. F&V 981–4, decided by the Judicial Officer on October 9, 1990 (2 pages), the Judicial Officer denied an application for interim relief based on established precedent. The Judicial Officer also denied petitioners' request for an immediate decision on the advertising issue because of the large backlog of pending cases.

In *In re Shield Livestock Co., Inc.*, P&S Docket No. D–89–19, decided by the Judicial Officer on October 24, 1990 (2 pages), the Judicial Officer granted a joint motion by the parties to withdraw their respective appeals from the decision filed by Judge Bernstein (ALJ), and to modify the order to assess a civil penalty of $50,000 against respondents Shield Livestock Co. and R.B. Shield, in lieu of any suspension of their registration, and prohibit respondent Fitzgerald from registering or operating subject to the Act for 6 months.

In *In re Bobo*, A.Q. Docket No. 89–48, decided by the Judicial Officer on October 31, 1990 (6 pages), the Judicial Officer affirmed that part of the decision by Chief Judge Palmer (ALJ) concluding that respondent Ricky Bobo violated the Act of February 2, 1903, and regulations promulgated thereunder by moving cattle interstate that were not accompanied by an owner's or shipper's statement or certificate containing prescribed information. However, in accordance with the policy stated in *In re Kaplinsky*, 47 Agric. Dec. 613 (1988), the Judicial Officer reduced the civil penalty of $2,000 imposed by the ALJ to $1,000, in accordance with complainant's recommendation to the Judicial Officer based upon a re-examination of its sanction policy in Animal Quarantine cases.

In *In re Utica Veal Co.*, P&S Docket No. D-89-57, decided by the Judicial Officer on November 5, 1990 (32 pages), the Judicial Officer affirmed the decision and order by Judge Hunt (ALJ) ordering respondents to cease and desist from agreeing or otherwise arranging with others to refrain from bidding on calves or other livestock against any competitive calf or livestock buyer; and from taking turns with others in buying of calves or other livestock at auctions or other livestock markets. The order assesses a civil penalty of $80,000 to respondent Utica Veal Company, Inc. ("Utica"); and, to respondents Perretta Packing Company, Inc., Victor Perretta and John Perretta ("the Perrettas"), the order assesses, jointly and severally, a civil penalty of $20,000. The arrangement between Utica and the Perrettas, under which they did not compete in the purchase of calves at auction markets, violates the Packers and Stockyards Act (7 U.S.C. §§ 192(a), (e), (f), (g)), and the regulations (9 C.F.R. § 201.70). A turn-taking agreement can be inferred from the circumstances. Complainant need not prove an impact on prices, but prices are presumed to be affected by an unlawful agreement not to compete. The gravity of the offense would warrant an equal civil penalty against Utica and the Perrettas, but in view of the effect of the penalty on the ability to continue in business, the civil penalty imposed on the Perrettas was properly reduced by the ALJ to $20,000. The ALJ's findings are supported by more than a preponderance of the evidence, which is all that is required. Respondents have the burden of adducing evidence that a civil penalty will interfere with their ability to continue in business, but, in any event, the record shows that respondents' ability to continue in business will not be adversely affected by the penalties imposed here. Because of the probability of worsened financial circumstances since the administrative hearing, the civil penalties will be paid over a 4-year period.

In *In re Pacific Container Terminal*, P.Q. Docket No. 90–1, decided by the Judicial Officer on November 8, 1990 (4 pages), the Judicial Officer reversed the decision by Judge Kane (ALJ) finding that respondent violated a regulation issued under the Federal Plant Pest Act and the Plant Quarantine Act of August 20, 1912, but holding that a civil penalty cannot be assessed because the Secretary did not comply with the Administrative Procedure Act. The Judicial Officer assessed a $375 civil penalty, holding that where a statute is amended to authorize civil

penalties for a violation of regulations issued under the statute, there is no requirement in the Administrative Procedure Act, or elsewhere, that the regulation advise the public of the fact that violation of the regulation may subject the violator to a civil penalty.

In *In re Gateway Freight Services, Inc.*, P.Q. Docket No. 90–2, decided by the Judicial Officer on November 8, 1990 (4 pages), the Judicial Officer reversed the decision by Judge Kane (ALJ) finding that respondent violated a regulation issued under the Federal Plant Pest Act and the Plant Quarantine Act of August 20, 1912, but holding that a civil penalty cannot be assessed because the Secretary did not comply with the Administrative Procedure Act. The Judicial Officer assessed an $1,800 civil penalty, holding that where a statute is amended to authorize civil penalties for a violation of regulations issued under the statute, there is no requirement in the Administrative Procedure Act, or elsewhere, that the regulation advise the public of the fact that violation of the regulation may subject the violator to a civil penalty.

In *In re Emresa Naviera Santa, S.A.*, P.Q. Docket No. 89–48, decided by the Judicial Officer on November 8, 1990 (4 pages), the Judicial Officer reversed the decision by Judge Kane (ALJ) finding that respondent violated a regulation issued under the Cattle Contagious Disease Act of February 2, 1903, the Federal Plant Pest Act and the Plant Quarantine Act of August 20, 1912, but holding that a civil penalty cannot be assessed because the Secretary did not comply with the Administrative Procedure Act. The Judicial Officer assessed a $375 civil penalty, holding that where a statute is amended to authorize civil penalties for a violation of regulations issued under the statute, there is no requirement in the Administrative Procedure Act, or elsewhere, that the regulation advise the public of the fact that violation of the regulation may subject the violator to a civil penalty.

In *In re Balacy*, P.Q. Docket No. 88–8, decided by the Judicial Officer on November 13, 1990 (5 pages), the Judicial Officer reversed the decision by Judge Kane (ALJ) finding that respondent violated a regulation issued under the Plant Quarantine Act of August 20, 1912, but holding that a civil penalty cannot be assessed because the Secretary did not comply with the Administrative Procedure Act. The Judicial Officer assessed a $1,750 civil penalty, holding that where a statute is amended to authorize civil penalties for a violation of regulations issued under the statute, there is no requirement in the Administrative Procedure Act, or elsewhere, that the regulation advise the public of the fact that violation of the regulation may subject the violator to a civil penalty.

In *In re Backhaz*, P.Q. Docket No. 89–27, decided by the Judicial Officer on December 13, 1990 (4 pages), the Judicial Officer reversed the decision by Judge Kane (ALJ) finding that respondent violated the regulations issued under the Plant Quarantine Act of August 20, 1912, but holding that a civil penalty cannot be assessed because the Secretary did not comply with the Administrative Procedure Act. The Judicial Officer assessed a $625 civil penalty, holding that where a statute is amended to authorize civil penalties for a violation of regulations issued under the statute, there is no requirement in the Administrative Procedure Act, or elsewhere, that the regulation advise the public of the fact that violation of the regulation may subject the violator to a civil penalty.

In *In re Velesquez de Robledo*, P.Q. Docket No. 88–15 decided by the Judicial Officer on December 13, 1990 (4 pages), the Judicial Officer reversed the decision by Judge Kane (ALJ) finding that respondent violated a regulation issued under the Plant Quarantine Act of August 20, 1912, but holding that a civil penalty cannot be assessed because the Secretary did not comply with the Administrative Procedure Act. The Judicial Officer assessed a $250 civil penalty, holding that where a statute is amended to authorize civil penalties for a violation of regulations issued under the statute, there is no requirement in the Administrative Procedure Act, or elsewhere, that the regulation advise the public of the fact that violation of the regulation may subject the violator to a civil penalty.

In *In re Edwards*, HPA Docket No. 88–2, decided by the Judicial Officer on December 14, 1990 (2 pages), the Judicial Officer denied respondents' petition for reconsideration for the reasons stated in the original decision and in complainant's opposing briefs. Frequently, the only evidence that a horse was sore is the professional opinion of the Department's veterinarians, based upon their palpation of the horse's pasterns. Making the disqualification periods applicable to partners consecutively would not serve as an effective deterrent to future violations.

In *In re Aull*, A.Q. Docket No. 89–31, decided by the Judicial Officer on January 10, 1991 (4 pages), the Judicial Officer reversed the decision by Judge Kane (ALJ) finding that respondent violated a regulation issued under the Cattle Contagious Disease Act of February 2, 1903, but holding that a civil penalty cannot be assessed because the Secretary did not comply with the Administrative Procedure Act. The Judicial Officer assessed a $750 civil penalty, holding that where a statute is amended to authorize civil penalties for a violation of regulations issued under the statute, there is no requirement in the Administrative Procedure Act, or elsewhere, that the regulation advise the public of the fact that violation of the regulation may subject the violator to a civil penalty.

In *In re Cal-Almond, Inc.*, 91 AMA Docket No. F&V 981–8, decided by the Judicial Officer on January 10, 1991 (1 page), the Judicial Officer denied an application for interim relief based on established precedent.

In *In re Smith (Decision as to Charles Reed)*, A.Q. Docket No. 88–26, decided by the Judicial Officer on January 11, 1991 (17 pages), the Judicial Officer affirmed that part of the decision by Judge Hunt (ALJ) assessing $2,000 in civil penalties against respondent for moving two brucellosis reactor calves from Missouri to Illinois without an accompanying certificate, and for moving interstate on another occasion one test-eligible cow from Missouri to Illinois without the required certificate. The Judicial Officer assessed an additional $1,000 civil penalty because respondent moved the same two brucellosis reactor calves through two approved stockyards prior to slaughter, in violation of the regulations. The ALJ did not assess a civil penalty for moving the two brucellosis reactor cattle through two approved stockyards because he concluded that the evidence did not show that respondent knew that the two calves had previously moved through an approved stockyard before he transported the calves to the second approved stockyard. However, intent is not an element of the violation. The Judicial Officer rejected complainant's argument that a fourth violation occurred when respondent failed to deliver the certificate or permit (which was non-existent) to the consignee. Where respondent does not have a permit, his failure to have a permit and give it to the consignee is but a single violation. The civil penalties assessed here are modest considering the importance of the Brucellosis Eradication Program. The evidence adequately supports the ALJ's findings of fact. A preponderance of the evidence is all that is required.

In *In re Breed*, A.Q. Docket No. 89–72, decided by the Judicial Officer on January 11, 1991 (2 pages), the Judicial Officer dismissed a purported appeal because it was filed after the initial decision had become effective, and, in addition, it did not remotely conform to the requirements of the Rules of Practice.

In *In re All-Airtransport, Inc.*, A.Q. Docket No. 89–75, decided by the Judicial Officer on January 11, 1991 (9 pages), the Judicial Officer reversed the order filed by Judge Kane (ALJ) granting respondent's motion to dismiss the complaint. The ALJ's order was based on the facts that complainant had previously filed another complaint against respondent based on the same factual circumstances, but alleging violation of a different regulation, and the ALJ had granted complainant's motion to dismiss its first complaint. The Judicial Officer remanded the proceeding to the Office of Administrative Law Judges for a hearing before an Administrative Law Judge. The ALJ had no authority to entertain a motion to dismiss on the pleading. In any

event, since the dismissal of the first complaint was without prejudice, it is not a bar to the filing of a new complaint. Neither laches nor equitable estoppel applies to the Department when it is bringing an action, as sovereign, to enforce a public right or protect the public interest.

In *In re Rowan*, A.Q. Docket No. 89–66, decided by the Judicial Officer on January 14, 1991 (4 pages), the Judicial Officer reversed the decision by Judge Kane (ALJ) finding that respondent violated a regulation issued under the Cattle Contagious Disease Act of February 2, 1903, but holding that a civil penalty cannot be assessed because the Secretary did not comply with the Administrative Procedure Act. The Judicial Officer assessed a $1,000 civil penalty, holding that where a statute is amended to authorize civil penalties for a violation of regulations issued under the statute, there is no requirement in the Administrative Procedure Act, or elsewhere, that the regulation advise the public of the fact that violation of the regulation may subject the violator to a civil penalty.

In *In re Todd*, A.Q. Docket No. 90–18, decided by the Judicial Officer on January 15, 1991 (3 pages), the Judicial Officer reversed the decision by Judge Kane (ALJ) finding that respondent violated regulations issued under the Cattle Contagious Disease Act of February 2, 1903, but holding that a civil penalty cannot be assessed because the Secretary did not comply with the Administrative Procedure Act. The Judicial Officer assessed a $500 civil penalty, holding that where a statute is amended to authorize civil penalties for a violation of regulations issued under the statute, there is no requirement in the Administrative Procedure Act, or elsewhere, that the regulation advise the public of the fact that violation of the regulation may subject the violator to a civil penalty.

In *In re Camenzind*, A.Q. Docket No. 90–16, decided by the Judicial Officer on January 15, 1991 (4 pages), the Judicial Officer reversed the decision by Judge Kane (ALJ) finding that respondent violated a regulation issued under the Cattle Contagious Disease Act of February 2, 1903, but holding that a civil penalty cannot be assessed because the Secretary did not comply with the Administrative Procedure Act. The Judicial Officer assessed a $1,000 civil penalty, holding that where a statute is amended to authorize civil penalties for a violation of regulations issued under the statute, there is no requirement in the Administrative Procedure Act, or elsewhere, that the regulation advise the public of the fact that violation of the regulation may subject the violator to a civil penalty.

In *In re Flying Tiger Line, Inc.*, A.Q. Docket No. 89–19, decided by the Judicial Officer on January 15, 1991 (3 pages), the Judicial Officer reversed the decision by Judge Kane (ALJ) finding that respondent violated a regulation issued under the Cattle Contagious Disease Act of February 2, 1903, but holding that a civil penalty cannot be assessed because the Secretary did not comply with the Administrative Procedure Act. The Judicial Officer assessed a $2,000 civil penalty (in an attached consent decision), holding that where a statute is amended to authorize civil penalties for a violation of regulations issued under the statute, there is no requirement in the Administrative Procedure Act, or elsewhere, that the regulation advise the public of the fact that violation of the regulation may subject the violator to a civil penalty. The Judicial Officer also held that the Secretary's authority to issue regulations as to "livestock" and "animals" encompasses regulations as to horses, and that import regulations under 21 U.S.C. § 111 have the force and effect of law.

In *In re Hall*, A.Q. Docket No. 89–26, decided by the Judicial Officer on January 15, 1991 (3 pages), the Judicial Officer reversed the decision by Judge Kane (ALJ) finding that respondent violated a regulation issued under the Cattle Contagious Disease Act of February 2, 1903, but holding that a civil penalty cannot be assessed because the Secretary did not comply with the Administrative Procedure Act. The Judicial Officer assessed a $250 civil penalty, holding that where a statute is amended to authorize civil penalties for a violation of regulations issued under the statute, there is no requirement in the Administrative Procedure Act, or

elsewhere, that the regulation advise the public of the fact that violation of the regulation may subject the violator to a civil penalty.

In *In re Saulsbury Orchards and Almond Processing, Inc.*, AMA Docket No. F&V 981–4, decided by the Judicial Officer on January 23, 1991 (181 pages), the Judicial Officer reversed that part of the initial Decision and Order by Judge Bernstein (ALJ) holding that the Agricultural Marketing Agreement Act of 1937, the Administrative Procedure Act and/or the Marketing Order for Almonds Grown in California were violated as to six issues, but upheld the ALJ's holdings that the numerous other contentions by petitioners are invalid. Narrow scope of review explained. Section 981.31, which allows a majority of the Almond Board's 10 positions to be held by persons associated with a single entity (the cooperative), is in accordance with law, is supported by substantial evidence in the rulemaking record, and does not violate petitioners' rights to due process and equal protection, and does not constitute an unlawful delegation of authority. The Almond Butter Market Development Program ("Program") has a rational basis in the rulemaking record, and the Secretary was not required to specify in the final rules the percentage of the reserve to be allocated to the Program for the crop years 1984–86. The Secretary was not required to engage in notice-and-comment rulemaking as to the minimum prices required to be charged to buyers and special assessments on almonds disposed of under the Program. Section 981.441, which establishes the standards for crediting for marketing promotion including paid advertising, is in accordance with §§ 8c(6)(I), 8c(10), and 10(b)(2)(ii) of the Act. Section 981.441 is not inconsistent with § 981.41 of the Order, and did not require formal rulemaking. Section 981.441 does not unlawfully delegate authority to the Almond Board, which must apply the terms of the section to determine whether a handler's advertisements qualify for credit towards his assessment, since the Secretary has the final authority to make decisions. The annual rules from 1980–89, through which the Secretary established the creditable portion of the assessments, were supported by substantial evidence in the rulemaking records. Under § 981.81, a handler must pay an assessment on almonds held in reserve. Sections 981.41, .81, and .441, relating to the creditable portion of the assessment obligation of handlers, do not violate handlers' rights of free speech and association under the first amendment of the Constitution. The appropriate test for determining whether government regulation impinges on commercial free speech is whether the government regulation bears a reasonable "fit" to the government's important interest--a fit that is not necessarily perfect, but reasonable. The creditable portion of the assessment obligation does not amount to a tax, and is not an unconstitutional exercise of the taxing power granted to Congress. The Secretary was not required to engage in notice-and-comment rulemaking on the rule extending the date for disposing of reserve almonds from September 1, 1986, to March 1, 1987, nor on the annual rules from 1980–86 establishing the assessment rates, including the creditable portion thereof. The rules imposing the assessment rates from 1980–81 through 1988–89, each of which was issued after the handling of almonds had begun for the crop year, were not invalid retroactive regulations.

In *In re Sparkman*, HPA Docket No. 88–58, decided by the Judicial Officer on January 24, 1991 (17 pages), the Judicial Officer affirmed the decision and order by Chief Judge Palmer (ALJ) assessing a $1,000 civil penalty against respondent Sparkman for entering and showing a sore horse at a horse show, and a $1,000 civil penalty against respondent McCook, one of the owners, for permitting the entry and showing of a sore horse. An owner is responsible for permitting the entry and showing of a sore horse even though he did not know that it was sore, and even though he had instructed his trainer not to show a sore horse. It is of no consequence that APHIS veterinarians could not pinpoint the exact cause of the horse's soreness. The fact that the Department's enforcement efforts are primarily directed against the soring of Tennessee Walking Horses does not result in discrimination against owners of Tennessee Walking Horses in violation of the Fifth and Fourteenth Amendments to the Constitution. More than a preponderance of the evidence supports the allegations of the complaint. The palpation test is sufficient to establish that a horse was sore. The issue as to whether a disqualification

order should also be issued is not raised only because the violation occurred during the period when the Department was generally allowing the industry to police itself.

In *In re Rodriguez*, A.Q. Docket No. 331, decided by the Judicial Officer on January 29, 1991 (4 pages), the Judicial Officer reversed the decision by Judge Kane (ALJ) finding that respondent violated regulations issued under the Cattle Contagious Disease Act of February 2, 1903, but holding that a civil penalty cannot be assessed because the Secretary did not comply with the Administrative Procedure Act. The Judicial Officer assessed a $2,500 civil penalty, holding that where a statute is amended to authorize civil penalties for a violation of regulations issued under the statute, there is no requirement in the Administrative Procedure Act, or elsewhere, that the regulations advise the public of the fact that violation of the regulations may subject the violator to a civil penalty. The Judicial Officer also held that the Secretary's authority to issue regulations as to "livestock" and "animals" encompasses regulations as to horses, and that import regulations under 21 U.S.C. § 111 have the force and effect of law. Double jeopardy does not preclude the assessment of a civil penalty, notwithstanding the $1,000 Customs penalty involving the same circumstances.

In *In re Aull*, A.Q. Docket No. 89–31, decided by the Judicial Officer on January 30, 1991 (2 pages), the Judicial Officer denied a motion for a new trial, or for reconsideration, because it was filed late. If timely filed, it would have been denied for the reasons set forth in the original decision and complainant's brief.

In *In re Tipco, Inc.*, PACA Docket No. 89-528, decided by the Judicial Officer on February 6, 1991 (48 pages), the Judicial Officer reversed the decision of Judge Hunt (ALJ) dismissing the complaint. The Judicial Officer revoked respondent's license for commercial bribery violations arising out of respondent's surreptitious payments to the buying agent of one of respondent's customers, in violation of § 2(4) of the Perishable Agricultural Commodities Act. Respondent's invoices to its customer, concealing the fact that respondent was recapturing the payments made to the customer's agent, were false. A licensee has an implied duty not to corrupt an employee of its customer, by making surreptitious payments to its buying agent. Respondent's violations were willful, flagrant and repeated. Complainant's evidence exceeds a preponderance of the evidence, which is all that is required. The Judicial Officer may reverse findings by an ALJ, and draw different inferences. Prior policy that Judicial Officer will reverse ALJ findings only when record compels such action is overruled. The Act and regulations are sufficiently definite to withstand a due process challenge. Extortion and commercial bribery are not mutually exclusive. Complainant's investigation was not unfair. The sanction of revocation is not too severe, considering the serious nature of respondent's violations.

In *In re S.S. Farms Linn County, Inc. (Decision as to James Joseph Hickey and Shannon Hansen)*, AWA Docket No. 89–03, decided by the Judicial Officer on February 8, 1991 (32 pages), the Judicial Officer affirmed the order by Chief Judge Palmer (ALJ) suspending respondent Hickey for one year, prohibiting the licensing of respondent Hansen for the year, assessing a $10,000 civil penalty, and ordering respondents to cease and desist from interfering with inspections of their facilities, failing to keep adequate records, failing to provide records to APHIS officials, and failing to maintain their facilities in accordance with the standards involving housing, veterinary care, and feeding of animals. However, the Judicial Officer reversed that part of the ALJ's decision holding invalid the regulation providing that each primary enclosure shall contain no more than one adult cat without an affixed collar and official tag. Verbal abuse of an inspector by respondent Hickey amounted to failure to permit access to the licensee's facility. A preponderance of the evidence is all that is required to sustain complainant's case. A violation is willful if it is done intentionally or with careless disregard of statutory requirements. The "severe" sanction policy set forth in many prior decisions (e.g., *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. 268, 435–62 (1987), *aff'd on other grounds*, 841 F.2d 1451 (9th Cir. 1988)) will no longer be followed. The sanction in each case will be determined

by examining the nature of the violations in relation to the remedial purposes of the statute, along with all relevant circumstances, giving appropriate weight to administrative recommendations.

In *In re Stewart*, FMIA Docket No. 89–06 and PPIA Docket No. 89–02, decided by the Judicial Officer on February 13, 1991 (13 pages), the Judicial Officer affirmed the Decision and Order by Judge Hunt (ALJ) withdrawing meat inspection services, and denying poultry products inspection services, indefinitely from respondent, because of the felony conviction of respondent Stewart involving the slaughtering and preparing of a beef carcass capable of use as human food, without the required inspection process, with intent to defraud. The part owner and manager of an unincorporated firm is responsibly connected with the firm. Under the Department's *per se* approach, where the felony conviction strikes at the heart of the meat inspection program, no mitigating circumstances need be considered. But in the event a reviewing court disagrees, the mitigating circumstances here are not sufficient to overcome the presumption of unfitness resulting from the felony conviction.

In *In re Clark*, A.Q. Docket No. 89–32, decided by the Judicial Officer on February 14, 1991 (7 pages), the Judicial Officer affirmed the order by Judge Bernstein (ALJ) assessing a civil penalty of $3,000 against respondent because of 12 violations involving untreated garbage. Respondent's appeal, filed with the Hearing Clerk after the effective date of the ALJ's order, is accepted as timely because respondent is appearing *pro se*, and his appeal was received in the Department's mail room, addressed to complainant's attorney, 10 days before the effective date of the ALJ's order. The amount of the civil penalty, challenged by respondent, is consistent with the Department's settled policy with respect to this type of proceeding.

In *In re Cano*, A.Q. Docket No. 318, decided by the Judicial Officer on February 14, 1991 (5 pages), the Judicial Officer reversed the order by Chief Judge Palmer (ALJ) assessing a civil penalty of $1,000 for violating the Act of February 2, 1903, and regulations (9 C.F.R. Part 92) involving the movement of one horse from Chihuahua, Mexico, into the United States, at a location that was not a designated port of entry, without delivering to the veterinary inspector an application for inspection, without delivering copies of a declaration of import to the collector of customs, without having the horse inspected, without having an inspection certificate, and without holding the horse in quarantine, as required. The ALJ held that only a single violation occurred, but the Judicial Officer assessed civil penalties of $3,000, holding that six violations occurred. Respondent's failure to file a timely answer constitutes an admission of the allegations in the complaint and a waiver of hearing.

In *In re Clark*, A.Q. Docket No. 89–32, decided by the Judicial Officer on February 27, 1991 (2 pages), the Judicial Officer denied a petition for reconsideration, holding that the fact respondent is unable to pay a $3,000 civil penalty is no basis for overturning the penalty.

In *In re Cal-Almond, Inc.*, 89 AMA Docket No. F&V 981–7, decided by the Judicial Officer on February 28, 1991 (16 pages), the Judicial Officer affirmed that part of the Decision and Order by Judge Hunt (ALJ) concluding that the assessment provisions of the California Almond Order, including the provisions for crediting a handler for marketing promotion including paid advertising, do not involve an unconstitutional delegation of power by the Secretary to the Almond Board, and do not violate a handler's right to due process or freedom of speech. However, the Judicial Officer reversed that part of the ALJ's decision holding that § 981.441(c)(2) of the regulations, setting forth the criteria for determining whether advertisements qualify for credit towards a handler's assessment obligations, violates § 8c(10) of the Agricultural Marketing Agreement Act of 1937. The Judicial Officer also expressed the view that the ALJ should not have remanded the issue to the Secretary (Agricultural Marketing Service) as to the validity of the Board's rejection of petitioner's two 1989 advertisements, since it is up to the handler to decide whether to seek review of the Board's determination by the Secretary. Also, the

issue would now be moot since petitioner sought review by the Secretary, who affirmed the Board's decision.

In *In re Kam Fung Enterprises, Inc.*, P.Q. Docket No. 90–31, decided by the Judicial Officer on March 1, 1991 (2 pages), the Judicial Officer affirmed Judge Baker's (ALJ) order assessing a civil penalty of $375 against respondent under the Endangered Species Act of 1973, as amended, on the basis of *In re Kaplinsky*.

In *In re Stewart*, FMIA Docket No. 89–06 and PPIA Docket No. 89–02, decided by the Judicial Officer on March 1, 1991 (1 page), the Judicial Officer denied a petition for reconsideration for the reasons previously stated in the original decision. The order properly denied inspection services to "respondent, its affiliates, successors or assigns."

In *In re Dailey*, P&S Docket No. D–90–87, decided by the Judicial Officer on March 4, 1991 (12 pages), the Judicial Officer affirmed Judge Kane's (ALJ) order requiring respondent to cease and desist from engaging in business without filing and maintaining an adequate bond or its equivalent. The order also suspends respondent as a registrant under the Act until he complies with the bonding requirements, and assesses a $1,250 civil penalty. A respondent's failure to file a timely answer or deny the allegations of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Even if respondent were permitted to file a late answer, it would not affect the outcome of this proceeding. Operation without a bond is a serious violation of the Act, irrespective of whether complainant has notified the registrant that his bond is about to expire.

In *In re Thompson (Decision as to Darrell Moore)*, A.Q. Docket No. 89–55, decided by the Judicial Officer on March 6, 1991 (22 pages), the Judicial Officer reversed the Decision and Order by Judge Baker (ALJ) dismissing the complaint as to respondent Moore. The Judicial Officer assessed a civil penalty of $1,000 under the Act of February 2, 1903, because respondent Moore moved 11 brucellosis-exposed calves from Missouri to Texas without the required permit, in violation of 9 C.F.R. § 78.8(a)(2). By arranging for the transportation of the calves and the trucker, respondent Moore "moved" the animals, as that term is defined in the regulations, even though he was not the owner and received no compensation from the owner. The term "moved" is defined to mean "[s]hipped, transported, delivered, or received for movement, or otherwise aided, induced, or caused to be moved." A $1,000 civil penalty is appropriate to serve as an effective deterrent for this serious violation of the Brucellosis Eradication Program.

In *In re Cal-Almond, Inc.*, 89 AMA Docket No. F&V 981–5, 981–6, decided by the Judicial Officer on March 8, 1991 (44 pages), the Judicial Officer reversed that part of the initial Decision and Order by Chief Judge Palmer (ALJ) holding that the 1988–89 rules requiring petitioners to hold 25% of their almonds in reserve and to pay administrative assessments under the Marketing Order for Almonds Grown in California were invalid retroactive rules. The 15-day comment period for the 25% reserve rule was adequate. Departmental Regulation 1512–1 and Executive Order No. 12,291 do not afford a basis for a private party to challenge Departmental action. The reserve rule is not a taking of property without just compensation in violation of the Fifth Amendment. The reserve rule is a valid exercise of the commerce power. A contract for the disposition of reserve almonds, entered into before the release of the reserve, constitutes a sale or consignment, which is an act of handling. An agency's interpretation of its own regulations is entitled to great weight. The Almond Board's requirement that reserve almonds be stored within the State of California was valid. The 10-day comment period for the handler assessment rule was adequate. Assessments on reserve almonds are authorized under the Order. The statement of basis and purpose issued in support of the assessment rule is adequate. The Almond Board's act of placing an informational newspaper advertisement informing growers of their obligations under the Order imposed no legal obligation upon petitioners, and is not

reviewable in this proceeding. The assessment of monetary damages is not authorized in § 8c(15)(A) proceedings.

In *In re Pickard*, V.A. Docket No. 89–2, decided by the Judicial Officer on March 13, 1991 (24 pages), the Judicial Officer reversed the Decision and Order by Judge Kane (ALJ) under the Animal Quarantine and Related Laws holding that complainant failed to prove a violation of 9 C.F.R. § 161.3(b), and that respondent's violation of 9 C.F.R. § 161.3(h) did not warrant any sanction. The Judicial Officer suspended respondent's accreditation under 9 C.F.R. §§ 160–162 for 90 days, because respondent issued an Official Health Certificate showing negative test results for brucellosis for 47 test-eligible cattle, without waiting for confirmation of the results of his card tests from the State-Federal laboratory. This violated 9 C.F.R. § 161.3(b), and respondent's failure to keep himself informed on applicable regulations violated 9 C.F.R. § 161.3(h). Under the regulations, cattle must test negative to an official brucellosis test prior to interstate movement from a Class B State. Under the definition of "Official test" in the regulations, a card test is not official until confirmation is received from the State-Federal laboratory (except in circumstances not relevant here). Since respondent violated the regulations, it is irrelevant whether he also violated instructions issued by the Veterinary Services. But respondent did, in fact, violate the instructions, which restate the requirements of the regulations, and it is inferred that he received the instructions. Respondent's conduct did not also violate 9 C.F.R. § 161.3(d), because respondent ultimately obtained an official test, when confirmation was received from the State-Federal laboratory. Respondent's 90-day suspension period is the minimum period recommended by Veterinary Services for violation of the major subsections of the regulations, including 9 C.F.R. § 161.3(b).

In *In re Sequoia Co.*, AMA Docket Nos. F&V 907–12, 907–15, 907–16, 910–8, decided by the Judicial Officer on March 29, 1991 (79 pages), the Judicial Officer reversed that part of the Decision and Order by Chief Judge Palmer (ALJ) holding that the "prorate regulations issued for fiscal year 1986–87, and the subsequent fiscal years, did not comply with the requirements of 5 U.S.C. § 553," and, therefore, "that they were not in accordance with law nor were the resulting obligations imposed upon the petitioners which are the subject of their respective petitions and amended petitions." The Judicial Officer held that the weekly volume regulations are exempt from the notice and comment provisions of § 553 under the "good cause" exception. The Judicial Officer affirmed the other conclusions of the ALJ, that the notice and comment requirements of the Administrative Procedure Act are not applicable to the Navel Orange Administrative Committee's and Lemon Administrative Committee's annual marketing policies, or to the Secretary's annual position or issue papers as to the annual marketing policies. The Judicial Officer also affirmed the ALJ's conclusion that the prorate regulations issued under Marketing Orders 907 and 910 did not violate petitioners' constitutional right to equal protection, and did not constitute an unconstitutional taking of petitioners' private property. The prorate regulations did not violate the Act or the marketing orders by being inequitable to District 1 handlers as compared to District 2 handlers. The Secretary's actions under the marketing orders were not arbitrary, capricious or an abuse of discretion. It is not appropriate to hold a fact-finding hearing in this type of proceeding. Even if petitioners were correct in their arguments, monetary damages could not be awarded to petitioners.

In *In re Ellison*, A.Q. Docket No. 90–22, decided by the Judicial Officer on April 3, 1991 (2 pages), the Judicial Officer accepted an interlocutory appeal based on the refusal by Judge Kane (ALJ) to sign and issue a consent decision for civil penalties under the Act of February 2, 1903, for violations of the Act and regulations promulgated thereunder governing the interstate movement of cattle. The Judicial Officer issued the consent decision, but stated that the acceptance of the interlocutory appeal will not be regarded as a precedent.

In *In re North America Produce Corp.*, P.Q. Docket No. 91–5, decided by the Judicial Officer on April 10, 1991 (2 pages), the Judicial Officer accepted an interlocutory appeal based

on the refusal by Judge Kane (ALJ) to sign and issue a consent decision for civil penalties under the Federal Plant Pest Act and the Plant Quarantine Act of August 20, 1912, for violations of the Acts and regulations promulgated thereunder governing the movement of Florida grapefruit to the Virgin Islands. The Judicial Officer issued the consent decision, but stated that the acceptance of the interlocutory appeal will not be regarded as a precedent.

In *In re Sea–Land Service, Inc.*, P.Q. Docket No. 91–2, decided by the Judicial Officer on April 10, 1991 (2 pages), the Judicial Officer accepted an interlocutory appeal based on the refusal by Judge Kane (ALJ) to sign and issue a consent decision for civil penalties under the Federal Plant Pest Act and the Plant Quarantine Act of August 20, 1912, for violations of the Acts and regulations promulgated thereunder governing the movement of goods brought to the United States from Okinawa, Japan. The Judicial Officer issued the consent decision, but stated that the acceptance of the interlocutory appeal will not be regarded as a precedent.

In *All-Airtransport, Inc.*, A.Q. Docket No. 89–75, decided by the Judicial Officer on April 17, 1991 (3 pages), the Judicial Officer accepted an interlocutory appeal based on the refusal by Judge Kane (ALJ) to sign and issue a consent decision for civil penalties under the Act of August 30, 1890, the Act of February 2, 1903, and the Act of July 2, 1962, for alleged violations of the Acts and regulations promulgated thereunder governing the importation of cattle embryos from Israel. The Judicial Officer issued the consent decision, but stated that the acceptance of the interlocutory appeal will not be regarded as a precedent. The Judicial Officer declined to discuss questions certified to the Judicial Officer by the ALJ with respect to cases regarded by the Judicial Officer as irrelevant.

In *In re Harris*, P.Q. Docket No. 91–27, decided by the Judicial Officer on May 1, 1991 (50 pages), the Judicial Officer ruled, in response to questions certified by Judge Kane (ALJ), that *Air Transport Ass'n of America v. Dep't of Transp.* and *Bowen v. Georgetown Univ. Hosp.* will not be applied in the Department's A.Q. and P.Q. dockets, since they are irrelevant to the A.Q. and P.Q. situations. The Department's Rules of Practice were issued after notice and comment rulemaking, and do not contain discretionary and highly contentious choices, such as those involved in *Air Transport*. Since the statutes were amended to authorize administrative civil penalty proceedings based on future violations of the Department's regulations, no issue of retroactivity arises under *Bowen*. It was highly improper for the ALJ to certify the questions as to the applicability of these two cases, because they relate to the legal issue as to whether the Department was required to engage in notice and comment rulemaking after the statutes were amended to provide for administrative civil penalty proceedings, and the Judicial Officer had previously ruled adversely to the ALJ's view in 17 cases (all but one of which came to the attention of the ALJ before his certification). The decisions of the Judicial Officer are binding on an ALJ irrespective of whether the ALJ regards the decisions as correct, and irrespective of whether the Judicial Officer ignores cases deemed relevant by the ALJ. In addition, since this case (and others) involved Consent Decisions agreed to by all parties, the ALJ was required by the Department's Rules of Practice to enter the Consent Decisions without further procedure, unless an error appeared on the face of the Consent Decisions. There was no error on the face of the Consent Decisions. The ALJ's attack on the ethics of complainant's attorneys is unwarranted since, contrary to the ALJ's statements, complainant's attorneys cited *Air Transport* in all of their briefs appealing decisions by the ALJ, and in the attachments to their appeals in the three cases specified by the ALJ, where interlocutory appeals were filed without waiting for the ALJ's decision. Interlocutory appeals are proper where the respondent consents to a decision and waives any further procedure, and the ALJ refuses to issue the Consent Decision. Subordinate role of an ALJ explained. The ALJ's refusal to issue Consent Decisions, as required by the Rules of Practice, and refusal to follow express rulings by the Judicial Officer, is adversely affecting important governmental programs. Importance of A.Q. and P.Q. programs explained.

In *In re Benton*, A.Q. Docket No. 91–5, decided by the Judicial Officer on May 2, 1991 (4 pages), the Judicial Officer affirmed the Decision and Order by Judge Bernstein (ALJ) assessing a civil penalty of $1,000 for moving "S" brand cows, by other than direct shipment, from Mississippi to Texas, and without an "S" brand permit listing the correct point of destination. The case is governed by *In re Kaplinsky*.

In *In re Ellison*, A.Q. Docket No. 90–22, decided by the Judicial Officer on May 2, 1991 (2 pages), the Judicial Officer struck a Notice inserted in the file by Judge Kane one week after the Judicial Officer had issued the final Decision and Order in the proceeding, since the ALJ no longer had jurisdiction of the case.

In *In re Davis (Decision as to Russell Kelly Brown)*, A.Q. Docket No. 89–76, decided by the Judicial Officer on May 2, 1991 (2 pages), the Judicial Officer accepted an interlocutory appeal based on the refusal by Judge Kane (ALJ) to sign and issue a consent decision for civil penalties under the Act of February 2, 1903, and the Act of May 29, 1884, for violations of the Acts and regulations promulgated thereunder governing the interstate movement of cattle. The Judicial Officer issued the consent decision, but stated that the acceptance of the interlocutory appeal will not be regarded as a precedent.

In *In re World Wide Citrus*, 90 AMA Docket Nos. F&V 907–18 and 907–17, decided by the Judicial Officer on May 9, 1991 (31 pages), the Judicial Officer dismissed the petitions filed under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 relating to the navel orange order for Arizona and designated parts of California, since the issues were the same as those involved in *In re Sequoia Orange Co.*, 50 Agric. Dec. ____ (Mar. 29, 1991). Chief Judge Palmer certified the consolidated proceeding to the Judicial Officer for a decision as to the issues without issuing an Initial Decision and Order. The Judicial Officer held that he is authorized to decide the proceeding without an Initial or Recommended Decision since the Agency (Secretary) or his *alter ego* (Judicial Officer) is authorized by the Administrative Procedure Act and the Rules of Practice to decide a proceeding without an Initial or Recommended Decision by the ALJ. Detailed explanation given as to the creation of the Judicial Officer's position and the role of the Judicial Officer as *alter ego* of the Secretary. Alternatively, the Judicial Officer was authorized to decide this proceeding because no evidence was received, and the parties waived an Initial Decision by the ALJ.

In *In re Horton*, A.Q. Docket No. 88–5, decided by the Judicial Officer on May 14, 1991 (48 pages), the Judicial Officer affirmed that part of the decision by Judge Hunt finding that respondents moved test-eligible cattle without health certificates and without permits for entry, but the Judicial Officer increased the civil penalties assessed by the ALJ of $1,000 to respondent Terry Horton and $4,000 to respondent Johnny Horton to $2,000 and $9,000, respectively. The Judicial Officer held that failure to have the proper health certificate and failure to have the required permit for entry are separate violations, each warranting a $1,000 civil penalty. In addition, the Judicial Officer found that respondent Johnny Horton committed three violations in addition to those found by the ALJ, involving moving brucellosis reactor cattle other than to the required immediate slaughter, and moving brucellosis exposed cattle without the required "S" brand and permit for movement. The fact that respondent was found not guilty of some of the violations by a municipal court does not invoke the principles of double jeopardy and *res judicata* in this administrative proceeding, which does not involve the same facts and law considered by the municipal court. A preponderance of the evidence is all that is required to support the violations. "Immediately" means in direct connection or relation without an interval of time. "Directly" means in a direct manner without delay. Respondent's failure to testify gives rise to the inference that his testimony would have been adverse to his position, and this inference can be used to help make out complainant's *prima facie* case. ALJ's findings are given great weight by the Judicial Officer, but may be reversed. A single transaction can result in more

than one violation, and a separate civil penalty is imposed for each violation. Importance of Brucellosis Eradication Program explained.

In *In re Blackwell (Decision as to James Blackwell*), A.Q. Docket No. 280, decided by the Judicial Officer on May 15, 1991 (13 pages), the Judicial Officer affirmed that part of the decision by Judge Baker finding that on four occasions, respondent purchased cattle in Texas and had them transported to Nebraska, which had backtags not affixed a few inches from the midline and just behind the shoulder of the cattle, as required by the regulations. Instead, the backtags were placed on the hips, requiring greater effort to retrieve them at slaughter. However, the Judicial Officer increased the $200 civil penalty assessed by the ALJ to $1,200. The fact that other persons were involved in the violations does not excuse or mitigate respondent's violations. The fact that lesser civil penalties were imposed with respect to respondents who consented is given no weight in a litigated case. Importance of Brucellosis Eradication Program explained.

In *In re Wileman Bros. & Elliott, Inc.*, 91 AMA Docket No. F&V 907–19, decided by the Judicial Officer on May 15, 1991 (3 pages), the Judicial Officer affirmed the decision by Chief Judge Palmer dismissing the petition for lack of jurisdiction. Petitioner seeks relief from a Subpoena Duces Tecum issued pursuant to 7 U.S.C. § 610(h), which relief is not authorized by 7 U.S.C. § 608c(15)(A).

In *In re Bradshaw*, AWA Docket No. 90–22, decided by the Judicial Officer on May 17, 1991 (16 pages), the Judicial Officer affirmed that part of the decision by Judge Hunt assessing a civil penalty of $10,000, and directing respondent to cease and desist from violating the Act, regulations and standards, and, in particular, to cease and desist from engaging in any activity for which a license is required without holding a valid license. However, the Judicial Officer reversed that part of the decision by the ALJ holding that a suspension order could not be issued for a violation occurring while respondent was not licensed. The Judicial Officer imposed a 2-month suspension order. Under 7 U.S.C. § 2149(a), a licensed dealer can be suspended if the dealer "has violated" the Act, irrespective of whether the violation occurred before the license was issued. Also, such an order could be based on 7 U.S.C. § 2151, which authorizes such orders as the Secretary deems necessary to effectuate the purposes of the Act. The choice between rulemaking and adjudication rests in the discretion of the agency. The Secretary is not required to consider the effect of the penalty on the person's ability to continue in business.

In *In re Harris*, P.Q. Docket No. 91–27, decided by the Judicial Officer on June 14, 1991 (3 pages), the Judicial Officer signed a Consent Decision assessing a $375 civil penalty against respondent under the Federal Plant Pest Act and the Plant Quarantine Act, after Judge Kane issued an Initial Decision and Order imposing the same civil penalty, rather than signing the Consent Decision signed by the parties. Complainant appealed from the Initial Decision because, under the Rules of Practice, an ALJ is required to issue a Consent Decision unless there is an error apparent on its face.

In *In re Rater*, A.Q. Docket No. 91–8, decided by the Judicial Officer on July 1, 1991 (3 pages), the Judicial Officer signed a Consent Decision assessing a $500 civil penalty against respondent under the Act of February 2, 1903, after Judge Kane issued an Initial Decision and Order imposing the same civil penalty, rather than signing the Consent Decision signed by the parties. Complainant appealed from the Initial Decision because, under the Rules of Practice, an ALJ is required to issue a Consent Decision unless there is an error apparent on its face.

In *In re Cooper*, A.Q. Docket No. 91–21, decided by the Judicial Officer on July 16, 1991 (3 pages), the Judicial Officer signed a Consent Decision assessing a $400 civil penalty against respondent under the Act of February 2, 1903, after Judge Kane issued an Initial Decision and Order imposing the same civil penalty, rather than signing the Consent Decision signed by the

parties. Complainant appealed from the Initial Decision because, under the Rules of Practice, an ALJ is required to issue a Consent Decision unless there is an error apparent on its face.

In *In re Palmer*, P.&S. Docket Nos. D–89–28 and D–89–74, decided by the Judicial Officer on July 18, 1991 (50 pages), the Judicial Officer affirmed the Decision and Order by Judge Bernstein ordering respondent to cease and desist from engaging in business without filing and maintaining an adequate bond or its equivalent, from engaging in the business of a dealer while insolvent, from issuing NSF checks in payment for livestock, from failing to pay when due for livestock, and from failing to pay for livestock. The order also suspends respondent as a registrant under the Act for 5 years and thereafter, until he demonstrates he is no longer insolvent and complies with the bonding requirements. If a registrant's current liabilities exceed current assets, he is insolvent. Respondent did not have a line of credit with his bank, but even if he did, the fact that the bank failed to honor the line of credit would not be a defense or a mitigating circumstance. Depending on his bank to obtain the proper bond is no defense and is not a mitigating circumstance. The issuance of NSF checks and failing to pay when due and failing to pay the full purchase price for livestock violate the Act. The Department's severe sanction policy is no longer followed. A preponderance of the evidence is all that is required. Although the Department regards a violation as willful if respondent acts in careless disregard of statutory requirements, respondent's conduct here meets the Tenth Circuit's standard of an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof. However, willfulness is not required here because of prior notice and an opportunity to achieve compliance. A prior cease and desist order and suspension order constitutes prior notice. Inference drawn against party who fails to call a witness whose testimony would have been expected. The sanction imposed here is appropriate considering respondent's prior violations and the fact that respondent was speculating in the futures market instead of paying livestock sellers. The criteria in 7 U.S.C. § 213(b) is relevant only as to civil penalties. It would not be appropriate to reopen the hearing to permit respondent to show that he settled civil litigation with his bank because the settlement agreement would not reveal the reasons for the settlement, and the bank's failure to carry out an informal line of credit would not be a defense.

In *In re Wileman Bros. & Elliott, Inc.*, AMA Docket Nos. F&V 916-1, 917-3, 916-2, 917-2 (Wileman I), 916–3, 917–4 (Wileman II), the Judicial Officer issued an Order on September 18, 1991 (2 pages), separating the proceedings and denying petitioners' Motion to Recuse.

In *In re Wileman Bros. & Elliott, Inc.*, AMA Docket Nos. F&V 916–3, 917–4 (*Wileman II*), decided by the Judicial Officer on September 30, 1991 (209 pages), the Judicial Officer reversed the Initial Decision and Order by Judge Baker under the Federal Marketing Orders regulating the handling of nectarines grown in California and fresh pears, plums and peaches grown in California. The ALJ held that the obligations imposed against petitioners under the Orders were not in accordance with law, in a number of respects, and that a further hearing should be held to determine petitioners' damages. The Judicial Officer held that the Act limits the scope of inquiry in a § 8c(15)(A) proceeding to the matters raised in the Petitions filed by petitioners, and does not authorize the award of monetary damages. The lawfulness of an Order or provision thereof or regulation issued thereunder must be determined only upon the basis of the evidence before the Secretary in the formal or informal rulemaking records, and not by evidence received at a § 8c(15)(A) proceeding. *Res judicata* (claim preclusion and issue preclusion) requires dismissal of some of petitioners' claims. The promotional programs under the Marketing Orders present no impingement on petitioners' First Amendment rights. The "forced speech" doctrine is inapplicable to commercial speech. The promotional programs under the Orders do not require petitioners to speak or engage in expressive conduct of any kind. Petitioners' "forced association" claim has no basis in law or fact. The promotional programs under the Orders do not violate the Fifth Amendment to the Constitution of the United States under the Due Process Clause or the equal protection guarantees. Congress has not unlawfully

delegated the power to tax to the Secretary. There has been no violation of the Sunshine Act, the Brown Act, or the Federal Advisory Committee Act. The relationship between the Tree Fruit Reserve and the Marketing Orders is in accordance with law. Whether the Marketing Order Committees' members are immune from antitrust liability is not a proper issue here. The Secretary's decisionmaking regarding the establishment of promotional programs under the Orders was in accordance with law, and the formal rulemaking records, which provide the basis for the promotional programs, are unchallenged in this proceeding. The 1988 and 1989 assessment regulations provided a substantial basis and purpose statement, and provided opportunity for public comment, in accordance with the APA. The 1988 and 1989 assessment regulations provided good cause as to why the regulations were not postponed for 30 days after their adoption, and do not constitute improper retroactive rulemaking. The 1988 size regulations under the Orders are authorized by the AMAA, were not arbitrary or capricious, were promulgated in accordance with the APA, and do not constitute a "taking" under the Fifth Amendment. The maturity regulations under the Orders, both as promulgated and as applied, are in accordance with law. Neither the APA nor the Department's regulations requires a 30-day comment period. The Act does not permit advertising "credits" for promotional programs involving California peaches, plums or nectarines. The Secretary need only consider alternatives that are significant and that were proposed.

Fiscal Year 1992

In *In re Mills*, V.A. Docket No. 90–6, decided by the Judicial Officer on October 24, 1991 (26 pages), the Judicial Officer affirmed the Decision and Order by Judge Baker revoking respondent's accreditation as a veterinarian authorized to perform official duties under State-Federal disease eradication programs, because respondent violated the specific accreditation standards in 9 C.F.R. § 161.3(b), (d), and (h), and, particularly, because respondent signed and issued a United States Origin Health Certificate to facilitate movement of 21 cattle to Canada, when respondent knew that the cattle had been exposed to bluetongue, and were, therefore, ineligible for export. Complainant's case is supported by much more than a preponderance of the evidence, which is the proper standard of proof to be applied. Revocation of Federal accreditation is not a license revocation proceeding. Inference drawn against respondent for failure to testify. Revocation is not too severe, considering the importance of the official health certificate.

In *In re Gerawan Co. (Gerawan I)*, AMA Docket Nos. F&V 916–4 and 917–5, decided by the Judicial Officer on October 30, 1991 (36 pages), the Judicial Officer affirmed that part of the decision by Chief Judge Palmer under the Marketing Orders for California nectarines, pears, plums and peaches concluding that assessments for market promotion including paid advertising for the 1988–89 fiscal year were not unconstitutional under the First Amendment, did not violate the Fifth Amendment, were not an unlawful tax and did not involve an unlawful delegation of authority, but the Judicial Officer reversed the ALJ's conclusion that the assessments were invalid because they were retroactive. The Judicial Officer denied petitioner's motion to recuse. The Judicial Officer adopted the ALJ's denial of petitioner's motion to reopen the hearing to incorporate the transcript and documents from *Wileman II*. The issues here are the same as the issues decided in *Wileman II*. The Judicial Officer held that the retroactivity issue could not be reached because it was not raised in the petition, but that if the issue could be reached, the assessments were not invalid because of retroactivity.

In *In re Gerawan Co. (Gerawan II)*, AMA Docket Nos. F&V 916–6 and 917–7, decided by the Judicial Officer on October 30, 1991 (13 pages), the Judicial Officer affirmed the order by Chief Judge Palmer dismissing the petition, which alleged that 1988 interim final rules, establishing maturity and size requirements for the handling of California peaches, plums and nectarines were not in accordance with law. The petition was dismissed under the doctrine of *res judicata*, because it is an attempt to relitigate the same issues dismissed in *Gerawan I* after petitioner failed to present evidence as to these issues. A judgment is final for *res judicata* purposes even though an appeal was filed. A dismissal for failure to present evidence acts as a judgment on the merits for purposes of the doctrine of *res judicata*. The fact that the 1988 regulations were also applied in 1989 and 1990 does not prevent application of the *res judicata* doctrine. Claims not pleaded are not cognizable in a § 8c(15)(A) proceeding.

In *In re Jet Farms, Inc.*, 88 AMA Docket No. F&V 985–1, decided by the Judicial Officer on November 21, 1991 (83 pages), the Judicial Officer dismissed the Amended Petition filed under the Federal Marketing Order Regulating the Handling of Spearmint Oil Produced in the Far West. The Judicial Officer reversed the Initial Decision and Order by Judge Bernstein holding that the Department violated the Agricultural Marketing Agreement Act of 1937 or the Order by allowing transfers of allotment base under § 985.59(b) pursuant to procedures established by the Committee without the approval of the Secretary; failing to require the Committee to label each container of spearmint oil as either salable or excess reserve pool oil; failing to require the Committee to formally designate a Committee employee as the reserve pool manager as required by § 985.57(a); and allowing sales of oil prior to the issuance of the initial allotment base. However, the Judicial Officer affirmed that part of the ALJ's Initial Decision holding that there is no authority in a § 8c(15)(A) proceeding to consider Petitioner's allegation that it was wrongfully denied an amendatory rulemaking hearing; the language in the Order "with

the approval of the Secretary" does not require the Secretary to promulgate rules pursuant to the APA; transfer of allotment base by purchase and sale is not a violation of the Act; § 985.53(e) of the Order requires that the bona fide effort requirement be based upon attempts to produce; petitioner did not prove that the Committee failed to enforce the bona fide effort requirement; the Order does not require the Committee to take physical possession of reserve pool oil, but permits the delivery of excess oil to the Committee or its designees for storage; the Committee acted in accordance with the Order when it made the decision not to sell reserve pool oil, and to allow a producer to withdraw oil from the reserve pool to meet his annual allotment; the Committee acted in accordance with § 985.53(c) of the Order when it conducted its 5-year review and made the decision not to adjust the allotment base; and petitioner was unable to prove that producers submitted fraudulent applications for initial allotment of base. An anonymous report is unreliable hearsay not admissible in evidence. Petitioner's burden of proof and narrow scope of review explained. The Act limits the scope of inquiry in this proceeding to the matters raised in the Amended Petition filed by petitioner, and does not permit an award of monetary damages. Where the Secretary's approval of Committee action is required, the approval may be informal, need not be evidenced by a written document, and may be inferred from failure to object to the Committee's known conduct. The Secretary's construction of his own regulation becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. Even though a procedural rule may affect a person's substantive rights, this possibility does not make a procedural rule a substantive one and thereby implicate the APA's notice and comment requirement. Nothing in the APA permits a court to review and overturn the rulemaking proceeding on the basis of the procedural devices employed (or not employed) by the agency so long as the agency employed at least the statutory *minima*.

In *In re Asakawa Farms*, 90 AMA Docket Nos. F&V 916–7, 917–8, 916–8, 917–9, 916–9, 917–10, 916–10, 917–11, 916–11, 917–12, 916–12, 917–13, 916–13, 917–14, 916–14, 917–15, 916–15, 917–16, 916–16, 917–17, 916–17, 917–18, 916–18, 917–19, 916–19, 917–20, decided by the Judicial Officer on November 27, 1991 (27 pages), the Judicial Officer affirmed the Order by Chief Judge Palmer dismissing the Petitions filed under the Federal Marketing Orders Regulating the Handling of Nectarines Grown in California and Fresh Pears, Plums, and Peaches Grown in California. The motion to dismiss for want of standing is denied, but the Petitions are dismissed because the delegation of authority by the Secretary to the Marketing Committees and their staffs is lawful, the expense and rate of assessment regulations issued under Marketing Orders 916 and 917 were issued in accordance with the Administrative Procedure Act, were not impermissible retroactive regulations and are in accordance with law, and the rate of assessment regulations for advertising: are authorized under the Agricultural Marketing Agreement Act; do not violate Petitioners' rights under the First Amendment of the United States Constitution; do not violate due process and equal protection as guaranteed by the Fifth Amendment of the United States Constitution; and are not an unlawful delegation of the taxing power granted to Congress. In addition, the Government in the Sunshine Act is not applicable to meetings held by the Marketing Committees, the maturity standards imposed for 1988-89 are valid and in accordance with law, the size regulations imposed for 1988-89 are valid and in accordance with law, the size regulations under Marketing Order 916 do not constitute a taking of property without just compensation in violation of the Fifth Amendment of the United States Constitution, this is not the proper forum in which to raise alleged violations of the antitrust laws, Petitioners' allegations respecting interim relief and monetary damages do not present justiciable issues for resolution, and Petitioners' request for attorney's fees is premature.

In *In re Quesnel*, P.Q. Docket No. 91–47, decided by the Judicial Officer on December 2, 1991 (2 pages), the Judicial Officer affirmed Judge Hunt's Order assessing a civil penalty of $375 against respondents under the Federal Plant Pest Act, as amended, the Plant Quarantine Act, as amended, and the regulations promulgated thereunder, on the basis of *In re Kaplinsky*.

In *In re Bartolome*, P.Q. Docket No. 91–25, decided by the Judicial Officer on December 3, 1991 (2 pages), the Judicial Officer affirmed Judge Bernstein's Order assessing a civil penalty of $375 against respondent under the Federal Plant Pest Act, as amended, the Plant Quarantine Act, as amended, and the regulations promulgated thereunder, on the basis of *In re Kaplinsky*.

In *In re Dailey (Decision as to Patrick Sheil)*, A.Q. Docket No. 90–28, decided by the Judicial Officer on December 3, 1991 (2 pages), the Judicial Officer affirmed Judge Kane's Order assessing a civil penalty of $500 against respondent under the Act of February 2, 1903, as amended, and the regulations promulgated thereunder, on the basis of *In re Kaplinsky*.

In *In re Isahak (Decision as to A.W. Isahak, d/b/a Tropical Food Products*), P.Q. Docket No. 91–41, decided by the Judicial Officer on December 4, 1991 (2 pages), the Judicial Officer affirmed Judge Hunt's Order assessing a civil penalty of $750 against respondent under the Federal Plant Pest Act, as amended, the Plant Quarantine Act, as amended, and the regulations promulgated thereunder, on the basis of *In re Kaplinsky*.

In *In re Milne*, P.Q. Docket No. 91–16, decided by the Judicial Officer on December 9, 1991 (2 pages), the Judicial Officer affirmed Chief Judge Palmer's Order assessing a civil penalty of $375 against respondent under the Federal Plant Pest Act, as amended, the Plant Quarantine Act, as amended, and the regulations promulgated thereunder, on the basis of *In re Kaplinsky*.

In *In re Kneeland*, A.Q. Docket No. 91–25, decided by the Judicial Officer on December 9, 1991 (5 pages), the Judicial Officer reversed the decision by Chief Judge Palmer assessing civil penalties of $3,000 for four violations under the Swine Health Protection Act. The Judicial Officer assessed civil penalties of $6,000 for eight violations. Permitting the feeding of garbage to swine is a separate violation from allowing untreated garbage into swine feeding areas. The eight violations were admitted by respondent's failure to file a timely Answer, and, also, by failing to deny the material allegations of the Complaint in the untimely Answer. The ALJ erred in finding facts based upon information learned from a telephone conference with Respondent and Complainant's counsel. Seriousness of violations explained.

In *In re Cal-Almond, Inc.* (*Cal-Almond II*), 91 AMA Docket No. F&V 981-8, decided by the Judicial Officer on December 11, 1991 (12 pages), the Judicial Officer affirmed the Decision and Order by Chief Judge Palmer under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, which dismissed the Petition filed by handlers subject to the Federal Marketing Order Regulating the Handling of Almonds Grown in California on the basis of *In re Cal-Almond, Inc.* (*Cal-Almond I*) (Mar. 8, 1991) and *In re Saulsbury Orchards & Almond Processing, Inc.* (Jan. 23, 1991).

In *In re Lansing Dairy, Inc.*, 90 AMA Docket No. M 40-1, decided by the Judicial Officer on December 12, 1991 (105 pages), the Judicial Officer reversed the Initial Decision filed by Judge Kane which held that the Secretary's amendments to the location adjustment provisions of the Southern Michigan Milk Marketing Area were not based on the proper statutory standard, and were not supported by substantial evidence and rational findings. The ALJ ordered that Petitioners should receive the money that they paid under the changed location adjustments, with interest. The Judicial Officer held that the location adjustment amendments must comply with the criteria in § 8c(5), not § 8c(18) relied on by the ALJ, and that substantial evidence and rational findings support the location adjustments under § 8c(5). Significant weight is given to the settled and contemporaneous administrative construction of the Act. The Act limits the scope of inquiry to the matters raised in the Petitions filed by Petitioners, and does not permit an award of monetary damages (interest). The lawfulness of an Order or provision thereof or regulation issued thereunder must be determined only upon the basis of the evidence before the Secretary in the formal or informal rulemaking records, and not by evidence received at a § 8c(15)(a) proceeding. The ALJ erred in defaulting Respondent's Answer for not being signed by the

Administrator. Also, the Rules of Practice contain no provisions for a default (admission of facts) based on a failure to file a timely Answer by the Department. In addition, the Amended Petition related to alleged inconsistent post-hoc rationale by a Department attorney in a court proceeding, and it is improper to judge the Secretary's rulemaking decision on post-hoc rationale. It was not error for the ALJ to fail to rule specifically on each of Petitioners' proposed findings of fact.

In *In re Holt* (*Decision as to Respondent Holt*), HPA Docket No. 91-77, decided by the Judicial Officer on December 13, 1991 (9 pages), the Judicial Officer affirmed the Decision by Chief Judge Palmer under the Horse Protection Act of 1970 assessing a civil penalty of $2,000 and disqualifying Respondent Holt for 5 years because he was found to have entered a horse for showing while the horse was sore. Where a timely answer is not filed, a default order is appropriate. A 5-year disqualification order is the minimum disqualification order permitted by the Act for a second violation.

In *In re Harris*, P.&S. Docket No. D–91–18, decided by the Judicial Officer on January 2, 1992 (6 pages), the Judicial Officer affirmed the Decision by Judge Baker ordering Respondent to cease and desist from issuing NSF checks in payment for livestock, from failing to pay when due for livestock, and from failing to pay for livestock. The Order suspends Respondent as a registrant for 5 years, provided however, that a supplemental Order may be issued terminating the suspension after 150 days upon demonstration by Respondent that all unpaid livestock sellers have been paid in full, and provided further, that the Order may be modified to permit Respondent's salaried employment by another registrant or packer after the expiration of the 150-day period of suspension. The sanction is not too severe, considering the serious nature of the violations.

In *In re ENA Meat Packing Corporation*, P.&S. Docket No. D–91–28, decided by the Judicial Officer on January 2, 1992 (6 pages), the Judicial Officer affirmed the Decision by Chief Judge Palmer ordering Respondent to cease and desist from purchasing livestock for slaughter without filing and maintaining an adequate bond or its equivalent, and assessing a $1,000 civil penalty. A default order is proper even though Respondent's employee, who signed for the Complaint, did not advise Respondent's officials of the document. The sanction is appropriate.

In *In re Craft*, HPA Docket No. 91–137 (Decision as to Respondent Albert Craft), decided by the Judicial Officer on January 2, 1992 (5 pages), the Judicial Officer affirmed the Decision by Judge Hunt under the Horse Protection Act of 1970 assessing a civil penalty of $2,000 and disqualifying Respondent for 1 year because he was found to have allowed the entry of a horse for showing while the horse was sore. Where a timely answer is not filed, a default order is appropriate.

In *In re Sequoia Orange Co.*, 90 AMA Docket No. F&V 908–6, decided by the Judicial Officer on January 3, 1992 (3 pages), the Judicial Officer remanded the proceeding to Chief Judge Palmer to determine whether Petitioner's appeal was delivered by the United States Postal Service or, rather, was hand delivered. Under the Rules of Practice, Petitioner's appeal is deemed filed when postmarked, if delivered by the United States Postal Service, but if hand delivered, it is deemed filed when received by the Hearing Clerk. The Pitney Bowes, Inc., postage meter stamp on the envelope was timely, but the Hearing Clerk's filing date, 22 days later, was not timely.

In *In re Balcom*, AWA Docket No. 91-26, decided by the Judicial Officer on January 8, 1992 (22 pages), the Judicial Officer affirmed Chief Judge Palmer's decision assessing a civil penalty of $10,000, and directing respondents to cease and desist from violating the Act, regulations and standards, and, in particular, to cease and desist from violating the regulations with respect to housing facilities, sanitation requirements, and record keeping. The Order

suspends Respondents' licenses for one year and continuing thereafter until they demonstrate that they are in full compliance with the Act and the regulations and standards. Where a timely Answer is not filed, a Default Order is appropriate.

In *In re Hendren*, P.&S. Docket No. D–91–49, decided by the Judicial Officer on January 9, 1992 (7 pages), the Judicial Officer affirmed the Decision by Judge Bernstein ordering Respondent to cease and desist from issuing NSF checks in payment for livestock, failing to pay when due for livestock, failing to pay for livestock, and engaging in business without proper bond coverage. The Order suspends Respondent as a registrant under the Act for 5 years, and thereafter until adequate bond or its equivalent is obtained, provided, however, that a supplemental order may be issued terminating the suspension after 120 days upon demonstration by Respondent that all unpaid livestock sellers have been paid in full, and provided further, that this Order may be modified upon application to the Packers and Stockyards Administration to permit Respondent's salaried employment by another registrant or packer after the expiration of the 120-day period of suspension. The sanction is not too severe, considering the serious nature of the violations.

In *In re Harrison*, AWA Docket No. 90–35, decided by the Judicial Officer on January 9, 1992 (7 pages), the Judicial Officer affirmed the Decision by Judge Bernstein assessing a civil penalty of $2,000, and directing Respondents to cease and desist from violating the Act, regulations and standards, and, in particular, to cease and desist from engaging in any activity for which a license is required without holding a valid license. A preponderance of the evidence is all that is required. Since respondents did not offer evidence or argument that they could not pay the civil penalty, it is too late for that argument on appeal.

In *In re Muckleroy*, A.Q. Docket No. 90–15 (decision as to Jim Barrow), decided by the Judicial Officer on January 14, 1992 (5 pages), the Judicial Officer affirmed that part of the decision by Judge Hunt finding violations of the Acts of February 2, 1908, and May 29, 1884, and regulations, governing the interstate movement of cattle. However, the Judicial Officer reversed as to the ALJ's $1,500 civil penalty, reducing it to $750 in accordance with *Kaplinsky*.

In *In re ACR Fresh Food Systems, Inc.*, PACA Docket No. D–90–531, decided by the Judicial Officer on January 16, 1992 (11 pages), the Judicial Officer affirmed the Decision by Chief Judge Palmer publishing the finding that Respondent has committed willful, flagrant and repeated violations of § 2 of the Act by failing to make full payment promptly to 16 sellers for 71 lots of fruits and vegetables totalling $212,285.87. Wilfulness is not required under the Act or under the APA, since no license is being suspended or revoked. Respondent sought to introduce evidence that it thought business interruption insurance would pay for the produce, but such evidence would not have negated the finding of willful, flagrant and repeated violations. No hearing was required where Respondent's Answer admits failure to pay promptly in amounts that are not *de minimis*.

In *In re Van Buren County Fruit Exchange, Inc.*, PACA Docket No. D–91–521, decided by the Judicial Officer on January 22, 1992 (11 pages), the Judicial Officer affirmed the Decision by Judge Kane revoking Respondent's license for failure to make full payment promptly to 13 sellers for 64 lots of produce totalling $231,466.34. This case is governed by numerous precedents summarized in *In re The Caito Produce Co.*, 48 Agric. Dec. 602 (1989). Respondent's failure to deny the allegation that the transactions were in interstate commerce is deemed an admission of that fact. Interstate commerce is not precluded merely because the buyer and seller are located in the same State. The revocation order was not reduced to a suspension order notwithstanding the fact that full payment in the 64 transactions was made prior to the hearing, because Respondent was not then in present compliance with the payment requirements.

In *In re Tony Kastner & Sons Produce Co.*, PACA Docket No. D–91–539, decided by the Judicial Officer on January 29, 1992 (9 pages), the Judicial Officer affirmed the Decision by Judge Bernstein denying Respondent's application for a license, and publishing the finding that Respondent has committed willful, flagrant and repeated violations by failing to make full payment promptly to 14 sellers for 339 lots of perishable agricultural commodities, with approximately $140,000 not paid as of the date of the hearing, and approximately $185,000 past due from transactions later than those alleged in the Complaint. This case is governed by numerous precedents summarized in *In re The Caito Produce Co.*, 48 Agric. Dec. 602 (1989).

In *In re Calabrese* (Decision as to Vito Balice), 91 AMA Docket No. F&V 981–10, decided by the Judicial Officer on January 31, 1992 (11 pages), the Judicial Officer affirmed the Initial Decision and Order by Judge Bernstein dismissing the Petition challenging the Federal Marketing Order Regulating the Handling of Almonds Grown in California for the 1987–88 crop year, primarily on the basis of *In re Cal-Almond, Inc.*, 50 Agric. Dec. 183 (1991), *appeal docketed*, No. CV–F–91–123 REC (E.D. Cal. Mar. 15, 1991), and *In re Saulsbury Orchards & Almond Processing, Inc.*, 50 Agric. Dec. 23 (1991), *appeal docketed*, No. CV–F–91–064 REC (E.D. Cal. Feb. 8, 1991). Petitioner's contention that the reserve requirement was invalid because the Secretary refused to order the Board to provide agency agreements which would have allowed the sale of reserve almonds into noncompetitive outlets is moot because there is no evidence that Petitioner requested an agency agreement.

In *In re Markham*, V.A. Docket No. 89–4, decided by the Judicial Officer on February 6, 1992 (20 pages), the Judicial Officer reversed the Decision and Order by Judge Kane suspending Respondent's accreditation as a veterinarian authorized to perform official duties under State-Federal disease eradication programs for 300 days, because Respondent violated the specific accreditation standards in 9 C.F.R. § 161.3(b), (h), and (j), and, particularly, because respondent (i) brucellosis-tested cattle and applied eartags but recorded the wrong prefix for the eartags; (ii) used official vaccination eartags on cattle that were not officially vaccinated; and (iii) performed brucellosis vaccinations which he did not report promptly to State or Federal officials. The Judicial Officer increased the suspension period to 15 months (450 days) because of Respondent's prior consent suspensions. Willfulness is not required, but Respondent's gross neglect of a known duty, as to some violations, and Respondent's intentional failure to comply with regulations, as to other violations, meets the Tenth Circuit's standard for willfulness.

In *In re Travis*, P.Q. Docket No. 91-21, decided by the Judicial Officer on February 10, 1992 (2 pages), the Judicial Officer affirmed that part of Judge Bernstein's Decision finding violations against Respondent under the Federal Plant Pest Act, as amended, the Plant Quarantine Act, as amended, and the regulations promulgated thereunder. However, the Judicial Officer reversed as to the ALJ's $275 civil penalty, increasing it to $375, in accordance with *Kaplinsky*.

In *In re Independent Handlers*, 92 AMA Docket No. F&V 907–25, decided by the Judicial Officer on February 12, 1992 (1 page), the Judicial Officer denied an application for interim relief based on established precedent.

In *In re Carpenter*, AWA Docket No. 91-69, decided by the Judicial Officer on February 13, 1992 (11 pages), the Judicial Officer affirmed the Decision by Judge Hunt assessing a civil penalty of $3,000, and suspending Respondents' license for 6 months, and thereafter until they are in full compliance with the Act, regulations and standards, because Respondents failed to keep their primary enclosures for dogs in suitable condition, failed to store food properly, failed to have effective pest control and disease control programs, failed to maintain complete records, failed to keep watering receptacles clean, failed to handle wastes properly, failed to provide adequate veterinarian care, and failed on one occasion to allow APHIS to inspect their premises and records. Where a timely Answer is not filed, a Default Order is appropriate.

In *In re Harvey* (Decision as to William T. Hays, Jr.), A.Q. Docket No. 89–63, decided by the Judicial Officer on February 13, 1992 (7 pages), the Judicial Officer affirmed that part of the Decision by Judge Kane assessing a civil penalty of $500 because Respondent shipped a test-eligible bull from Louisiana to Oklahoma without a permit for entry. However, the Judicial Officer held that the ALJ erred in failing to find and conclude that Respondent also violated the regulations by not having the required certificate for which an additional $500 civil penalty is added. Importance of Brucellosis Eradication Program explained.

In *In re Young*, A.Q. Docket No. 88–21, decided by the Judicial Officer on February 19, 1992 (13 pages), the Judicial Officer affirmed that part of the Decision by Judge Hunt holding that Respondent violated the Act of February 2, 1903, and the regulations governing the interstate movement of cattle without a health certificate and the interstate movement of cattle without a Permit for Entry, but the Judicial Officer reversed as to the ALJ's $1,000 civil penalty for two violations, and increased it to $2,000 for four violations. Failure to have a health certificate is a separate violation from failure to have a Permit for Entry, and movement of vaccinated cattle without a health certificate and Permit for Entry is a separate violation from moving non-vaccinated cattle without a health certificate and Permit for Entry. Seriousness of violations explained.

In *In re Smith*, HPA Docket No. 91–24, decided by the Judicial Officer on February 20, 1992 (10 pages), the Judicial Officer affirmed the Decision by Judge Hunt in which he found that Respondent Corbello entered and exhibited a horse, and Respondent Smith allowed the entry and exhibition of the horse, at Baton Rouge, Louisiana, while the horse was sore. The ALJ assessed a civil penalty of $2,000 against each Respondent and disqualified each Respondent for 1 year, *inter alia*, from showing, exhibiting or entering any horse in a horse show. Respondents' appeal is dismissed because of its complete failure to comply with the Rules of Practice. In addition, a review of the record shows no grounds for setting aside the ALJ's Decision.

In *In re Kurjan*, P.Q. Docket No. 91–69, decided by the Judicial Officer on February 24, 1992 (2 pages), the Judicial Officer denied a late appeal after the Initial Decision had become final and effective.

In *In re Jones*, AWA Docket No. 91–24, decided by the Judicial Officer on March 4, 1992 (2 pages), the Judicial Officer denied a late appeal after the Initial Decision had become final and effective. However, if the appeal had been timely filed, it would have been dismissed on the merits because of Respondent's failure to file a timely Answer.

In *In re Sequoia Orange Co.*, AMA Docket No. F&V 908–6, decided by the Judicial Officer on March 6, 1992 (13 pages), the Judicial Officer affirmed the Initial Decision and Order by Chief Judge Palmer dismissing the Petition relating to the Federal Marketing Order Regulating the Handling of Valencia Oranges Grown in Arizona and Designated Part of California for the 1979–82 marketing seasons. The Petition contended that the Department did not comply with the procedural and substantive requirements of § 4 of the APA; that the decision to impose volume regulations was arbitrary, capricious, and an abuse of discretion; that the volume control regulations violated §§ 8c(6)(C) and 8c(11)(C) of the AMAA, and § 908.51(b) of Order 908; and that the volume regulations violated the Fifth Amendment to the Constitution of the United States by being a denial of equal protection of the laws and a taking of private property without just compensation. The doctrine of laches does not apply. The Department is not bound by an adverse District Court decision now on appeal.

In *In re Milne*, P.Q. Docket No. 91–16, decided by the Judicial Officer on March 12, 1992 (2 pages), the Judicial Officer denied a Petition for Reconsideration for the reasons previously stated in the original Decision.

In *In re Rion*, P.Q. Docket No. 92–06, decided by the Judicial Officer on March 26, 1992 (2 pages), the Judicial Officer reversed Judge Hunt's Order assessing a civil penalty of $100, increasing it to $375, against respondent under the Federal Plant Pest Act, as amended, the Plant Quarantine Act, as amended, and the regulations promulgated thereunder, on the basis of *In re Kaplinsky*.

In *In re Lloyd Myers Co.*, PACA Docket Nos. D–88–547, D–89–539, decided by the Judicial Officer on March 27, 1992 (41 pages), the Judicial Officer affirmed the Initial Decision and Order by Judge Hunt in No. D–89–539 that Respondents committed willful, repeated and flagrant violations of the Act by failing to make full payment promptly for 63 lots of produce totalling $334,400.50. The Judicial Officer, however, reversed the ALJ's holding that there was insufficient record evidence in No. D–88–547 that Respondents used a false or misleading statement on the application to obtain a PACA license. The Judicial Officer affirmed the ALJ's Order revoking the license of the corporation, but expanded the Order to include publication of the finding that the individual Respondent committed repeated and flagrant violations of § 2 of the Act. A statement on a license application that the applicant is a corporation is false or misleading when the corporation's charter was under suspension by the State, irrespective of whether the applicant knew that the corporate charter was under suspension. An Order extending the time for filing an appeal in one docket of a consolidated proceeding automatically applies to the other docket in the consolidated proceeding. Complainant need only prevail by a preponderance of the evidence. Failure to pay promptly for produce constituted flagrant and repeated violations of the Act. It is appropriate to pierce the corporate veil where an individual is 100% owner and operator of a licensed corporation. Where the owner and operator of a corporation transfers his own property to the creditor in an attempt to extinguish the corporation's debt, which does not result in actual full payment to the creditor by the time of the hearing in the case, even if a novation occurred, which extinguished the debt (which I do not believe occurred), the Department's sanction policy would be changed for the purpose of this case, and future cases, to revoke the corporation's license, rather than merely suspend the corporation's license. The ALJ properly refused to grant a continuance that was not timely requested by Respondents, even though Respondents had to appear *pro se* at the hearing.

In *In re Murray Meat*, FMIA Docket No. 92-6, PPIA Docket No. 92-3, decided by the Judicial Officer on April 10, 1992 (2 pages), the Judicial Officer ruled in response to a question certified by Judge Hunt that an ALJ cannot order the reinstatement of inspection services pending (1) the lodging of an appeal by the Department, or (2) all further appeal proceedings, based upon the ALJ's determination that Respondent has provided adequate written assurances that conduct or circumstances that threatened, assaulted, or intimidated program employees will not continue or recur. Under the Administrative Procedure Act and the Department's regulations, an ALJ only has authority to issue initial decisions, which are subject to review by the Judicial Officer.

In *In re Murray Meat*, FMIA Docket No. 92-6, PPIA Docket No. 92-3, decided by the Judicial Officer on May 8, 1992 (36 pages), the Judicial Officer reversed the Decision by Judge Hunt (ALJ), which held that Respondent had presented effective steps and adequate assurances that the conduct leading to the temporary suspension of inspection service will not recur in the future as to impair the effective operation of the federal inspection program. The Judicial Officer held that Respondent's assurances were inadequate, unless Richard Faddis and Patrick Faddis were also barred from the plant. (The ALJ had barred Kenneth Faddis from the plant.) The plant operator has the burden of proof to show that the suspension of inspection services should be terminated. Even if Complainant had the burden of proof, the review should be to determine whether the Administrator's refusal to accept the assurances was arbitrary and capricious, and Complainant need only prevail by a preponderance of the evidence. Respondent's failure to offer any testimony contradicting Complainant's version of the incidents involved in the proceeding, because its officers and employees relied on the Fifth Amendment as to self-incrimination, gives rise to the inference that the testimony would have been adverse to Respondent's position. In

determining whether Respondent's assurances are adequate, we are free to examine Respondent's entire past conduct which has any bearing on whether the assurances are likely to be fulfilled, including prior conduct with respect to State inspectors. The ALJ did not err in admitting numerous exhibits and testimony offered by Complainant, which Respondent contended should have been excluded on the grounds of relevancy, unnecessary cumulativeness, undue prejudice outweighing probative value, and hearsay.

In *In re Elliott* (Decision as to William Dwaine Elliott), HPA Docket No. 90-20 and HPA Docket No. 91-122, decided by the Judicial Officer on May 14, 1992 (27 pages), the Judicial Officer reversed the Decision by Judge Hunt (ALJ) dismissing the Complaints. The Judicial Officer assessed civil penalties of $6,000 and imposed a disqualification period of 15 years for Respondent's three separate violations, occurring after Respondent previously paid a civil penalty for a violation of the Act. The ALJ had determined that three horses were sore when they were examined immediately prior to the shows, but that there is no evidence that they were sore when they were entered one or more days earlier. The Judicial Officer held that entering is a process that begins with the clerical steps of paying an entry fee and sending in an entry form, and that it includes the pre-show inspection and examination by the DQP and/or USDA veterinarians. Remedial legislation should be liberally construed to achieve the Act's purpose. The administrative construction is entitled to weight. If a stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is inoperative. Complainant need only prevail by a preponderance of the evidence.

In *In re Malinat*, P.Q. Docket No. 92–40, decided by the Judicial Officer on May 20, 1992 (2 pages), the Judicial Officer reversed Judge Bernstein's Order assessing a civil penalty of $275, increasing it to $375, against Respondent under the Federal Plant Pest Act, as amended, the Plant Quarantine Act, as amended, and the regulations promulgated thereunder, on the basis of *In re Kaplinsky*.

In *In re Marshall*, P.Q. Docket No. 92–54, decided by the Judicial Officer on May 20, 1992 (2 pages), the Judicial Officer affirmed Judge Hunt's Order assessing a civil penalty of $375 against Respondent under the Federal Plant Pest Act, as amended, the Plant Quarantine Act, as amended, and the regulations promulgated thereunder, on the basis of *In re Kaplinsky*.

In *In re Cugnini*, A.Q. Docket No. 92–04, decided by the Judicial Officer on May 22, 1992 (2 pages), the Judicial Officer affirmed Chief Judge Palmer's Order assessing a civil penalty of $1,000 against Respondent under the Act of February 2, 1903, as amended, and the regulations promulgated thereunder, on the basis of *In re Kaplinsky*.

In *In re Jacob*, P.Q. Docket No. 91-57, decided by the Judicial Officer on May 22, 1992 (2 pages), the Judicial Officer reversed Judge Hunt's Order assessing a civil penalty of $25, increasing it to $375, against Respondent under the Federal Plant Pest Act, as amended, the Plant Quarantine Act, as amended, and the regulations promulgated thereunder, on the basis of *In re Kaplinsky*.

In *In re Smith*, HPA Docket No. 92-2, decided by the Judicial Officer on May 29, 1992 (10 pages), the Judicial Officer affirmed the Decision and Order by Judge Bernstein (ALJ) finding that Respondent entered a horse, while the horse was sore. The ALJ assessed a civil penalty of $2,000 against Respondent and disqualified Respondent for 1 year, *inter alia*, from showing, exhibiting or entering a horse in a horse show. Where a timely Answer is not filed, a Default Order is appropriate. A $2,000 civil penalty is appropriate where Respondent presented no evidence warranting a lesser civil penalty. Respondent is not permitted to select the beginning of the 1-year disqualification period. Respondent's second Appeal was not timely filed. Even if it were, Respondent's argument is without merit that the Department has no jurisdiction to find an exhibitor in violation of the Act prior to the time the horse is exhibited.

In *In re Johnson*, AWA Docket No. 91–18, decided by the Judicial Officer on June 3, 1992 (12 pages), the Judicial Officer affirmed that part of the Decision and Order by Judge Kane (ALJ) assessing a civil penalty of $10,000, and directing Respondents to cease and desist from violating the Act, regulations and standards, and, in particular, to cease and desist from engaging in any activity for which a license is required without being licensed as required, but the Judicial Officer added a 1-year disqualification order. The Judicial Officer also expressed the policy that ability to pay will no longer be considered in determining civil penalties under the Animal Welfare Act.

In *In re Newark Produce Distributors, Inc.*, PACA Docket No. D–92–523, decided by the Judicial Officer on June 4, 1992 (2 pages), the Judicial Officer denied a late appeal after the Initial Decision had become final and effective.

In *In re Lloyd Myers Co.*, PACA Docket Nos. D–88–547, D–89–539, decided by the Judicial Officer on June 24, 1992 (3 pages), the Judicial Officer denied Respondents' Petition for Reconsideration in the main for the reasons set forth in the prior Decision and Order. Respondents' new argument raised for the first time on appeal comes too late. Even if it were timely, it would be denied because settlement between the parties does not deprive the Department of jurisdiction in a disciplinary case, notwithstanding the effect of such settlement in a reparations case.

In *In re Calabrese*, AMAA Docket No. 90–4, decided by the Judicial Officer on June 25, 1992 (63 pages), the Judicial Officer affirmed the decision by Judge Bernstein (ALJ) holding that the Respondents violated the Almond Marketing Order's requirements that each handler withhold from handling a quantity of almonds having a kernel weight equal to 18% of the kernel weight of all almonds such handler received for his own account during the 1987-88 crop year; keep records which clearly show the details of his receipts of almonds, withholdings, sales, shipments, inventories, and reserve disposition; report to the Almond Board of California (Board) on ABC Form 1 on a timely basis; properly dispose of inedible almonds; and handle almonds grown in California only in compliance with the terms of the Order. However, the Judicial Officer increased the $216,000 civil penalty assessed by the ALJ to $225,500, with respect to Respondent Balice only. As to Respondent Balice, the Judicial Officer increased the civil penalty for violating the reserve requirements from $62,000 to $124,000, increased the civil penalty for violating the reporting requirements from $1,000 to $2,000, affirmed the $74,500 civil penalty for the recordkeeping violations, but reduced the civil penalty for the inedible disposition violations from $78,500 to $25,000, for a net increase of $9,500. Respondents were required to comply with the reserve requirements notwithstanding the requirements of Italian law that they ship their almonds to Italy because they had borrowed funds from Italian banks, and were required to ship the purchased goods to Italy within 4 months of the date of purchase. The Board's failure to provide agency agreements is irrelevant since Respondents never requested an agency agreement. The ALJ's Initial Decision should not be increased as to the Respondents who filed no Appeal, since Complainant filed no direct Appeal, but only a Cross-Appeal following the Appeal filed by Respondent Balice. An agent of a handler who is in charge of the handler's activities can be assessed civil penalties for continuing violations initiated during the agency relationship, even after the agency terminates. Remedial legislation should be liberally construed to achieve the Act's purpose. The administrative construction of a statute by the officers charged with its enforcement is entitled to great weight. Even if Order provisions were ultimately held to be invalid, that would not affect civil penalties assessed for violations committed prior to the institution of a § 8c(15)(A) proceeding. Respondents failed to keep the required records, and, moreover, shipping the records to Italy violated the recordkeeping requirements. It was proper to estimate Respondents' inedible disposition requirement where Respondents failed to obtain the required inspections and keep the required records. Civil penalties can be assessed under 7 U.S.C. § 608c(14)(B) for violations of the quality control regulations (7 C.F.R. § 981.442), but such violations also necessarily violate the Order (7 C.F.R. § 981.42(a)).

In *In re United Airlines*, P.Q. Docket No. 92-67, decided by the Judicial Officer on June 30, 1992 (2 pages), the Judicial Officer reversed Judge Hunt's Order assessing a civil penalty of $250, increasing it to $500, against Respondent under § 2 of the Act of February 2, 1903, as amended, the Federal Plant Pest Act, as amended, the Plant Quarantine Act, as amended, and the regulations promulgated thereunder, on the basis of *In re Kaplinsky*.

In *In re Claude*, P.Q. Docket No. 92-29, decided by the Judicial Officer on July 2, 1992 (2 pages), the Judicial Officer affirmed Judge Hunt's Order assessing a civil penalty of $375 against Respondent under the Federal Plant Pest Act, as amended, the Plant Quarantine Act, as amended, and the regulations promulgated thereunder, on the basis of *In re Kaplinsky*.

In *In re Luscher* (Decision as to Rudolph J. Luscher, Jr.), A.Q. Docket No. 91–26, decided by the Judicial Officer on July 6, 1992 (2 pages), the Judicial Officer affirmed Chief Judge Palmer's Order assessing a civil penalty of $5,000 against Respondent under the Act of February 2, 1903, as amended, and the regulations promulgated thereunder, on the basis of *In re Kaplinsky*.

In *In re Luscher* (Decision as to Raymond W. Nelson, d/b/a Ray Nelson, Inc.), A.Q. Docket No. 91–26, decided by the Judicial Officer on July 6, 1992 (2 pages), the Judicial Officer affirmed Chief Judge Palmer's Order assessing a civil penalty of $5,000 against Respondent under the Act of February 2, 1903, as amended, and the regulations promulgated thereunder, on the basis of *In re Kaplinsky*.

In *In re Rosenberger*, V.A. Docket No. 92–02, decided by the Judicial Officer on August 6, 1992 (7 pages), the Judicial Officer reversed the Decision and Order by Judge Bernstein (ALJ) suspending Respondent's accreditation as a veterinarian authorized to perform official duties under State-Federal disease eradication programs for 1 month, and instead increased the suspension to 6 months, because Respondent violated the introductory paragraph of the accreditation standards in 9 C.F.R. § 161.3 (1991), and 9 C.F.R. § 161.3(h) (1991), by vaccinating a calf in Pennsylvania, a State in which he was not accredited.

In *In re Gray*, HPA Docket No. 90–28, decided by the Judicial Officer on August 26, 1992 (2 pages), the Judicial Officer ruled on a question certified by Judge Baker that her proposed ruling to reopen the hearing is incorrect. Respondent had an opportunity to present evidence at the original hearing but elected not to do so, preferring to file an interlocutory appeal with the District Court. There is no basis for reopening the hearing after the District Court dismissed Respondent's appeal for lack of jurisdiction.

In *In re Hopkins*, P.Q. Docket No. 92-14, decided by the Judicial Officer on August 27, 1992 (2 pages), the Judicial Officer reversed Judge Bernstein's Order assessing a civil penalty of $250, increasing it to $375, against Respondent under the Plant Quarantine Act, as amended, and the regulations promulgated thereunder, on the basis of *In re Kaplinsky*.

In *In re Pet Paradise, Inc.*, AWA Docket No. 90–2, decided by the Judicial Officer on September 16, 1992 (38 pages), the Judicial Officer affirmed the Order, but not the reasoning, of Judge Kane (ALJ) assessing a civil penalty of $5,000, suspending Respondent's license for 30 days, and directing Respondent to cease and desist from violating the Animal Welfare Act, regulations and standards, and, in particular, to cease and desist from operating as a dealer within the meaning of the Act and regulations without effectuating 11 specific housekeeping, husbandry and recordkeeping requirements. The ALJ erred in holding that the regulations and standards in effect when the Complaint was issued are those by which Respondent's conduct is to be judged, rather than the regulations and standards in effect when the violations occurred. The prior regulations and standards continued in effect in the amendatory rulemaking, but even if they had not continued in effect, it would have been appropriate to issue a cease and desist order for

violations committed while the regulations and standards were in effect. The ALJ erred in dismissing allegations of the Complaint that identified the sections, but not the subsections, of the regulations and standards alleged to be violated. Formalities of court pleading are not applicable in administrative proceedings. Findings of fact need only be supported by a preponderance of the evidence. A violation is willful if the person intentionally does an act which is prohibited or acts with careless disregard of statutory requirements. Statutory factors for determining civil penalties under Animal Welfare Act discussed. Ability to pay is not a relevant criterion.

In *In re Vic Bernacchi & Sons, Inc.*, PACA Docket No. D–91–555, decided by the Judicial Officer on September 18, 1992 (9 pages), the Judicial Officer affirmed the Decision by Judge Bernstein (ALJ) publishing the finding that Respondent has committed willful, flagrant and repeated violations of § 2 of the Act by failing to make full payment promptly to 39 sellers for 284 lots of produce totalling $475,664.08. Wilfulness is not required under the Act or under the APA, since no license is being suspended or revoked. No hearing was required where Respondent's Answer admits failure to pay promptly in amounts that are not *de minimis*.

In *In re Frazier Nut Farms, Inc.*, 92 AMA Docket Nos. F&V 981-13, 981–14, decided by the Judicial Officer on September 21, 1992 (25 pages), the Judicial Officer affirmed the Decision and Order by Chief Judge Palmer under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, which dismissed the Petitions filed by handlers subject to the Federal Marketing Order Regulating the Handling of Almonds Grown in California primarily on the basis of *In re Cal-Almond, Inc.* (*Cal-Almond I*) (Mar. 8, 1991) and *In re Saulsbury Orchards & Almond Processing, Inc.* (Jan. 23, 1991).

In *In re Goodman Produce Co.*, PACA Docket No. D–92–535, decided by the Judicial Officer on September 23, 1992 (4 pages), the Judicial Officer affirmed the Decision by Judge Bernstein publishing the finding that Respondent has committed willful, flagrant and repeated violations by failing to make full payment promptly to 56 sellers for 639 lots of perishable agricultural commodities totalling $1,241,289.92. This case is governed by numerous precedents summarized in *In re The Caito Produce Co.*, 48 Agric. Dec. 602 (1989).

In *In re Roxy Produce Wholesalers, Inc.*, PACA Docket No. D–91–560, decided by the Judicial Officer on September 24, 1992 (18 pages), the Judicial Officer affirmed the Decision by Judge Bernstein (ALJ) publishing the finding that Respondent has committed willful, flagrant and repeated violations of section 2 of the Perishable Agricultural Commodities Act by failing to make full payment promptly for approximately 130 lots of perishable agricultural commodities totalling over $600,000. Violations are repeated if there is more than one violation. Violations are flagrant if the amount not paid is more than a *de minimis* amount. Violations are willful if a person intentionally does an act prohibited by a statute or if a person carelessly disregards statutory requirements. The ALJ did not err in denying a request made 5 days before the hearing for a postponement in order to enable Respondent to obtain records from a bankruptcy court, but even if he had erred, it would have been harmless error since Respondent admits payment violations involving more than a *de minimis* amount. It is not necessary to show the exact amount of money not paid to creditors. It was not error to issue a Bench Decision proposed by Complainant that had not been served on Respondent since the admitted facts and the Department's settled policy compel the issuance of the Order issued in this proceeding. The ALJ did not err in rejecting Respondent's contention that, but for the involuntary petition of bankruptcy, Respondent would have paid all amounts due prior to the hearing.

Fiscal Year 1993

In *In re Mims Produce, Inc.*, PACA Docket No. D–91–544, decided by the Judicial Officer on October 2, 1992 (9 pages), the Judicial Officer affirmed the Decision by Judge Baker revoking Respondent's license because Respondent failed to make full payment promptly to 20 sellers for 80 lots of perishable agricultural commodities totalling $574,088.02, and failed to make full payment promptly to a broker totalling $11,722.40. Where a timely Answer is not filed, a Default Order is appropriate. This case is governed by numerous precedents summarized in *In re The Caito Produce Co.*, 48 Agric. Dec. 602 (1989).

In *In re Jordan*, HPA Docket No. 91–23, decided by the Judicial Officer on October 22, 1992 (3 pages), the Judicial Officer remanded a proceeding under the Horse Protection Act of 1970 to Administrative Law Judge Paul Kane (ALJ) to reweigh the evidence, since the ALJ erred in failing to regard as probative Complainant's documentary evidence. Notwithstanding the fact that the government veterinarians had no present recollection of their examination of the horse at the time of their testimony at the hearing, past recollection recorded is considered reliable, probative and substantial evidence, and fulfills the requirements of the Administrative Procedure Act, if the events were fresh in the witnesses' minds when they were recorded.

In *In re Allsweet Produce Co., Inc.*, PACA Docket No. D–90–528, decided by the Judicial Officer on October 28, 1992 (6 pages), the Judicial Officer affirmed the Decision by Judge Baker (ALJ) publishing the finding that Respondent has committed willful, flagrant and repeated violations by failing to make full payment promptly to eight sellers for 58 lots of perishable agricultural commodities totalling $278,120.85. This case is governed by numerous precedents summarized in *In re The Caito Produce Co.*, 48 Agric. Dec. 602 (1989).

In *In re Stark Packing Co.*, 92 AMA Docket No. F&V 907–22, decided by the Judicial Officer on November 3, 1992 (17 pages), the Judicial Officer affirmed the Decision by Judge Hunt (ALJ) dismissing the Petition filed by a handler regulated by the Federal Marketing Order Regulating the Handling of Navel Oranges Grown in Arizona and Designated Part of California. Under the Judicial Officer's decision in *Sequoia-Riverbend* (Jan. 29, 1988), affirmed in part and reversed in part by the court of appeals, no issue remains unresolved relating to the notice and comment rulemaking requirements and the Secretary's review of recommendations by the Navel Orange Administrative Committee. The court of appeals decision in *Sequoia*, holding that the amendments to the Order were invalid because of the referendum procedure, did not rule that the Marketing Order must be terminated. The Secretary made no findings requiring the termination of the Marketing Order.

In *In re The Lubrizol Corp.*, Plant Variety Protection Appeal Application No. 8900260, decided by the Judicial Officer on November 24, 1992 (13 pages), the Judicial Officer affirmed the denial by the Commissioner of the Plant Variety Protection Office of Petitioner's application for plant variety protection of a corn variety designated as "J–17." Petitioner used "J–17" more than 1 year prior to filing the application for protection to produce hybrid seed corn, which was commercially sold by Petitioner. Such use of the variety made it a public variety under the Plant Variety Protection Act, which is a bar to Petitioner's application for protection. The term "used" should be given its ordinary dictionary meaning. The cryptic legislative history is not persuasive. Great deference should be given to the interpretation of a statute by the agency charged with its administration. No weight is given to an interpretation of the Act not published in the Federal Register or brought to Petitioner's attention.

In *In re Stark Packing Corp.*, 92 AMA Docket No. F&V 908-9, decided by the Judicial Officer on November 25, 1992 (3 pages), the Judicial Officer affirmed the Decision and Order by Chief Judge Palmer (ALJ) dismissing the Petition filed by a handler regulated by the Valencia Orange Marketing Order. Petitioner's contentions that the annual marketing policy of the

Valencia Orange Administrative Committee (VOAC) and the Secretary's position paper constituted rulemaking without the notice and comment required by the Administrative Procedure Act; that the Secretary's promulgation of weekly volume flow-to-market ("prorate") restrictions for the 1974 through the 1986 marketing seasons were not in accordance with law because they were issued without adequate review of VOAC's recommendation and without notice and comment rulemaking; that the volume regulations were non-uniform and denied equity of marketing opportunity and equal protection of the laws, and were an unconstitutional taking of prorate property without just compensation; that the Secretary's 1984 referendum on the Order was invalid; and that the Secretary failed to terminate the Order after finding that its provisions no longer tend to effectuate the policies of the Act are rejected for the reasons set forth in *In re Stark Packing Co.*, 51 Agric. Dec. ___ (Nov. 3, 1992), and cases cited therein; and *In re Sequoia Orange Co.*, 50 Agric. Dec. 216 (1991), *appeal docketed sub nom. District One Independent Handlers v. Madigan*, No. CV-F-91–202 REC (E.D. Cal. Apr. 18, 1991).

In *In re Corey Farms, Inc.*, BPRA Docket No. 91–1, decided by the Judicial Officer on December 7, 1992 (23 pages), the Judicial Officer affirmed the Decision by Judge Hunt (ALJ) dismissing the Complaint on the ground that the Beef Promotion and Research Act does not authorize collection of assessments on cattle produced in the United States that are exported to Canada. The contemporaneous administrative construction of an Act is entitled to great weight. Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble. The Beef Promotion and Research Order, though ambiguous, does not require assessments to be collected on cattle sold in a foreign country. An agency's construction of its own regulation becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

In *In re Eastland*, A.Q. Docket No. 90-30, decided by the Judicial Officer on December 30, 1992 (17 pages), the Judicial Officer affirmed the Decision by Judge Baker (ALJ) finding that Respondent shipped interstate from Missouri to an auction market in Kansas one brucellosis reactor cow, in violation of the regulation requiring that the cow be shipped directly to a recognized slaughtering establishment, be identified with a metal tag and "B" branded, and be accompanied to destination by a permit. However, the Judicial Officer increased the civil penalties from $500 to $3,000. Department's sanction policy explained. Importance of the Brucellosis Eradication Program explained. Intent is not an element of a violation of the regulations. There is no need to show wilfulness under the Administrative Procedure Act, since no license is being suspended or revoked. Inability to pay is not a relevant circumstance under this statute.

In *In re Benicta*, P.Q. Docket No. 92–08, decided by the Judicial Officer on January 5, 1993 (2 pages), the Judicial Officer denied a late appeal after the Initial Decision had become final and effective.

In *In re American Airlines*, P.Q. Docket No. 92–131, decided by the Judicial Officer on January 8, 1993 (2 pages), the Judicial Officer affirmed Chief Judge Palmer's Order assessing a civil penalty of $375 against Respondent under the Act of February 2, 1903, as amended, the Federal Plant Pest Act, as amended, and the regulations promulgated thereunder, on the basis of *In re Kaplinsky*.

In *In re Browning*, AWA Docket No. 91–61, decided by the Judicial Officer on January 27, 1993 (38 pages), the Judicial Officer affirmed the Decision and Order by Judge Bernstein (ALJ) assessing a civil penalty of $2,000, and suspending Respondents' license for 30 days, and thereafter until they are in full compliance with the Animal Welfare Act, regulations and standards, because Respondents failed to keep their primary enclosures sanitary and in suitable condition, failed to maintain complete records, failed to keep food and watering receptacles clean, failed to handle wastes properly, failed to provide adequate veterinarian care,

and failed to utilize sufficient personnel to maintain proper husbandry practices. The preponderance of the evidence supports Complainant's allegations. An agency's interpretation of the statute which it is charged with administering, and its interpretation of its own regulation, is entitled to great deference. Respondents chose to appear at the hearing without an attorney and cannot complain now that they were not represented by counsel. The sanction is not too severe, considering the serious and wilful violations.

In *In re Brengle*, P.Q. Docket No. 92-66, decided by the Judicial Officer on January 28, 1993 (2 pages), the Judicial Officer reversed Judge Hunt's Order assessing a civil penalty of $250, increasing it to $375, against Respondent under the Federal Plant Pest Act, as amended, the Plant Quarantine Act, as amended, and the regulations promulgated thereunder, on the basis of *In re Kaplinsky*.

In *In re Hostetter*, V.A. Docket No. 91–9, decided by the Judicial Officer on January 29, 1993 (32 pages), the Judicial Officer affirmed the decision by Judge Bernstein (ALJ) revoking Respondent's accreditation as a veterinarian authorized to perform official duties under State-Federal disease eradication programs because Respondent violated 9 C.F.R. § 161.3(b) and (d) by permitting a specimen submission form to be used without ascertaining that the form had been accurately completed with respect to the identity of the horse to which the form applied, and by submitting an equine blood sample to a designated laboratory and incorrectly identifying the animal from which the blood was drawn. There is no need to give an opportunity to achieve compliance where the violations were wilful, even if the notice provisions of the Administrative Procedure Act were applicable. However, the notice provisions of the APA are inapplicable to veterinarian accreditation cases. There is no basis for reopening the hearing to allow Respondent to testify or interview other witnesses. An adverse inference is drawn because of Respondent's failure to testify notwithstanding the fact that, until near the end of the hearing, he thought that a criminal investigation was pending.

In *In re Valero*, P.Q. Docket No. 92-115, decided by the Judicial Officer on February 18, 1993 (2 pages), the Judicial Officer affirmed Judge Baker's Order assessing a civil penalty of $375 against Respondent under the Federal Plant Pest Act, as amended, the Plant Quarantine Act, as amended, and the regulations promulgated thereunder, on the basis of *In re Kaplinsky*.

In *In re Sunland Packing House Co.*, 91 AMA Docket No. F&V 907–21, decided by the Judicial Officer on February 22, 1993 (7 pages), the Judicial Officer affirmed the Decision by Chief Judge Palmer (ALJ) dismissing the Petition on the ground that the issues were controlled by prior decisions of the Judicial Officer. Petitioner contended that the annual marketing policy of the Navel Orange Administrative Committee (NOAC) and the Secretary's position paper constituted rulemaking without the notice and comment required by the Administrative Procedure Act; that the Secretary's promulgation of weekly volume flow-to-market ("prorate") restrictions for 1974–1975 through 1989-1990 were not in accordance with law because they were issued without adequate review of NOAC's recommendation and without notice and comment rulemaking; that the Secretary's 1984 referendum on the Order was invalid; that the Secretary's "negative tendency" findings in 1984 terminated the Order; that the pre-referendum Order cannot now be reinstated; that the ALJ's dismissal of allegations for insufficiency of specification was improper; and that the ALJ's denial of Petitioner's request for an oral hearing denied Petitioner's due process rights. Relevant Court of Appeals decisions filed after the ALJ's decision are discussed in *In re Stark Packing Co.* (Nov. 3, 1992). Where an amended rule is set aside, the prior version of the regulation remains in effect. In reversing agency action found to be in error, the tribunal should place the complaining party in the position that it would have been in but for the illegal action, but should not improve its position. The ALJ did not err in dismissing unspecified allegations for "insufficiency of their specification." The ALJ properly denied Petitioner's request for an oral hearing.

In *In re Baird-Neece Packing Corp.*, 92 AMA Docket No. F&V 907–23, 908–7, 907–24, 908–8, decided by the Judicial Officer on February 22, 1993 (7 pages), the Judicial Officer affirmed the Decision by Chief Judge Palmer (ALJ) dismissing the Petitions on the ground that the issues were controlled by prior decisions of the Judicial Officer. Petitioners contended that the annual marketing policies of the Navel and Valencia Orange Administrative Committees and the Secretary's position papers constituted rulemaking without the notice and comment required by the Administrative Procedure Act; that the Secretary's promulgation of weekly volume flow-to-market ("prorate") restrictions for specified years were not in accordance with law because they were issued without adequate review of the Committees' recommendations and without notice and comment rulemaking; that the Secretary's 1984 referendum on the Orders was invalid; that the Secretary's "negative tendency" findings in 1984 terminated the Orders; and that the pre-referendum Orders cannot now be reinstated. Relevant Court of Appeals decisions filed after the ALJ's decision are discussed in *In re Stark Packing Co.* (Nov. 3, 1992). Where an amended rule is set aside, the prior version of the regulation remains in effect. In reversing agency action found to be in error, the tribunal should place the complaining party in the position that it would have been in but for the illegal action, but should not improve its position.

In *In re Hostetter*, V.A. Docket No. 91–9, decided by the Judicial Officer on March 10, 1993 (6 pages), the Judicial Officer lifted the Stay Order which he had filed pending the outcome of proceedings for judicial review, since there is little likelihood or probability of Respondent's success on judicial review, and the public interest requires that the Order revoking his accreditation to perform official duties under the State-Federal Disease Eradication Programs be revoked immediately. Complainant is not estopped from opposing a stay pending judicial review merely because the Administrator did not summarily suspend Respondent's accreditation prior to the administrative disciplinary proceeding. The ALJ's initial decision was automatically stayed by the Rules of Practice pending appeal to the Judicial Officer.

In *In re Holt* (Decision as to Richard Polch and Merrie Polch), HPA Docket No. 91–77, decided by the Judicial Officer on March 12, 1993 (23 pages), the Judicial Officer affirmed the decision by Chief Judge Palmer (ALJ) finding that Respondents entered a horse for showing while the horse was sore, but the Judicial Officer increased the $1,000 joint civil penalty assessed by the ALJ to $2,000, and added a 1-year disqualification order. Much more than a preponderance of the evidence supports the findings, which is all that is required. A horse may be found to be sore based upon the professional opinion of veterinarians who relied solely upon palpation of the horse's pasterns. The amendment to the Fiscal Year 1993 budget for APHIS, prohibiting the payment of salary to any Department veterinarian who relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore, is not applicable. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum disqualification order on the owners, even though they had no knowledge or intent as to the soring.

In *In re Gore, Inc.*, 90 AMA Docket No. M 126–11, decided by the Judicial Officer on March 17, 1993 (14 pages), the Judicial Officer affirmed the Decision and Order by Judge Hunt (ALJ) under the Agricultural Marketing Agreement Act of 1937 denying the relief requested by Petitioner, a handler of milk subject to Order No. 126, which regulates the handling of milk in the Texas marketing area. The Market Administrator correctly determined that the complex in San Antonio, Texas, owned by H.E. Butts (HEB), a supermarket chain, is a single operating unit, i.e., a "plant," within the meaning of the Order, and that the portion of the complex to which Petitioner ships bottled milk, which functions as the single cooler unit for the complex and also as a Perishable Distribution Center, is not a "separate" facility within the meaning of the Order (7 C.F.R. § 1126.4). Petitioner has the burden of proving that the Administrator's determination is "not in accordance with law." The Market Administrator's interpretation of the Order is entitled to great weight.

In *In re Fine* (Decision as to Theresa A. Fine), PACA Docket No. D–92–537, decided by the Judicial Officer on March 18, 1993 (7 pages), the Judicial Officer affirmed the Decision by Judge Hunt (ALJ) publishing the finding that Respondents have committed willful, flagrant and repeated violations by failing to make full payment promptly for produce. This case is governed by numerous precedents summarized in *In re The Caito Produce Co.*, 48 Agric. Dec. 602 (1989).

In *In re San Joaquin Valley Handlers*, 92 AMA Docket Nos. F&V 907–26, 908–10, decided by the Judicial Officer on March 22, 1993 (9 pages), the Judicial Officer affirmed the Decision by Chief Judge Palmer (ALJ) dismissing the Petition on the ground that the issues were controlled by prior decisions of the Judicial Officer. Petitioners contended that the Secretary's 1984 referendum on the Marketing Orders Regulating the Handling of Navel and Valencia Oranges Grown in Arizona and Designated Part of California was invalid; that the Secretary's "negative tendency" findings in 1984 terminated the Orders; and that the pre-referendum Orders cannot now be reinstated. Where an amended rule is set aside, the prior version of the regulation remains in effect. In reversing agency action found to be in error, the tribunal should place the complaining party in the position that it would have been in but for the illegal action, but should not improve its position.

In *In re Carrington*, P.Q. Docket No. 92–130, decided by the Judicial Officer on March 23, 1993 (2 pages), the Judicial Officer denied a late appeal after the Initial Decision had become final and effective.

In *In re Brinkley* (Decision as to Doug Brown), HPA Docket No. 91–63, decided by the Judicial Officer on March 24, 1993 (24 pages), the Judicial Officer affirmed the decision by Judge Hunt (ALJ) finding that Respondent entered a horse for showing while the horse was sore, but the Judicial Officer increased the $1,000 civil penalty assessed by the ALJ to $2,000, and added a 1-year disqualification order. Much more than a preponderance of the evidence supports the findings, which is all that is required. A horse may be found to be sore based upon the professional opinion of veterinarians who relied solely upon palpation of the horse's pasterns. The amendment to the Fiscal Year 1993 budget for APHIS, prohibiting the payment of salary to any Department veterinarian who relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore, is not applicable. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum disqualification order on the owner, even though he had no knowledge or intent as to the soring.

In *In re Lester*, P.Q. Docket No. 91–42, decided by the Judicial Officer on April 1, 1993 (2 pages), the Judicial Officer denied a late appeal after the Initial Decision had become final and effective.

In *In re Reed* (Decision as to Dean Reed and Pete Donathan), A.Q. Docket No. 91–37, decided by the Judicial Officer on April 8, 1993 (31 pages), the Judicial Officer affirmed the decision by Chief Judge Palmer assessing civil penalties of $8,500 against Respondent Reed and $2,500 against Respondent Donathan for moving brucellosis test-eligible cattle, brucellosis reactor cattle, and brucellosis exposed cattle interstate without the required certificates or permits. Importance of Brucellosis Eradication Program explained. Hearsay is admissible in administrative proceedings. Records regularly kept in the course of business are admissible. Respondent Reed's failure to testify at the hearing raises an inference that his testimony would have been adverse to his interests, which inference can aid in making out a *prima facie* case. Complainant need only prevail by a preponderance of the evidence. It is not necessary to show that Respondents knowingly violated the Act in order to assess civil penalties. The sanction imposed is not too severe, considering the importance of the Brucellosis Eradication Program.

In *In re Hagus*, V.A. Docket No. 91–5, decided by the Judicial Officer on April 15, 1993 (21 pages), the Judicial Officer affirmed the decision by Judge Hunt (ALJ) under the Animal Quarantine and Related Laws that Respondent violated 9 C.F.R. § 161.3(b) and (d) by signing and permitting a specimen submission form to be used without ascertaining that the form had been accurately completed with respect to the identity of the cow to which the form applied, and by submitting a blood sample to a designated laboratory and incorrectly identifying the animal from which the blood was drawn. However, the Judicial Officer increased the suspension of Respondent's accreditation under the provisions of 9 C.F.R. §§ 160-162 from 60 days to 1 year. The Judicial Officer also concluded that Respondent violated 9 C.F.R. § 161.3(h). Importance of Brucellosis Eradication Program explained. There is no need to give notice and an opportunity to achieve compliance under the Administrative Procedure Act since no license is being suspended. If accreditation is regarded as a license, the public health, interest, or safety exception to the Administrative Procedure Act would be applicable. In addition, Respondent's violations were willful. A violation is willful, within the meaning of the Administrative Procedure Act, if a person carelessly disregards regulatory requirements. Furthermore, Respondent received a prior warning letter relating to the requirements of 9 C.F.R. § 161.3.

In *In re Lesser*, AWA Docket No. 91-3, decided by the Judicial Officer on April 28, 1993 (22 pages), the Judicial Officer affirmed the Decision by Judge Hunt (ALJ) under the Animal Welfare Act suspending Respondents' license for 30 days, and thereafter until they are in full compliance with the Act, regulations and standards, and ordering Respondents to cease and desist from interfering with or refusing APHIS inspections of their facilities, and failing to maintain their facilities in accordance with the standards involving housing, sanitation, cleaning, ventilation, storage of food and bedding, and lighting. However, the Judicial Officer increased the civil penalties of $9,250 assessed by the ALJ by $500, because of sanitation and waste violations, for which the ALJ assessed no civil penalties. Much more than a preponderance of the evidence supports Complainant's case, which is all that is required. Respondents wilfully failed to permit inspections. A violation is willful if a person carelessly disregards the regulatory requirements. Even under the stricter standard followed in some circuits, Respondents' conduct in refusing to permit inspections would still be willful. Since Respondents did not raise any issue before the ALJ as to whether warrantless inspections are unreasonable under the Fourth Amendment, they cannot raise the issue on appeal. Although an agency cannot declare a statute unconstitutional, constitutional issues can and should be raised before the ALJ. The Fourth Amendment is not violated by warrantless inspections under this regulatory statute. Additional civil penalties of $500 for the sanitation and waste violations are appropriate irrespective of the fact that the violations did not cause Respondents' rabbits to become sick or diseased.

In *In re Callaway*, HPA Docket No. 91–81, decided by the Judicial Officer on May 6, 1993 (33 pages), the Judicial Officer affirmed the decision by Judge Hunt (ALJ) finding that Respondent entered a horse for showing while the horse was sore. The ALJ assessed a civil penalty of $2,000, and disqualified Respondent for 1 year, *inter alia*, from showing, exhibiting or entering a horse in a horse show. Much more than a preponderance of the evidence supports the findings, which is all that is required. A horse may be found to be sore based upon the professional opinion of veterinarians who relied solely upon palpation of the horse's pasterns. The amendment to the Fiscal Year 1993 budget for APHIS, prohibiting the payment of salary to any Department veterinarian who relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore, is not applicable. Entering of a horse is a continuing process, not an event, and includes all activities required to be completed before a horse can be shown or exhibited. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum disqualification order on the trainer who entered a sore horse.

In *In re Faircloth*, AWA Docket No. 91–25, decided by the Judicial Officer on May 7, 1993 (12 pages), the Judicial Officer reversed the Order by Judge Hunt (ALJ) dismissing the

Complaint under the Animal Welfare Act. The Judicial Officer assessed a civil penalty of $4,000 and issued a cease and desist order, as well as an order disqualifying Respondents for 1 year from becoming licensed under the Act. The ALJ held that the activities of Respondents are neither in nor affect interstate commerce and, therefore, they are not an exhibitor subject to the Act. The Judicial Officer held that Respondents' activities are in commerce, as defined in the Act. Respondents operated as an exhibitor without a license and failed to provide proper enclosures for their animals, to provide shade, to dispose of waste, to store food properly, and to keep the premises clean and sanitary. Complainant need only prevail by a preponderance of the evidence. However, there was insufficient evidence to prove that on August 15, 1989, Respondents' facility was not structurally sound or that Respondents' premises were not clean and in good repair.

In *In re Full Sail Produce, Inc.*, PACA Docket No. D-90-553, decided by the Judicial Officer on May 14, 1993 (21 pages), the Judicial Officer affirmed the Decision by Chief Judge Palmer (Chief ALJ) publishing the finding that Respondent has committed willful, flagrant and repeated violations by failing to make full payment promptly for produce. The Department's policy as to payment violations is summarized in *In re The Caito Produce Co.*, 48 Agric. Dec. 602 (1989). Complainant proved by a preponderance of the evidence the interstate nature of the transactions, and Respondent's failure to make full payment. Partial payment as a result of an accord and satisfaction under which all creditors agreed to accept less than full payment does not comply with the Act. The evidence shows that Complainant received reparation complaints against Respondent, but Complainant can proceed on its own complaint. There is no evidence that Complainant's employees told anyone that a disciplinary proceeding would not be brought if Respondent made partial payments. Furthermore, the Government is not subject to estoppel when it is acting in its sovereign capacity. Respondent's violations were willful, but there is no requirement that the violations be willful since no license is being suspended.

In *In re Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), HPA Docket Nos. 91–18, 91–58, decided by the Judicial Officer on May 27, 1993 (27 pages), the Judicial Officer affirmed the decision by Judge Hunt (ALJ) finding that Respondent Rizio entered a horse for showing while the horse was sore. The ALJ assessed a civil penalty of $2,000, and disqualified Respondent Rizio for 1 year, *inter alia*, from showing, exhibiting or entering a horse in a horse show. However, the Judicial Officer reversed the ALJ's order dismissing the Complaint against Respondent Wagner. The Judicial Officer held that Respondent Wagner's act of presenting the horse to the DQP for pre-show inspection was part of the entry process. The Judicial Officer imposed the same sanctions on Respondent Wagner as were imposed on Respondent Rizio. Much more than a preponderance of the evidence supports the findings, which is all that is required. A horse may be found to be sore based upon the professional opinion of veterinarians who relied solely upon palpation of the horse's pasterns. Past recollection recorded in the form of affidavits made while the events were fresh in the witnesses' minds is reliable, probative and substantial. The amendment to the Fiscal Year 1993 budget for APHIS, prohibiting the payment of salary to any Department veterinarian who relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore, is not applicable. Entering of a horse is a continuing process, not an event, and includes all activities required to be completed before a horse can be shown or exhibited. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum disqualification order on the persons who entered the sore horse in this case, in addition to a $2,000 civil penalty.

In *In re Brinkley* (Decision as to Doug Brown), HPA Docket No. 91–63, decided by the Judicial Officer May 27, 1993 (1 page), the Judicial Officer denied a petition to reconsider. Although the disqualification order is not identical to the language of the Act, it is consistent with the Act, and it is identical to, or similar to, other Orders in HPA cases.

In *In re Lesser*, AWA Docket No. 91–3, decided by the Judicial Officer on June 3, 1993 (1 page), the Judicial Officer denied a motion to reconsider. The Order suspending Respondents

for 30 days and thereafter until APHIS inspects the facility and determines that Respondents are in compliance with the Act, regulations and Order is identical to the Order issued in similar cases. The Act provides for unannounced inspections, and Respondents must be in compliance with the Act, regulations, and standards--not merely in compliance with respect to the matters previously found to be in violation. If Respondents want immediate inspection at or near the end of their suspension period, they should make that request to APHIS.

In *In re Jorgensen* (Decision as to Paul Mennick, D.V.M.), A.Q. Docket No. 92–23, decided by the Judicial Officer on June 9, 1993 (13 pages), the Judicial Officer affirmed the Decision and Order by Chief Judge Palmer (Chief ALJ) assessing civil penalties of $500 against Respondent Mennick because the certificate accompanying approximately five brucellosis test-eligible cattle did not provide individual identification of the animals and the date and results of a brucellosis test for each, as required by 9 C.F.R. § 78.9(b)(3)(ii), and because he participated in moving one brucellosis exposed cow from California to Colorado in violation of 9 C.F.R. § 78.8(c), because the cow was not less than 1 year old, nor moved from a farm of origin. Ignorance of the law is never an excuse or even a mitigating circumstance in disciplinary proceedings. Respondent was not denied the right to fully present his case. There is nothing to support Respondent's claim that the Chief ALJ had a private discussion with one of Complainant's witnesses. There was no impropriety in not making arrangements for an additional room to accommodate the sequestration of witnesses. Respondent made no request for sequestration, and only one of Complainant's witnesses was a true fact witness. There is no Department practice in this type of proceeding requiring an informal conference prior to the institution of a disciplinary proceeding. Respondent is required to know the Federal requirements of the Brucellosis Disease Eradication Program, and cannot avoid responsibility by claiming that he was given improper advice by an unnamed Colorado State official.

In *In re Higgs*, P.Q. Docket No. 93–82, decided by the Judicial Officer on June 24, 1993 (2 pages), the Judicial Officer affirmed Judge Palmer's Order assessing a civil penalty of $375 against Respondent under the Act of February 2, 1903, as amended, the Federal Plant Pest Act, as amended, and the regulations promulgated thereunder, on the basis of *In re Kaplinsky*.

In *In re Hines*, P.Q. Docket No. 93–06, decided by the Judicial Officer on June 25, 1993 (2 pages), the Judicial Officer affirmed Judge Bernstein's Order assessing a civil penalty of $375 against Respondent under the Act of February 2, 1903, as amended, the Federal Plant Pest Act, as amended, and the regulations promulgated thereunder, on the basis of *In re Kaplinsky*.

In *In re Green*, A.Q. Docket No. 90–36, decided by the Judicial Officer on July 2, 1993 (24 pages), the Judicial Officer affirmed the decision by Judge Bernstein (ALJ) assessing civil penalties of $14,000 against Respondent for moving cattle interstate without the required certificates, statements or permits. Importance of Brucellosis Eradication Program explained. The sanction imposed is not too severe, considering the importance of the Brucellosis Eradication Program.

In *In re Kornblum & Co.*, PACA Docket No. D-92-525, decided by the Judicial Officer on July 6, 1993 (5 pages), the Judicial Officer affirmed the Decision by Judge Baker (ALJ) publishing the finding that Respondent has committed willful, flagrant and repeated violations by failing to make full payment promptly for produce. The Department's policy as to payment violations is summarized in *In re The Caito Produce Co.*, 48 Agric. Dec. 602 (1989). Respondent's violations were willful, but there is no requirement that the violations be willful since no license is being suspended.

In *In re ABL Produce, Inc.*, PACA Docket No. D–92–521, decided by the Judicial Officer on July 15, 1993 (28 pages), the Judicial Officer affirmed Judge Hunt's (ALJ) decision holding that Respondent permitted Mr. Lombardo to continue his affiliation with it after being notified

that Lombardo was ineligible to be employed by or affiliated with any PACA licensee for a 1-year period because of a disciplinary order issued against Lombardo's company. However, the Judicial Officer revoked Respondent's license, whereas the ALJ had suspended it for 30 days. Respondent received adequate notice that to continue Lombardo's affiliation with Respondent could result in suspension or revocation of its license. Respondent cannot enlarge the notice requirements of the Act or the Administrative Procedure Act by denying that Lombardo was affiliated with Respondent, and seeking further opportunity to respond, before the filing of a Complaint. Anyone responsibly connected with ABL was required to be sure that ABL did not violate the employment restrictions, if he wanted to avoid the consequences of a disciplinary order issued as to ABL. Even if Lombardo had not been involved improperly with ABL's produce buying and selling, Lombardo's trucking activities would have been an improper affiliation, under the circumstances here, which reveal that Lombardo's trucking concern acted, in the main, as the trucking arm of Respondent.

In *In re Gray*, HPA Docket No. 90–28, decided by the Judicial Officer on July 23, 1993 (61 pages), the Judicial Officer affirmed the Decision by Judge Baker (ALJ) in which she found that Respondent entered, for the purpose of showing or exhibiting, a horse while the horse was sore. The Judicial Officer affirmed the ALJ's $2,000 civil penalty, but increased the 1–year disqualification order from 1 year to 5 years. Complainant's evidence established a *prima facie* case, and Respondent adduced no evidence. Entry is a process that includes presenting the horse for pre-show inspection. The Complaint reasonably apprised Respondent of the matters at issue. The Department's veterinarians were adequately qualified as expert witnesses. Although the veterinarians had no independent recollection of their examinations, their past recollection recorded was admissible and probative. The Federal Rules of Evidence are not controlling in an administrative proceeding. Abnormal sensitivity in both forelimbs creates a rebuttable presumption of soreness, but Complainant established a *prima facie* case without the presumption. A horse may be found to be sore based upon the professional opinion of veterinarians who relied solely upon palpation of the horse's pasterns, but here there were additional indicia of soreness. The amendment to the Fiscal Year 1993 budget for APHIS, prohibiting the payment of salary to any Department veterinarian who relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore, is not applicable. Complainant is not required to prove the specific cause of injury. There is no basis for reopening the hearing to permit Respondent to testify, when he declined to do so at the original hearing. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum disqualification order upon the person who entered the sore horse, in addition to a $2,000 civil penalty. Since this is Respondent's second violation, the minimum disqualification period in the Act is for 5 years, even though the earlier violation occurred before the 1976 amendments provided for disqualification orders, and was not for soring.

In *In re Gerawan Farming, Inc.*, 93 AMA Docket No. F&V 916–20, 917–21, decided by the Judicial Officer on August 11, 1993 (2 pages), the Judicial Officer denied an application for interim relief based on established precedent.

In *In re Roach* (Decision as to Calvin L. Baird, Sr.), HPA Docket Nos. 90–16, 91–25, decided by the Judicial Officer on August 13, 1993 (16 pages), the Judicial Officer affirmed the Decision and Order by Judge Hunt (ALJ) in which he found that on one occasion, Respondent Baird allowed the entry, for the purpose of showing or exhibiting, a horse at a horse show while the horse was sore and that, on another occasion, he allowed a horse to be shown while the horse was sore. The Judicial Officer affirmed the ALJ's order, which assessed a civil penalty of $4,000, and disqualified Respondent for 1 year from showing, exhibiting, or entering any horse, and from judging, managing, or otherwise participating in any horse show. Complainant proved its case by much more than a preponderance of the evidence, which is all that is required. Although the Department's veterinarians had no independent recollection of their examinations,

their past recollection recorded was admissible and probative. Abnormal sensitivity in both forelimbs creates a rebuttable presumption of soreness, but Complainant established a *prima facie* case without the presumption, which was not overcome by Respondent's evidence. A horse may be found to be sore based upon the professional opinion of veterinarians who relied solely upon palpation of the horse's pasterns, but here there was additional evidence of soreness as to one horse. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum disqualification order upon the person who allowed the entry, on one occasion, and allowed the showing, on another occasion, of a sore horse, in addition to a $4,000 civil penalty. *Burton v. USDA* is not followed outside of the Eighth Circuit, and, in the present case, one of the horses was not approved by the DQP.

In *In re Heywood*, P.Q. Docket No. 91–58, decided by the Judicial Officer on August 18, 1993 (9 pages), the Judicial Officer affirmed the decision by Judge Bernstein (ALJ) assessing a civil penalty of $750 against Respondent for offering to a common carrier approximately 12.2 pounds of raw or unprocessed mango fruit for shipment from Hawaii into the continental United States. However, the Judicial Officer remanded the proceeding to the ALJ to determine whether the penalty should be reduced because of Respondent's financial condition, under the new policy set forth in this decision for P.Q. and A.Q. cases. Under the new policy, which does not apply for serious or repeat violators, the civil penalty may be reduced if a Respondent alleges and proves by documentation that he or she is unable to pay the civil penalty requested in the Complaint. The civil penalty would be reduced below 25 percent of the amount requested in the Complaint only in the most unusual situations. A hearing should not be required to determine Respondent's financial condition. The contention that the ALJ was not impartial because he is paid by the Department is dismissed as frivolous. Complainant met its burden of proof by much more than a preponderance of the evidence. Respondent received proper notification of the oral hearing. There is no requirement that the Department advertise the regulations, but the record shows that the Department does provide posters to be placed in postal facilities and mailers to inform the public about the regulations. There was no undue delay in the proceeding.

In *In re Wise*, P.Q. 93–24, decided by the Judicial Officer on August 19, 1993 (2 pages), the Judicial Officer affirmed the Order by Judge Hunt (ALJ) assessing a civil penalty of $375 against Respondent under the Federal Plant Pest Act, as amended, the Plant Quarantine Act, as amended, and the regulations promulgated thereunder, on the basis of *In re Kaplinsky*. However, the Judicial Officer remanded the proceeding to the ALJ to determine whether the penalty should be reduced because of Respondent's financial condition under the new policy set forth in *In re Heywood*, 52 Agric. Dec. ___ (Aug. 18, 1993).

In *In re Edwards*, HPA Docket No. 91–113, decided by the Judicial Officer on August 24, 1993 (7 pages), the Judicial Officer reversed the Decision by Judge Kane (ALJ) dismissing the Complaint, and remanded the proceeding to the ALJ. The Judicial Officer held that the ALJ should have permitted Complainant to amend the Complaint to conform to the proof. The formalities and technicalities of court pleading are not applicable in administrative proceedings. The Complaint need only apprise Respondents of the issues in controversy. Respondents knew from the pre-trial exchange of exhibits that Complainant intended to prove that the post-show examination of the horse showed that it was sore. Complainant is only changing the legal inference to be drawn from that proof. However, in order to avoid any possibility of an appearance of prejudice to Respondents, Respondents will be permitted to call new witnesses or re-question prior witnesses based on the amended allegations of the Complaint.

In *In re Rowland*, HPA Docket No. 92–5, decided by the Judicial Officer on August 25, 1993 (34 pages), the Judicial Officer reversed the Initial Decision by Judge Bernstein (ALJ) in which he dismissed the Complaint which alleged that Respondents, as co-owners of a horse, entered and allowed the entry, for the purpose of showing or exhibiting, the horse at a horse show while the horse was sore. The ALJ held that the horse had bilateral scars indicative of soring, but

that the Department's Scar Rule did not apply because the scars were as fully healed as possible. The Judicial Officer held that under the plain language of the Scar Rule, "all" horses that meet the Scar Rule criteria are considered sore. "All" is a comprehensive and all inclusive word. The Scar Rule establishes an irrebuttable presumption of law that horses of the required age that have scars showing bilateral evidence of abuse indicative of soring are regarded as sore. The legislative history of the Scar Rule is not inconsistent with the plain language. The legislative history merely recognizes that a scarred horse could conceivably be restored to a condition where it no longer has scars, as defined in the Scar Rule. An agency's interpretation of its own regulation is entitled to great deference. The Scar Rule is consistent with the purpose of the Act. Providing a market for a scarred horse is highly culpable, and entering a scarred horse in an exhibition warrants a $2,000 civil penalty and a 1-year disqualification order.

In *In re Crowe*, HPA Docket No. 91–49, decided by the Judicial Officer on September 2, 1993 (32 pages), the Judicial Officer affirmed the decision by Judge Kane (ALJ) assessing a civil penalty of $150 against Leslie Crowe, and disqualifying her for 1 year from showing, exhibiting, or entering any horse in any horse show because she entered a horse at a horse show while the horse was sore. However, the Judicial Officer reversed that portion of the ALJ's decision which dismissed the Complaint against Glen O. Crowe. The Judicial Officer held that Glen O. Crowe also entered the horse while it was sore, since he paid the entry fee. The Judicial Officer assessed a $2,000 civil penalty against Glen O. Crowe and entered a 1-year disqualification order against him. The ALJ erred in dismissing the Complaint against Glen O. Crowe on the basis of the ALJ's finding that he was not the trainer of the horse. It is irrelevant that he was not the trainer, since he entered the horse. "Entering" is a process that includes payment of the entry fee. Palpation evidence is adequate to prove that a horse is sore, but in this case, the horse also walked "tucked under," especially when turned. The $150 civil penalty assessed against Leslie Crowe is affirmed only because of her poor financial condition. Proof is not required as to who actually sored the horse.

In *In re Cabanilla*, P.Q. Docket No. 92–69, decided by the Judicial Officer on September 14, 1993 (1 page), the Judicial Officer dismissed Complainant's appeal, in accordance with Complainant's request, pursuant to the Judicial Officer's decision in *In re Heywood*, 52 Agric. Dec. ___ (Aug. 18, 1993).

In *In re McConnell* (Decision as to Jackie McConnell), HPA Docket No. 91–162, decided by the Judicial Officer on September 16, 1993 (22 pages), the Judicial Officer affirmed the Decision and Order by Chief Judge Palmer (Chief ALJ) in which he found that Respondent McConnell entered for the purpose of showing or exhibiting a horse at a horse show while the horse was sore. The Chief ALJ assessed a civil penalty of $2,000, and disqualified Respondent for 2 years from showing, exhibiting, or entering any horse, and from judging, managing, or otherwise participating in any horse show. Complainant proved the violation by much more than a preponderance of the evidence, which is all that is required. Past recollection recorded is admissible and entitled to weight. Expert testimony by USDA veterinarians that they would have expected the horse to experience pain while moving is entitled to weight, but, here, the veterinarians also saw that the horse experienced pain while walking. The Chief ALJ properly refused to let an expert witness who did not examine the horse give his opinion, based on his review of Complainant's affidavits and documentary evidence, as to whether the horse was sore when examined by the Department's veterinarians. The Chief ALJ properly imposed a 2-year disqualification order on Respondent, since two previous 6–month disqualifications imposed as a result of consent decisions did not deter the present violation. However, the prior consent decisions do not qualify as proven or admitted prior violations, and therefore, only a 2-year disqualification order, rather than a 4-year disqualification order, as requested by Complainant, is imposed.

In *In re King*, P.Q. Docket No. 92–105, decided by the Judicial Officer on September 17, 1993 (17 pages), the Judicial Officer reversed the bench Initial Decision and Order by Judge Kane (ALJ) dismissing the Complaint, which alleged that Respondent imported fresh okra into the United States from Sierra Leone, Africa, in violation of 7 C.F.R. § 319.56. The Judicial Officer assessed a civil penalty of $750. Although great weight is given to determinations by ALJs as to the credibility of witnesses, in rare cases, it is necessary to reverse as to the facts, particularly where documentary evidence or inferences to be drawn from the facts are involved. Complainant proved its case by much more than a preponderance of the evidence, which is all that is required.

In *In re Samuel S. Napolitano Produce, Inc.*, PACA Docket No. D–93–526, decided by the Judicial Officer on September 23, 1993 (13 pages), the Judicial Officer affirmed the decision by Judge Bernstein (ALJ) revoking Respondent's license because Respondent failed to make full payment promptly to 22 sellers for perishable agricultural commodities totalling $359,212.09. A violation is willful, within the meaning of the Administrative Procedure Act, if a person carelessly disregards regulatory requirements. Respondent's violations were also repeated and flagrant. Failures to pay promptly and in full (in amounts that are not *de minimis*) are flagrant, irrespective of legitimate business problems that caused such failures. In view of the admissions in Respondent's bankruptcy proceeding, there was no need for a hearing. There was no undue delay between the last violations and the filing of the Complaint, but, in any event, laches does not apply to the Government acting in its sovereign capacity.

In *In re The Norinsberg Corporation*, PACA Docket No. D–92–571, decided by the Judicial Officer on September 24, 1993 (19 pages), the Judicial Officer affirmed the bench decision by Judge Bernstein (ALJ) revoking Respondent's license because Respondent failed to make full payment promptly to 10 sellers for perishable agricultural commodities totalling $424,913.75, which was reduced to approximately $250,000 at the time of the hearing. This case is governed by numerous precedents, summarized in *In re The Caito Produce Co.*, 48 Agric. Dec. 602 (1989). A violation is willful, within the meaning of the Administrative Procedure Act (5 U.S.C. § 558(c)), if a person carelessly disregards regulatory requirements. The ALJ's finding that Respondent's violations were "repeated" is correct. Failures to pay promptly and in full (in amounts that are not *de minimis*) are "flagrant," irrespective of legitimate business problems that caused such failures. There was no error in the ALJ's issuance of a bench decision based upon Complainant's motion filed 12 days before the hearing. Although the rules generally permit 20 days for responding to a motion, the time may be shortened by the ALJ, and, also, the ALJ could have issued the bench decision without a motion. An ALJ is required to follow settled Department case law. The ALJ did not err in refusing to turn over the investigative file (after his *in camera* review) of a marketing specialist who reviewed the records of Respondent's violations obtained by another employee, and analyzed the evidence. Such an investigative file is not a "statement" under the Jencks Act. Agreements for deferred payment must be entered into before the produce is purchased. The dismissal of reparation cases is irrelevant in this disciplinary proceeding. Department's sanction policy explained.

In *In re Burdette*, A.Q. Docket No. 92–35, decided by the Judicial Officer on September 29, 1993 (18 pages), the Judicial Officer reversed the decision by Judge Bernstein (ALJ) dismissing the Complaint, which alleged that Respondent moved at least four adult, test-eligible cattle from Pleasant Hope, Missouri, to Kelly, Louisiana, in violation of 9 C.F.R. § 78.9(b)(3)(ii) because the cattle were not negative to an official test within 30 days prior to the movement, and because they were not accompanied by the required certificate. The ALJ held that Complainant failed to prove that Respondent moved the cattle, within the meaning of the regulations (9 C.F.R. § 78.1). However, the Judicial Officer held that Respondent moved the cattle, and he assessed a civil penalty of $2,000 ($1,000 per violation). The definition of moved includes "received for movement," and "otherwise aided, induced, or caused to be moved." An agency's interpretation of its own regulation is entitled to great deference, unless it is clearly

erroneous or inconsistent with the language it interprets. Department's sanction policy explained. Ignorance of the law is not a mitigating circumstance in determining the civil penalty for violations of the Brucellosis Eradication Program.

Fiscal Year 1994

In *In re Watlington*, HPA Docket Nos. 91–45 and 91–158, decided by the Judicial Officer on October 1, 1993 (40 pages), the Judicial Officer affirmed the decision by Judge Bernstein (ALJ), in which he found that on two occasions, Respondent entered, for the purpose of showing or exhibiting, a horse while the horse was sore. Respondent was assessed a civil penalty of $4,000 and disqualified for 2 years from showing, exhibiting or entering any horse or participating in any horse show, exhibition, sale or auction. The ALJ did not err in denying Respondent's request for a continuance made approximately a week before the hearing, notwithstanding the fact that the attorney selected by Respondent just prior to the hearing was unable to attend the hearing. It is irrelevant that Complainant's witnesses had no independent recollections of the information they recorded in affidavits and violation forms. Past recollection recorded is adequate as long as the affidavits and documents were made while the events recorded were fresh in the witnesses' minds. The Federal Rules of Evidence do not apply. Hearsay is admissible, and can constitute substantial evidence to support findings, provided that it is reliable and probative. Entry is a process that includes, e.g., the clerical entry, filling out forms, and presenting the horse to the DQP for inspection. A horse may be found sore based upon digital palpation only. Complainant proved its case by much more than a preponderance of the evidence, which is all that is required. The Department's veterinarians were properly qualified as experts. Subjective conclusions by the Department's veterinarians are merely evidence, and the fact finders then determine if a horse is sore under the Act. Soring is not an exact science, and evidence that the horse was "unequally sore" does not disprove the fact that the horse was sored. There is no need in this case to rely on the statutory presumption of soreness. The civil penalty and suspension are not more harsh than warranted.

In *In re The Norinsberg Corp.*, PACA Docket No. D–92–571, decided by the Judicial Officer on October 18, 1993 (1 page), the Judicial Officer denied a Petition for Reconsideration and oral argument for the reasons previously stated in the original Decision.

In *In re Bennett*, HPA Docket No. 91–127, decided by the Judicial Officer on October 28, 1993 (3 pages), the Judicial Officer affirmed the Initial Decision and Order by Chief Judge Palmer (Chief ALJ) dismissing the Complaint, which alleged that Kim Bennett, as trainer, entered and exhibited a sore horse at the August 4, 1989, Kentucky State Fair Walking Horse Show at Louisville, Kentucky, and Barry Vinsant and Ellen Vinsant, as owners, exhibited and allowed the entry and exhibition of the allegedly sore horse at the August 4, 1989, show. Complainant's evidence established a prima facie case, but considering the record as a whole, Complainant failed to sustain its position by a preponderance of the evidence. The Judicial Officer can reverse a decision by an ALJ even where the decision is based on the ALJ's determination as to the credibility of witnesses. The doctrine that the Judicial Officer will reverse an ALJ's findings of fact only where the record "compels" such action was overruled in 1991.

In *In re Hubert H. Smith Packing Co.*, FMIA Docket No. 92-8, decided by the Judicial Officer on November 2, 1993 (26 pages), the Judicial Officer affirmed the decision by Judge Hunt (ALJ) withdrawing inspection services indefinitely from Respondent Hubert H. Smith Packing Company because of the conviction of Respondent Louis V. Smith of two misdemeanors under Title I of the Federal Meat Inspection Act, but suspending such withdrawal of inspection services for so long as Respondent Louis V. Smith has no connection with the packing company. Smith's conviction of adding pork to hamburger without proper labeling is serious and calls into question his trustworthiness as the recipient of inspection services. Since the conviction, he has been uncooperative with inspectors and has been reluctant to make required improvements. Complainant has proven by a preponderance of the evidence that Smith cannot be trusted or relied upon for purposes of assuring that the company under his direction

will protect the public's health and safety. The ALJ's view that Smith should have 90 days within which to sever his connections with the company is not unreasonable.

In *In re Syracuse Sales Co.* (Decision as to John Knopp), P.&S. Docket Nos. D–92–52 and D–92–89, decided by the Judicial Officer on November 5, 1993 (29 pages), the Judicial Officer affirmed the decision by Chief Judge Palmer (Chief ALJ) ordering Respondent (with regard to the Complaint in P.&S. Docket No. D–92–52) to cease and desist from engaging in business subject to the Act while insolvent, and from failing to pay when due for livestock, and in P.&S. Docket No. D–92–89, denying his application for registration for 5 years, but permitting his salaried employment by another registrant or packer after 90 days. A motion for intervention by a group of investors composed of Syracuse's creditors must be denied because intervention is not permitted in disciplinary proceedings. The alter ego doctrine does not apply to Respondent Knopp because he was not the owner of the firm and did not have sufficient control. Nonetheless, Respondent Knopp is subject to the Act as a dealer since he managed the day-to-day operations of the firm. A dealer includes any person, not a market agency, engaged in the business of buying and selling livestock either on his own account or as the employee or agent of the vendor or purchaser. Operating while insolvent is an unfair and deceptive practice. If a registrant's current liabilities exceed its current assets, it is deemed to be insolvent. A violation is willful if the Respondent intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements. A consent disciplinary order previously issued against Respondent ordering him to cease and desist from failing to pay, when due, for livestock was adequate notice under the Administrative Procedure Act concerning similar violations. The Chief ALJ's sanction is appropriate, considering the serious nature of the violations, and it is consistent with prior similar cases.

In *In re McCall*, AWA Docket No. 93-11, decided by the Judicial Officer on November 5, 1993 (41 pages), the Judicial Officer affirmed that part of the Order by Judge Bernstein (ALJ) assessing civil penalties of $7,500, and ordering Respondents to cease and desist from engaging in any activity for which a license is required without being licensed, and failing to maintain their facilities in accordance with the regulations and standards involving housing, shelter, veterinary care, records, sanitation, cleaning, food, and water. However, the Judicial Officer increased from 1 year to 10 years the period in which Respondents are disqualified from becoming licensed under the Act and regulations. Variance between the C.F.R. sections cited in investigation reports and the Complaint are not fatal. It is only necessary that the Complaint reasonably apprise the litigant of the issues in controversy. Hearsay is admissible in an administrative proceeding. The proof in this case far surpasses the preponderance of the evidence, which is all that is required. An adverse inference may be drawn because Respondents did not testify or offer other witnesses to testify on their behalf.

In *In re Burdette*, A.Q. Docket No. 92-35, decided by the Judicial Officer on November 8, 1993 (1 page), the Judicial Officer denied a Petition for Reconsideration for the reasons previously stated in the original Decision.

In *In re Richards* (Decision as to Donald D. Richards), HPA Docket No. 90–9, decided by the Judicial Officer on November 9, 1993 (9 pages), the Judicial Officer affirmed the Decision and Order by Judge Hunt (ALJ) in which he found that Respondent Richards entered for the purpose of showing or exhibiting a horse at a horse show while the horse was sore. The ALJ assessed a civil penalty of $2,000, and disqualified Respondent Richards for 1 year from showing, exhibiting, or entering any horse, and from judging, managing, or otherwise participating in any horse show. Respondent's failure to file an Answer constitutes an admission of the allegations in the Complaint and a waiver of hearing. Furthermore, Respondent's appeal admits that he entered the horse, and he does not contend that it was not sore. Entering a sore horse in a horse show violates the Act irrespective of who sored the horse.

In *In re Kopunec*, AWA Docket No. 93–22, decided by the Judicial Officer on November 9, 1993 (10 pages), the Judicial Officer affirmed the Decision and Order by Chief Judge Palmer (Chief ALJ) assessing a civil penalty of $10,000, and directing Respondents to cease and desist from violating the Act, regulations and standards, and, in particular, to cease and desist from engaging in any activity for which a license is required without being licensed as required. The Chief ALJ properly issued a default decision and order since Respondents filed no answer to the Complaint. Ability to pay is not considered in determining civil penalties under the Animal Welfare Act.

In *In re King*, P.Q. Docket No. 92-105, decided by the Judicial Officer on November 10, 1993 (1 page), the Judicial Officer denied Respondent's Petition for Reconsideration because it was not timely filed. If it had been timely filed, it would have been dismissed on the merits because it merely reargues the matters previously considered when the Decision and Order was filed.

In *In re Jordan* (Decision as to Sheryl Crawford), HPA Docket No. 91–23, decided by the Judicial Officer on November 19, 1993 (35 pages), the Judicial Officer affirmed the decision by Judge Kane (ALJ) finding that Respondent Crawford allowed the entry of a horse for showing while the horse was sore. The ALJ assessed a civil penalty of $2,000, and disqualified Respondent Crawford for 1 year, *inter alia*, from showing, exhibiting or entering a horse in a horse show. Much more than a preponderance of the evidence supports the findings, which is all that is required. A horse may be found to be sore based upon the professional opinion of veterinarians who relied solely upon palpation of the horse's pasterns, but here there was slightly more than palpation evidence. Past recollection recorded in the form of affidavits made while the events were fresh in the witnesses' minds is reliable, probative and substantial. The amendment to the Fiscal Year 1993 budget for APHIS, prohibiting the payment of salary to any Department veterinarian who relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore, and the language in the 1994 appropriations bill conference report that digital palpation should not be used as the sole means of determining soring, are not applicable. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum disqualification order on the persons who entered the sore horse in this case, in addition to a $2,000 civil penalty.

In *In re Heywood*, P.Q. Docket No. 91–58, decided by the Judicial Officer on November 24, 1993 (4 pages), the Judicial Officer affirmed the decision by Judge Bernstein (ALJ) on remand again imposing a civil penalty of $750 against Respondent since he failed to avail himself of the opportunity to submit documentation regarding his lack of ability to pay any or all of the civil penalty previously imposed. Respondent's argument that he did not violate the Act and regulations is not relevant at this stage of the proceeding, since the only issue on remand is Respondent's ability to pay the $750 civil penalty.

In *In re Sims* (Decision as to Charles Sims), HPA Docket Nos. 90–21, 91–201, 91–40, decided by the Judicial Officer on November 26, 1993 (35 pages), the Judicial Officer affirmed the decision by Chief Judge Palmer (Chief ALJ) finding that Respondent Sims, on two occasions, entered, for the purpose of showing or exhibiting, a horse, at New Castle, Indiana, on July 18, 1986, and at Columbus, Ohio, on October 2, 1987, respectively. The Chief ALJ assessed Respondent a civil penalty of $4,000 and disqualified him for 2 years from showing, exhibiting or entering any horse or participating in any horse show, exhibition, sale or auction. Much more than a preponderance of the evidence supports the findings, which is all that is required. A horse may be found to be sore based upon the professional opinion of veterinarians who relied solely upon palpation of the horse's pasterns. Past recollection recorded in the form of affidavits made while the events were fresh in the witnesses' minds is reliable, probative and substantial. The amendment to the Fiscal Year 1993 budget for APHIS, prohibiting the payment of salary to any Department veterinarian who relies solely on the use of digital palpation as the only diagnostic

test to determine whether or not a horse is sore, and the language in the 1994 appropriations bill conference report that digital palpation should not be used as the sole means of determining soring, are not applicable. *In re Fly*, 51 Agric. Dec. 1128 (1992), is expressly disapproved. Respondent voluntarily chose to proceed *pro se* at the hearing, and there is no basis for allowing him to retry the case with an attorney. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum disqualification order on the person who entered the sore horse in this case, in addition to a $2,000 civil penalty, for each of the violations.

In *In re Kelly*, HPA Docket No. 91–87, decided by the Judicial Officer on December 28, 1993 (31 pages), the Judicial Officer reversed the decision by Judge Kane (ALJ) dismissing the Complaint. The Judicial Officer held that Respondents entered and allowed the entry of a horse for showing while the horse was sore. The Judicial Officer assessed a civil penalty of $2,000, and disqualified Respondents for 1 year, *inter alia*, from showing, exhibiting or entering a horse in a horse show. Much more than a preponderance of the evidence supports the findings, which is all that is required. A horse may be found to be sore based upon the professional opinion of veterinarians who relied solely upon palpation of the horse's pasterns. Past recollection recorded in the form of affidavits made while the events were fresh in the witnesses' minds is reliable, probative and substantial. The amendment to the Fiscal Year 1993 budget for APHIS, prohibiting the payment of salary to any Department veterinarian who relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore, and the language in the 1994 appropriations bill conference report that digital palpation should not be used as the sole means of determining soring, are not applicable. Bilateral, reproducible pain in response to palpation, standing alone, is sufficient to be considered abnormal sensitivity and thus raise the statutory presumption of a sore horse, and to support a finding of a violation of the Act. It is irrelevant who trained the horse. "Entering" a horse is a continuing process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited. Whiting out "X" marks on the posterior pastern of the horse's left foot on the Summary of Alleged Violations form, and initialing the change, does not detract from the credibility of the document. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum disqualification order on the persons who entered the sore horse in this case, in addition to a $2,000 civil penalty imposed jointly on a husband and wife.

In *In re New York Primate Center, Inc.*, AWA Docket No. 93–27, decided by the Judicial Officer on January 3, 1994 (3 pages), the Judicial Officer denied a late appeal after the Initial Decision had become final and effective. If the appeal had been timely filed, it would have been dismissed because Respondents' Answer was filed late. The sanction was appropriate considering the serious nature of the violations.

In *In re Bobo*, HPA Docket No. 91–202, decided by the Judicial Officer on January 12, 1994 (47 pages), the Judicial Officer affirmed the decision by Judge Bernstein (ALJ) holding that on one occasion, Respondent Bobo entered for the purpose of showing or exhibiting a horse at a horse show while the horse was sore, and Respondent Mitchell, owner of the horse, allowed such entry, and that on another occasion, Respondent Bobo entered and exhibited the same horse, which was sore, and Respondent Mitchell allowed the entry and exhibition of such horse. The ALJ assessed a civil penalty of $2,000 as to each Respondent, and disqualified Respondents for 2 years from showing, exhibiting, or entering any horse, and from judging, managing, or otherwise participating in any horse show. Much more than a preponderance of the evidence supports the findings, which is all that is required. A horse may be found to be sore based upon the professional opinion of veterinarians who relied solely upon palpation of the horse's pasterns. Past recollection recorded in the form of affidavits and summaries made while the events were fresh in the witnesses' minds is reliable, probative and substantial. The amendment to the Fiscal Year 1993 budget for APHIS, prohibiting the payment of salary to any Department veterinarian

who relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore, and the language in the 1994 appropriations bill conference report that digital palpation should not be used as the sole means of determining soring, are not applicable. Bilateral, reproducible pain in response to palpation, standing alone, is sufficient to be considered abnormal sensitivity and thus raise the statutory presumption of a sore horse, and to support a finding of a violation of the Act. "Entering" a horse 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 facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum disqualification order on the Respondents in this case for each violation, or 2 years, in addition to a $2,000 civil penalty imposed on each Respondent.

In *In re Wise*, P.Q. Docket No. 93–24, decided by the Judicial Officer on January 27, 1994 (2 pages), the Judicial Officer affirmed the Order by Judge Hunt (ALJ) assessing a civil penalty of $187.50 against Respondent under the Federal Plant Pest Act, as amended, the Plant Quarantine Act, as amended, and the regulations promulgated thereunder. However, the Judicial Officer amended the Order to permit payment in 6 monthly installments by certified checks or money orders.

In *In re Frank Tambone, Inc.*, PACA Docket No. D–92–550, decided by the Judicial Officer on February 2, 1994 (35 pages), the Judicial Officer affirmed the Decision by Judge Baker (ALJ) publishing the finding that Respondent committed willful, flagrant and repeated violations by failing to make full payment promptly for produce. This case is governed by numerous precedents summarized in *In re The Caito Produce Co.*, 48 Agric. Dec. 602 (1989).

In *In re Unique Nursery and Garden Center* (Decision as to Valkering U.S.A., Inc.), P.Q. Docket No. 92–84, decided by the Judicial Officer on February 8, 1994 (72 pages), the Judicial Officer affirmed the Decision by Judge Baker (ALJ) in which she assessed a civil penalty under the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations promulgated thereunder against Respondent for its part in the movement of 19 shipments consisting of 7,818 trees from a gypsy moth high-risk area in Pennsylvania to approximately 60 nonregulated areas in nine States without a certificate or permit, as required, but the Judicial Officer increased the civil penalty from $5,000 to $14,500 based on Complainant's cross-appeal. Hearsay evidence is admissible and can constitute substantial evidence to support findings, if it is reliable and probative. The Federal Rules of Evidence are not applicable to administrative proceedings. Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. An agency's construction of its own regulation becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. A wholesaler involved in the movement of regulated articles may be assessed a civil penalty even though the wholesaler deals through a broker. The inclusion of the term "knowingly" in the criminal penalty provisions, while omitting the term in the civil penalty provisions, emphasizes that the term "knowingly" should not be implied in the place at which it is omitted. Unique circumstances led to the policy of imposing only half of the recommended sanction in P.Q. consent settlements.

In *In re Bobo*, HPA Docket No. 91–202, decided by the Judicial Officer on February 28, 1994 (2 pages), the Judicial Officer denied Respondents' Petition for Reconsideration. The resolution of the American Association of Equine Practitioners does not change my view as to the reliability of palpation to determine whether a horse is sore. The regulations limiting the number of persons allowed in the inspection area do not change my view that examinations conducted after a horse has left the inspection area are not as probative as the government inspections, because of the opportunity for tampering.

In re Heywood, P.Q. Docket No. 91–58, decided by the Judicial Officer on March 11, 1994 (2 pages), the Judicial Officer dismissed the Petition for Reconsideration because it was not

timely filed. If it had been timely filed, it would have been dismissed on the merits for the reasons set forth in the Decision and Order previously filed.

In *In re Martin*, HPA Docket No. 91–93, decided by the Judicial Officer on March 16, 1994 (35 pages), the Judicial Officer reversed the decision by Judge Kane (ALJ) dismissing the Complaint. The Judicial Officer held that Respondents entered and allowed the entry of a horse for showing while the horse was sore. The Judicial Officer assessed a civil penalty of $2,000 on the trainer and $2,000 jointly on the owners (husband and wife), and disqualified Respondents for 1 year, *inter alia*, from showing, exhibiting or entering a horse in a horse show. Much more than a preponderance of the evidence supports the findings, which is all that is required. A horse may be found to be sore based upon the professional opinion of veterinarians who relied solely upon palpation of the horse's pasterns. Past recollection recorded in the form of affidavits made while the events were fresh in the witnesses' minds is reliable, probative and substantial. The amendment to the Fiscal Year 1993 budget for APHIS, prohibiting the payment of salary to any Department veterinarian who relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore, and the language in the 1994 appropriations bill conference report that digital palpation should not be used as the sole means of determining soring, are not applicable. Bilateral, reproducible pain in response to palpation, standing alone, is sufficient to be considered abnormal sensitivity and thus raise the statutory presumption of a sore horse. The evidence is also sufficient to support a finding of a violation of the Act, even in the absence of the presumption. There is no substantial evidence to support the ALJ's inference that the horse's abnormal sensitivity was caused by a fungus. "Entering" a horse 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 facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum disqualification order on the persons who entered and allowed the entry of the sore horse, in addition to a $2,000 civil penalty imposed on the trainer and jointly on a husband and wife.

In *In re Starr*, V.A. Docket No. 92-1, decided by the Judicial Officer on March 23, 1994 (78 pages), the Judicial Officer reversed the Initial Decision and Order by Judge Kane (ALJ) dismissing the Complaint. The Judicial Officer revoked Respondent's accreditation under the provisions of 9 C.F.R. §§ 160-162. The Judicial Officer found that Respondent violated 9 C.F.R. § 161.3(b) by misstating on Tuberculosis Test Records the identity, number and age of animals tested. Respondent listed animals as having been tested for tuberculosis, which were not, in fact, tested. Respondent signed a Brucellosis Test Record stating that the laboratory results were negative when, in fact, the laboratory tests had not yet been performed. Respondent also permitted official ear tags to be kept in the custody of someone else prior to official use, in violation of 9 C.F.R. § 161.3(j). Although the ALJ erred in precluding Complainant's counsel from questioning an expert witness as to the nature of Respondent's violations and how they affect the disease eradication programs, there is no need for a new hearing for such evidence. There is a need for subpoena power because of the important governmental functions performed by accredited veterinarians. Discovery is not available in an administrative disciplinary hearing. The record in this case does not support a sanction for misstating the age of animals as adult on tuberculosis tests in Vermont where the veterinarian, in the exercise of reasonable judgment, relies on the farmer's advice as to which animals are adults subject to TB testing. The Department's failure to hold an informal conference with respect to one of the 12 counts alleging violations was harmless error in the circumstances of this case. Veterinarian accreditation is not a license subject to the notice requirements of the Administrative Procedure Act (5 U.S.C. § 558(c)), but if it is, the "public health, interest, or safety" exception is applicable. In addition, Respondent's violations were willful, in view of his careless disregard of regulatory requirements.

In *In re Barrios-Aguilar*, P.Q. Docket No. 93–97, decided by the Judicial Officer on March 24, 1994 (3 pages), the Judicial Officer affirmed the Order by Judge Baker (ALJ) assessing a civil penalty of $375 against Respondent under the Federal Plant Pest Act, as

amended, the Plant Quarantine Act, as amended, and the regulations promulgated thereunder, on the basis of *In re Kaplinsky*. However, the Judicial Officer remanded the proceeding to the ALJ to determine whether the penalty should be reduced and/or paid in installments because of Respondent's financial condition under the new policy set forth in *In re Heywood*, 52 Agric. Dec. 1315 (1993).

In *In re Cal-Almond, Inc.*, 94 AMA Docket No. F&V 981–1, decided by the Judicial Officer on March 28, 1994 (2 pages), the Judicial Officer denied an application for interim relief based on established precedent.

In *In re Dole DN&F, Inc.*, 94 AMA Docket No. F&V 981–2, decided by the Judicial Officer on March 28, 1994 (2 pages), the Judicial Officer denied an application for interim relief based on established precedent.

In *In re Hardin County Stockyards, Inc.* (Decision as to Hardin County Stockyards, Inc., and Rex Lineberry), P.&S. Docket No. D–93–73, decided by the Judicial Officer on April 1, 1994 (8 pages), the Judicial Officer affirmed the Order by Judge Hunt (ALJ) ordering Respondents to cease and desist from violating the custodial account regulations and misusing shippers' proceeds. The Order also suspends Respondents as registrants under the Act until the shortage in their custodial account is eliminated, and assesses a $3,000 civil penalty against Respondents, jointly and severally. Respondents' Answer admits the material allegations of the Complaint and, therefore, an Order was properly issued without a hearing. A violation is willful, within the meaning of the Administrative Procedure Act, if a person carelessly disregards regulatory requirements. Even under the stricter standard followed in some circuits, Respondents' conduct would still be willful in view of their disregard of express provisions of the regulations as to custodial accounts.

In *In re Martinez*, A.Q. Docket No. 94-8, decided by the Judicial Officer on April 13, 1994 (6 pages), the Judicial Officer affirmed the Decision by Judge Baker (ALJ) assessing civil penalties of $750 against Respondent for importing a bird from Mexico not in compliance with the regulations in that the bird was not accompanied by a veterinary health certificate, as required, and was not subjected to inspection at the Customs port of entry, as required. Failure to file a timely Answer is deemed an admission of the allegations in the Complaint and a waiver of hearing. Malicious intent is not an element of the violations leading to the civil penalties imposed here. The civil penalty requested in the Complaint was properly reduced by half since no hearing was required.

In *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), PACA Docket No. D-92–555, decided by the Judicial Officer on April 22, 1994 (41 pages), the Judicial Officer affirmed the Decision by Judge Kane (ALJ) suspending Respondents' licenses for 90 days for making false and misleading statements, for a fraudulent purpose, upon purchases of produce in interstate commerce. The violations occurred on seven occasions when Mr. Saer, acting for Jacobson, altered USDA inspection certificates and faxed the altered certificates to a supplier. It is not necessary to determine the exact status of Jacobson or Mr. Saer since Jacobson's purchases were regulated by the Act, and Mr. Saer was a person acting for Jacobson within the scope of his employment or office. Accordingly, Jacobson is responsible for Mr. Saer's violations (7 U.S.C. § 499p). Since Mr. Saer's violations were intentional, Jacobson's violations were willful and equally culpable as those of Mr. Saer. The fact that two of the altered inspection certificates were null and void because they were superseded by later inspection certificates does not vitiate the violations that occurred when the superseded inspection certificates were altered and faxed to the supplier for a fraudulent purpose. The violations here are particularly egregious because they undermine the integrity of federal inspection certificates.

In *In re Boss Fruit & Vegetable, Inc.* (Decision as to Boss Fruit & Vegetable, Inc.), PACA Docket No. D–93–554, decided by the Judicial Officer on May 5, 1994 (46 pages), the Judicial Officer affirmed the Decision by Judge Baker (ALJ) publishing the finding that Respondent has committed willful, flagrant and repeated violations of section 2 of the Act, by failing to make full payment promptly for produce. The ALJ's findings that Respondent acted as a dealer buying from the suppliers, rather than as a broker acting on a collect and remit basis only, are supported by far more than a preponderance of the evidence, which is all that is required. The resale of produce is an act of dominion constituting acceptance. It is normal practice for produce to be shipped to someone other than the purchaser.

In *In re James Petersen*, AWA Docket No. 93–13, decided by the Judicial Officer on May 6, 1994 (21 pages), the Judicial Officer affirmed the Decision by Judge Hunt (ALJ) assessing a civil penalty of $5,000 for operating as dealers without being licensed. The Order directs Respondents to cease and desist from violating the Act, regulations and standards, and, in particular, to cease and desist from engaging in any activity for which a license is required without being licensed. However, without changing the Order, the Judicial Officer reversed the ALJ's conclusion that Respondents were not also exhibitors, which requires licensure. The evidence supports the ALJ's finding and inference that Respondents conducted an animal auction for "compensation or profit" and that the animals were sold for "research, teaching, exhibition, or use as a pet." The ALJ properly considered Respondents' sale of animals 11 days before the hearing because the Complaint alleged that Respondents' sales included, but were not limited to, specified dates. The formalities and technicalities of court pleading are not applicable in administrative proceedings. Respondents were exhibitors because they exhibited their animals to the public at a private zoo, based upon advance arrangements made by the public. In the case of a zoo, it is not necessary to show that compensation was charged. The administrative construction of the Act is entitled to deference, and the construction of the Act should not render any clause superfluous or void of meaning. The civil penalty is modest considering the deliberate violations after repeated notices that a license was required. The sale of each animal constitutes a separate violation. The Act authorizes an Order prohibiting Respondents from obtaining a license for 1 year.

In *In re Teddy Bertuca, Co.*, PACA Docket No. D–94–506, decided by the Judicial Officer on May 13, 1994 (7 pages), the Judicial Officer affirmed the Decision by Judge Bernstein (ALJ) revoking Respondent's license for failing to make full payment promptly for produce. This case is governed by numerous precedents summarized in *In re The Caito Produce Co.*, 48 Agric. Dec. 602 (1989). An officer of the corporation has no standing to file an appeal "as an officer and `responsibly connected' person."

In *In re James Petersen*, AWA Docket No. 93–13, decided by the Judicial Officer on May 23, 1994 (1 page), the Judicial Officer denied a Petition for Reconsideration for the reasons previously stated in the original Decision.

In *In re Jacobson Produce, Inc.*, PACA Docket No. D–92–555, decided by the Judicial Officer on May 24, 1994 (1 page), the Judicial Officer denied a Petition for Rehearing for the reasons previously stated in the original Decision.

In *In re Hershey Chocolate, U.S.A.*, 91 AMA Docket No. M 2–76 & 93 AMA Docket No. M 2–77, decided by the Judicial Officer on May 27, 1994 (54 pages), the Judicial Officer affirmed the Decision by Chief Judge Palmer (Chief ALJ) dismissing the Petitions, which challenged the Secretary's action in two proceedings in 1991 and 1993 classifying fluid milk used to make milk chocolate as Class II milk, rather than Class III milk, when Order No. 2 was changed from a two-class Order to a three-class Order. The Secretary's actions were supported by the records and adequate findings, and were not arbitrary, capricious or an abuse of discretion. The Petitioner has the burden of proving that the challenged marketing order provisions are not

in accordance with law. Market alignment is a proper objective to facilitate orderly milk marketing conditions. Orders issued under the Act are principally for the economic benefit of producers and consumers. If the Secretary's rulemaking action had been found unlawful, the appropriate remedy would have been to remand the proceeding to the Secretary to determine the remedy in his legislative capacity.

In *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), HPA Docket No. 91–115, decided by the Judicial Officer on June 10, 1994 (79 pages), the Judicial Officer reversed the Decision by Judge Kane (ALJ), which dismissed the Complaint alleging that Respondent entered two horses at separate horse shows, for the purpose of showing or exhibiting, while each horse was sore. The Judicial Officer assessed civil penalties of $4,000, and disqualified Respondent for 2 years, *inter alia*, from showing, exhibiting or entering a horse in a horse show. "Entering" a horse is a continuing process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited. Much more than a preponderance of the evidence supports the allegations of the Complaint, which is all that is required. A horse may be found to be sore based solely upon the professional opinion of veterinarians from their palpation of the horse's pasterns. Past recollection recorded in the form of affidavits made while the events were fresh in the witnesses' minds is reliable, probative and substantial. The amendment to the Fiscal Year 1993 budget for APHIS, prohibiting the payment of salary to any Department veterinarian who relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore, and the language in the 1994 appropriations bill conference report that digital palpation should not be used as the sole means of determining soring, are not applicable. Bilateral, reproducible pain in response to palpation, standing alone, is sufficient to be considered abnormal sensitivity and thus raise the statutory presumption of a sore horse, and to support a finding of a violation of the Act. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum 1-year disqualification order on the person who entered the sore horse, in addition to a $2,000 civil penalty, for each violation.

In *In re Danny Burks*, HPA Docket No. 91–120, decided by the Judicial Officer on June 24, 1994 (36 pages), the Judicial Officer reversed the decision by Judge Kane (ALJ) imposing no sanction on Respondent, notwithstanding his finding that Respondent entered for the purpose of showing or exhibiting a horse at a horse show while the horse was sore. The JO assessed a civil penalty of $200, and disqualified Respondent for 1 year from showing, exhibiting, or entering any horse, and from judging, managing, or otherwise participating in any horse show. The JO also disagreed with the ALJ's finding that, on another occasion, a horse was not sore which Respondent entered. The JO concluded that the horse was sore, but dismissed the Complaint as to this issue because the case was not a suitable case for presenting an important issue of statutory construction as to whether one who enters a horse, but does not ride it in the Show, is one of the persons exhibiting the horse. Past recollection recorded in the form of affidavits and summaries made while the events were fresh in the witnesses' minds is reliable, probative and substantial. "Entering" a horse 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 facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum disqualification order on the Respondent, but in view of Respondent's poor financial condition, only a $200 civil penalty is imposed.

In *In re Simone Fruit Co.*, I&G Docket No. 93-01, decided by the Judicial Officer on June 28, 1994 (2 pages), the Judicial Officer Ruled on a Certified Question that Administrative Law Judge Dorothea A. Baker's proposed order for prehearing procedures was not correct, because the Order, in effect, permits discovery, which is unavailable under this Department's controlling Rules of Practice.

In *In re Ron Morrow*, AWA Docket No. 94-7, decided by the Judicial Officer on June 29, 1994 (19 pages), the Judicial Officer affirmed the Initial Decision and Order by Judge Bernstein

(ALJ) assessing a civil penalty of $50,000 for numerous violations, including operating as a dealer without being licensed, refusing to allow inspections, failing to construct and maintain suitable housing conditions, failing to provide appropriate food and water, and failing to maintain adequate records. The Order directs Respondent to cease and desist from violating the Act, regulations and standards in numerous respects, and disqualifies Respondent from becoming licensed for 10 years. Respondent's failure to file a timely Answer constitutes an admission of the allegations of the Complaint and a waiver of hearing. The Federal Rules of Civil Procedure are not applicable to this administrative proceeding.

In *In re Bill Young*, HPA Docket No. 91–203, decided by the Judicial Officer on August 3, 1994 (75 pages), the Judicial Officer reversed the Decision by Judge Kane (ALJ), which dismissed the Complaint alleging that Respondent Young entered for the purpose of showing or exhibiting a horse while the horse was sore, and Respondent Sherman, owner of the horse, allowed such entry. The Judicial Officer assessed civil penalties of $2,000 against each Respondent, and disqualified each Respondent for 1 year, *inter alia*, from showing, exhibiting or entering a horse in a horse show. "Entering" a horse is a continuing process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited. Much more than a preponderance of the evidence supports the allegations of the Complaint, which is all that is required. A horse may be found to be sore based solely upon the professional opinion of veterinarians from their palpation of the horse's pasterns. Past recollection recorded, in the form of affidavits and a summary form, made while the events were fresh in the witnesses' minds, is reliable, probative and substantial. Abnormal way of going, or gait deficit, is not required. The Ames and Auburn studies, relied on by Respondents, are outdated. The general consensus of a 1991 Atlanta meeting and the 1991 Recommended Protocol for DQP examinations are not persuasive. The amendment to the Fiscal Year 1993 budget for APHIS, prohibiting the payment of salary to any Department veterinarian who relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore, and the language in the 1994 appropriations bill conference report that digital palpation should not be used as the sole means of determining soring, are not applicable. Bilateral, reproducible pain in response to palpation, standing alone, is sufficient to be considered abnormal sensitivity and thus raise the statutory presumption of a sore horse, and to support a finding of a violation of the Act. Examinations of the private veterinarians and DQPs in this case are not as persuasive as those of the USDA veterinarians. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum 1-year disqualification order on the person who entered the sore horse, in addition to a $2,000 civil penalty.

In *In re Kathy Armstrong*, HPA Docket No. 92-25, decided by the Judicial Officer on August 12, 1994 (30 pages), the Judicial Officer reversed the Decision by Judge Hunt (ALJ), which dismissed the Complaint alleging that Respondent entered for the purpose of showing or exhibiting a horse while the horse was sore. The Judicial Officer assessed a civil penalty of $1,200. A horse may be found to be sore based solely upon the professional opinion of veterinarians from their palpation of the horse's pasterns. Evidence showing that Respondent applied a whitener to the pasterns of the horse to improve its appearance, rather than to affect its gait, which caused abnormal bilateral sensitivity in its pasterns, together with the uncontradicted testimony of the USDA veterinarians, based upon their palpation findings, that the horse would experience pain when moving, is sufficient to prove that the horse was sore. Also, the statutory presumption was raised by the abnormal bilateral sensitivity. Neither the soring evidence nor the statutory presumption was rebutted by Respondent's evidence that the whitener was not applied for the purpose of affecting the horse's gait. Intent is not an element of the violation. Unique circumstances warrant a reduction in the maximum civil penalty and the omission of a disqualification order.

In *In re Crown Pacific, Ltd.*, FSSAA Docket No. 94-2, decided by the Judicial Officer on August 26, 1994 (29 pages), the Judicial Officer affirmed the Decision by Chief Judge Palmer

(Chief ALJ) approving the sourcing area applied for, with a modification agreed to by the Applicant at the hearing. The sourcing area application met the technical requirements of the Act, and the proposed sourcing area is geographically and economically separate from the areas from which Crown Pacific has exported and intends to export private timber. Purpose of the Act and statutory provisions set forth. Under the Act, the Secretary considers "purchasing patterns," not isolated or theoretically possible purchasing, by the Applicant's mills and other persons "in the same local vicinity" as the Applicant. The hearing is for the purpose of supplementing the written record. The argument that the entire Pacific Northwest should be regarded as a single sourcing area should be presented to Congress, rather than the Secretary, and it is not consistent with the evidence in this case. The Chief ALJ's Findings and Conclusions are overwhelmingly supported by the evidence. The Chief ALJ did not abuse his discretion in denying the Motion for a Continuance, or for the taking of depositions after the hearing concluded. The Chief ALJ has no subpoena power under this Act, and no authority to compel testimony by any witness. Forest Service Form 2400-46, entitled "Purchaser Certification of Timber Domestically Processed and Exported," for the years 1990 through the present, for Forest Service Regions 1, 4, 5, and 6, are of marginal relevance to the issues in this case, and the Chief ALJ properly did not open the record after the hearing to receive them. The Chief ALJ properly denied the motion to require the Forest Service to place into the record all sourcing area applications and reviews under the Act from 1990 through the present for Regions 1, 4, 5, and 6. The Chief ALJ did not err in excluding evidence of the transport of logs, brought in as a test of feasibility, from outside the United States into the Applicant's proposed sourcing area. The Chief ALJ did not err in excluding testimony based on out-of-date, obsolete Forest Service instructions. The Chief ALJ did not err in excluding an exhibit showing that some logs were being shipped from the States of Utah and Nevada into the Pacific Northwest.

In *In re Crown Pacific Inland Lumber Limited Partnership*, FSSAA Docket No. 94-3, decided by the Judicial Officer on August 26, 1994 (20 pages), the Judicial Officer affirmed the Initial Decision and Order by Chief Judge Palmer (Chief ALJ) approving the Applicant's proposed sourcing area. The sourcing area is geographically and economically separate from any area from which the Applicant or its affiliates have exported or expect to harvest for export timber originating from private lands. The evidence adequately supports the Chief ALJ's Findings and Conclusions. There was no logical, statutory, or regulatory reason for consolidating this application with another application involving an affiliated company. Although the Chief ALJ did not receive Boise Cascade's recommendation prior to issuing the Bench Decision, any error would have been harmless error, since I have fully considered the recommendation. Boise Cascade had ample time within which to prepare for a hearing. The Chief ALJ properly stated that his Decision would, in the absence of an appeal, become final and effective on August 26, 1994, since that was the last day of the 4-month statutory period, irrespective of the fact that the 21-day period provided for in the regulations would not have expired by that date. The Act prevails over the regulations. The Chief ALJ properly shortened the appeal time and response time, from 10 days to 5 days, in view of the need to comply with the statutory deadline. "Form letter" appeals, merely adopting and supporting another party's appeal, add no additional support whatever to the original appeal, and are given no weight whatever. There was no showing of actual prejudice because of the shortened time for filing appeals and responses. The "rights" of opponents of the application do not stem from the Constitution or the Act, but, rather, from the regulations, and the agency has the authority to relax or modify its procedural rules in a given case if the ends of justice require it.

In *In re Bruce Thomas*, P. & S. Docket No. D-94-25, decided by the Judicial Officer on August 30, 1994 (10 pages), the Judicial Officer affirmed the Decision by Judge Baker (ALJ) ordering Respondent to cease and desist from issuing checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in his account, and failing to pay when due the full purchase price of livestock. The Order suspends Respondent as a registrant for 5 years, but provides for terminating the suspension after 120 days if all unpaid

livestock sellers are paid in full, and for permitting his salaried employment by another registrant or packer after 120 days upon demonstration of circumstances warranting modification of the Order. Where Respondent failed to file an Answer, a default order was properly issued.

In *In re National Produce Co.*, PACA Docket No. D-94-515, decided by the Judicial Officer on August 31, 1994 (7 pages), the Judicial Officer affirmed the Decision and Order by Judge Hunt (ALJ) publishing the finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the Act (7 U.S.C. § 499b(4)), by failing to make full payment promptly for produce. Since Respondent violated express requirements of the Act and regulations by failing to make full payment promptly, the violations were willful. The violations were also repeated, in view of the number of violations, and they were flagrant because the failures to pay were in amounts that are not *de minimis*. A hearing is not required where the bankruptcy documents show that Respondent has failed to make full payment exceeding a *de minimis* amount. Publication of the finding of the violations is the only sanction permitted by the Act where Respondent does not have a license.

In *In re Robert N. Watts, Jr.*, P.Q. Docket No. 92-136, decided by the Judicial Officer on August 31, 1994 (19 pages), the Judicial Officer affirmed the Decision by Judge Bernstein (ALJ) in which he assessed a civil penalty of $2,000 against Respondent Sereno Forests, Inc., for its part in the movement of trees from a gypsy moth high-risk area in Pennsylvania to the nonregulated area of Illinois, without a certificate or permit, as required. The ALJ dismissed the Complaint against Robert N. Watts, Jr. A nursery which sells trees in the ground, with the purchaser solely responsible for the removal and transportation of the trees, is responsible under the Acts and regulations for allowing the trees to be moved from a high-risk area to a nonregulated area without the required certificate or permit. Intent is not an element of the violations. The Complaint and proof were adequate with respect to the quarantined area of Columbia County, Pennsylvania. The Acts and regulations are not unconstitutionally vague. The administrative construction of the Acts and regulations are entitled to considerable weight. If there is a conflict between Federal and State law, Federal law prevails. Even though the buyers had contractual responsibility for digging and transporting the trees, the selling nursery could have provided in the contract of sale that it would obtain the necessary inspection or permits, or, alternatively, required the buyers to do so. The $2,000 civil penalty is warranted, considering the serious nature of the violations.

In *In re Richard Marion,*, V.A. Docket No. 93-02, decided by the Judicial Officer on September 13, 1994 (37 pages), the Judicial Officer reversed the Decision by Judge Hunt (ALJ) suspending, for 1 day in the State of Wisconsin, Respondent's accreditation as a veterinarian authorized to perform official duties under State-Federal disease eradication programs, because Respondent violated 9 C.F.R. § 161.3(b), (d), and (h) by signing a Tuberculosis Test Record, without ascertaining that the form had been accurately completed with respect to the identity of the person who conducted the test, by failing to personally perform a tuberculosis test on a dairy herd, and by not carrying out his responsibilities under the applicable programs in accordance with the regulations and instructions issued to him. The Judicial Officer dismissed the Complaint. The Judicial Officer held that Respondent violated 9 C.F.R. § 161.3(b) by carelessly signing a Tuberculosis Test Record, prepared by a colleague, without reading the form or even knowing what it was, which would warrant a 3-month suspension. However, the record indicates that Respondent did not, in fact, violate 9 C.F.R. § 161.3(d) by failing to personally perform a tuberculosis test because, except for carelessly signing the tuberculosis test form, he had no connection with the performance of the test. Respondent's violation of 9 C.F.R. § 161.3(b) necessarily violated 9 C.F.R. § 161.3(h) since he did not follow the regulations and instructions issued to him. It is not necessary to determine whether this would have added 90 days to the 90-day suspension for violating 9 C.F.R. § 161.3(b) because the record shows that this proceeding should not have affected his ability to become accredited in another State. In fact, however, the pendency of this proceeding did prevent him from becoming accredited in Missouri for over 20

months, where he was engaged in veterinary practice during the pendency of this proceeding. Since that is twice as long as the 10-month suspension sought by Complainant, the Complaint is dismissed. Responsible hearsay is admissible in disciplinary proceedings.

In *In re Myles C. Culbertson* (Decision as to Myles C. Culbertson, M.S. "Buddy" Major, Jr., and Stuart Major), A.Q. Docket No. 91–2, decided by the Judicial Officer on September 21, 1994 (41 pages), the Judicial Officer reversed the Decision by Judge Kane (ALJ) dismissing the Complaint against Respondent Culbertson, which alleged that Respondent Culbertson and other Respondents moved cattle interstate on two occasions which were not accompanied by the required certificate, and, also, on one of the occasions they were not found negative to an official brucellosis test within 30 days prior to movement. The Judicial Officer held that Respondent Culbertson "moved" the cattle, and assessed a civil penalty against Culbertson of $1,500. The Judicial Officer affirmed the ALJ's Decision assessing a $1,500 civil penalty against Stuart Major and $2,000 against M.S. "Buddy" Major, Jr., for their part in the violations. There is much more than a preponderance of the evidence that each Respondent committed the respective violations charged in the Complaint, which is all that is required. The definition of moved includes "otherwise aided, induced, or caused to be moved." An agency's interpretation of its own regulation is entitled to great deference, unless it is clearly erroneous or inconsistent with the language it interprets. Cases not appealed to the Judicial Officer are not controlling or persuasive. A person who relies on others, including accredited veterinarians, to comply with the regulatory requirements does so at his or her peril. The failure of the Respondents Major to appear at the hearing constitutes an admission of the facts presented at the hearing and of the material allegations of fact contained in the Complaint. The excuses offered by Respondents Major for not appearing at the hearing are insufficient, and, moreover, they did not contact the ALJ, the Hearing Clerk, or Complainant to request a continuance. Ignorance of the law is not a mitigating circumstance in determining the civil penalty for violations of the Brucellosis Eradication Program. Department's sanction policy explained.

In *In re Danny L. Brand, d/b/a Danny's Food Service*, PACA Docket No. D-94-541, decided by the Judicial Officer on September 23, 1994 (45 pages), the Judicial Officer reversed the Decision by Judge Kane (ALJ) holding that Complainant's denial of Respondent's license under the Perishable Agricultural Commodities Act (PACA) is improper and will not be upheld. The Judicial Officer found that Respondent was unfit to engage in the business of a licensee under the PACA because he engaged in practices of a character prohibited by the Act. Specifically, Respondent was unlawfully employed by his wife during the period of his employment restriction resulting from the revocation of his prior PACA license. The burden of proof is on Respondent to show that his license application should not be refused. The terms "employ" and "employment" include any affiliation, even without compensation. Respondent's admissions that, on limited occasions, he conveyed information that his wife or another employee left for customers of his wife's produce firm is sufficient to constitute "employment." However, the record also contains evidence that he actually engaged in business transactions for his wife's produce firm. The ALJ erroneously excluded evidence that Respondent discussed his wife's business with her, gave her advice on how to do things, how to run the business, and as to what purchases and sales to make. Complainant's offer of proof is received as evidence in the proceeding. An inference is drawn that the testimony of Respondent's wife would have been adverse to Respondent's position here, since she was present at the hearing, but did not testify. Respondent is also bound under the principles of *res judicata* by the prior consent order revoking the license of his wife's produce firm because she continued to employ Respondent, after receiving notice that a surety bond was required. Respondent negotiated the consent settlement of his wife's case with Complainant's counsel, and he is in privity with his wife for the purposes of *res judicata* as to the Consent Decision revoking her license because of the same practices involved in the present proceeding.

In *In re Kathy Armstrong*, HPA Docket No. 92-25, decided by the Judicial Officer on September 26, 1994 (3 pages), the Judicial Officer denied Respondent's Petition for Reconsideration for the reasons set forth in Decision previously filed herein.

In *In re Johnny E. Lewis*, HPA Docket No. 92-37, decided by the Judicial Officer on September 29, 1994 (40 pages), the Judicial Officer affirmed the Decision by Judge Baker (ALJ) holding that Respondent Lewis entered, for the purpose of showing or exhibiting, a horse at a horse show while the horse was sore, and Respondent Morrison, owner of the horse, allowed such entry. The ALJ assessed a civil penalty of $2,000 as to each Respondent, and disqualified Respondents for 1 year from showing, exhibiting, or entering any horse, and from judging, managing, or otherwise participating in any horse show. Much more than a preponderance of the evidence supports the findings, which is all that is required. A horse may be found to be sore based upon the professional opinion of veterinarians who relied solely upon palpation of the horse's pasterns. A gait deficit is not required. Past recollection recorded in the form of affidavits and summaries made while the events were fresh in the witnesses' minds is reliable, probative and substantial. Bilateral, reproducible pain in response to palpation, standing alone, is sufficient to raise the statutory presumption of a sore horse, and to support a finding of a violation of the Act. It is irrelevant that the horse passed a DQP inspection on two prior occasions on the same day. Proof of intent or knowledge is not required. The Act is not unconstitutionally vague, and the subjective determination of soring does not deny due process. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum 1-year disqualification order on the Respondents, in addition to a $2,000 civil penalty imposed on each Respondent.

Fiscal Year 1995

In *In re DiCarlo Distributors, Inc.*, PACA Docket No. D-93-519, decided by the Judicial Officer on November 7, 1994 (44 pages), the Judicial Officer affirmed the Decision by Judge Baker (ALJ) revoking Respondent's license for permitting Joseph T. Mirando and Anthony Mirando, Sr., to continue their affiliation with it after being notified that the Mirandos were ineligible to be employed by or affiliated with any PACA licensee without a surety bond and USDA approval, because the Mirandos were responsibly connected with a PACA licensee (North American Produce Corp.) which failed to pay a reparation order. Much more than a preponderance of the evidence supports the Complaint, which is all that is required. Responsible hearsay is freely admitted in our Department's administrative proceedings. Respondent has no standing to collaterally attack Complainant's determination as to the Mirandos' employment restrictions. The terms "employ" and "employment" include any affiliation, even without compensation. Respondent cannot enlarge the notice requirements of the PACA and the Administrative Procedure Act by erroneously denying, in a letter to Complainant, that the Mirandos were affiliated with Respondent. The facts here show no basis for estoppel against Complainant. Moreover, the Government is not subject to estoppel when it is acting in its sovereign capacity. Cases not appealed to the Judicial Officer are not controlling Departmental precedent.

In *In re Delta Air Lines, Inc.*, AWA Docket No. 91-13, decided by the Judicial Officer on November 9, 1994 (16 pages), the Judicial Officer affirmed the Decision by Chief Judge Palmer (Chief ALJ) assessing civil penalties of $140,000, with $60,000 held in abeyance for 1 year, for transporting 108 dogs and cats in a cargo space that was without sufficient air, causing the death of 32 dogs. The Order also directs Respondent to cease and desist from violating the Act, regulations and standards, and, in particular, to cease and desist from failing to ensure that dogs and cats have a supply of air sufficient for normal breathing. Both parties filed appeals. When a regulated entity fails to comply with the Animal Welfare Act, there is a separate violation for each animal harmed or placed in danger. A violation is willful if regulatory requirements have been carelessly disregarded, but it is unnecessary to make a finding of willfulness here because no license is being suspended or revoked. The civil penalties are based primarily on the serious nature of Respondent's violations. The Judicial Officer is not subject to the same limitations in reviewing a sanction imposed by an ALJ as a court in reviewing a sanction imposed by the Judicial Officer.

In *In re James Joseph Hickey, Jr.* (Decision as to James Joseph Hickey, Jr., d/b/a S & H Supply Co.), AWA Docket No. 94–09, decided by the Judicial Officer on November 16, 1994 (19 pages), the Judicial Officer affirmed the Decision by Judge Baker (ALJ) prohibiting Respondent from obtaining a license for a period of 10 years, assessing a civil penalty of $10,000, and directing Respondent to cease and desist from various practices involving interfering with inspectors during the course of an inspection, recordkeeping, maintenance of facilities, and failing to maintain programs of disease control, euthanasia, and adequate veterinary care. Respondent's failure to file a timely Answer or deny the allegations of the Complaint constitutes an admission of the allegations and a waiver of hearing. It is no defense that the ALJ did not rule on Respondent's Motions to Sever, Strike, and Make More Definite and Certain because the Department's Uniform Rules of Practice, unlike the Federal Rules of Civil Procedure, do not enlarge the time for filing an Answer when a motion to strike or make more definite and certain is filed. The formalities and technicalities of court pleading are not applicable in administrative proceedings. It is only necessary that the Complaint reasonably apprise the litigant of the issues in controversy. The sanctions sought by Complainant and imposed by the ALJ are consistent with the sanctions imposed in other AWA cases of a similar nature.

In *In re Tracy Renee Hampton* (Decision as to Dennis Harold Jones), HPA Docket No. 93–7, decided by the Judicial Officer on November 23, 1994 (48 pages), the Judicial Officer reversed the Decision by Judge Kane (ALJ), which dismissed the Complaint on the ground that Respondent Jones was not the owner of a horse when it was entered while sore. The Judicial Officer held that Respondent Jones was the owner, assessed a civil penalty of $2,000, and disqualified Respondent Jones for 1 year from showing, exhibiting, or entering any horse, and from judging, managing, or otherwise participating in any horse show. Respondent Jones' Answer admits ownership of the horse when it was entered. It was error for the ALJ to amend Respondent's Answer, after the hearing record was closed, to deny a fact (ownership) previously admitted in the Answer. Furthermore, the ALJ permitted Respondent's statements at the hearing to be an amendment to his Answer, but all of his statements at the hearing admitted ownership. The undisputed evidence shows preliminary negotiations for the sale or trade of the horse, which were never consummated. Respondent Jones is responsible for allowing the entry of the horse while sore, notwithstanding the facts that he permitted the prospective buyer to have possession of the horse for several weeks prior to the show, he permitted the prospective buyer to elevate the horse's forelimbs to see how it would do in a Big Lick competition, and he permitted the prospective buyer to enter the horse in a show. Where the parties intend not to be bound unless the price be fixed or agreed, and it is not fixed or agreed, there is no contract. The holding in *In re Charles Sims*, in which the parents of a minor child were held responsible as *de facto* owners, rather than the minor child, who was the *de jure* owner, is not relevant here. *Burton v. USDA* is not applied outside of the Eighth Circuit, but, nonetheless, the Burton criteria are not met here by Respondent.

In *In re Tuffy Truesdell*, AWA Docket No. 94-6, decided by the Judicial Officer on November 30, 1994 (10 pages), the Judicial Officer affirmed the Decision by Chief Judge Palmer assessing civil penalties of $2,000, and suspending Respondents' license for 60 days. Respondents were ordered to cease and desist from failing to maintain their facilities properly, failing to remove wastes and control pests, and failing to maintain complete and accurate records of the acquisition and disposition of animals. The sanction is not too severe, in view of the numerous violations found on four different dates over a period of almost 13 months.

In *In re Jim Prentice*, P.Q. Docket No. 94-52, decided by the Judicial Officer on November 30, 1994 (2 pages), the Judicial Officer affirmed Judge Baker's Order assessing a civil penalty of $375 against Respondent under the Act of February 2, 1903, as amended, the Federal Plant Pest Act, as amended, and the regulations promulgated thereunder, on the basis of *In re Shulamis Kaplinsky*.

In *In re Springdale Lumber Co.*, FSSAA Docket No. 94–6, decided by the Judicial Officer on December 1, 1994 (18 pages), the Judicial Officer affirmed the Decision by Chief Judge Palmer (i) denying the sourcing area applied for because the Applicant did not have a prior pattern of acquiring logs for export, but (ii) concluding that if such a pattern had been established, the application would have been granted, inasmuch as the sourcing area applied for is economically and geographically separate from the area from which the Applicant's parent company expects to harvest timber from private lands for export. A prior pattern of acquiring logs for export by the Applicant or an affiliated company is required in order to grant an application for a sourcing area. An interpretation of a statute by the head of the agency entrusted with its administration is entitled to deference, provided the interpretation is not inconsistent with the plain meaning of the statutory provisions. The Chief ALJ's findings are adequately supported by the record. The Rules of Practice permit an amendment of the sourcing area boundaries prior to the close of the hearing, if there is a hearing. The Chief ALJ properly excluded proffered evidence which was immaterial, unduly repetitious, or which was not of the sort upon which responsible persons are accustomed to rely. The Forest Service properly performed its review function. Although the application was denied, the findings and conclusions as to the sourcing

area are not merely dicta, but will be controlling in a future application proceeding, in the absence of supplemental evidence to the contrary.

In *In re The Produce Place*, PACA Docket No. D-93-550, decided by the Judicial Officer on December 14, 1994 (60 pages), the Judicial Officer affirmed the Decision by Judge Hunt (ALJ) finding that Respondent made false and misleading statements, for a fraudulent purpose, by altering USDA inspection certificates for berries on six occasions to show lower temperatures than recorded by the inspectors. However, the Judicial Officer increased the ALJ's sanction, which would have suspended Respondent's license for 30 days, but held the suspension in abeyance if Respondent removed Ted Kaplan, who altered the certificates, from its business for a period of 6 months. The Judicial Officer imposed an unconditional 90-day suspension order on Respondent. The evidence supports the inference that Kaplan altered the inspection certificates for a fraudulent purpose, *viz.*, to facilitate obtaining substantial price reductions on the berries. In addition, the altered certificates could have been used to satisfy Respondent's customers, if they wanted to be sure that the berries had been stored at a proper temperature. It is no defense that the price adjustments would have been given even without the altered temperatures. It is customary to prove a fraudulent purpose by an inference drawn from all of the circumstances. The Secretary has jurisdiction under section 8(a) of the Act (7 U.S.C. § 499h(a)) to suspend or revoke a license for altering inspection certificates for a fraudulent purpose irrespective of whether Respondent has been found guilty in a Federal court of having altered certificates in violation of section 14(b) of the Act (7 U.S.C. § 499n(b)). The berries do not actually have to be in interstate commerce. They "shall be considered" in interstate commerce as long as they are part of that "current of commerce usual in the trade in that commodity" whereby interstate commerce occurs (7 U.S.C. § 499a(8)). Reparation decisions are never binding, or even persuasive, in disciplinary cases. In license suspension or revocation cases, where the statute makes the act of any person within the scope of his employment or office the act of the principal, as well, there is never a basis for imposing a lesser sanction on an unknowing principal than on the person who committed the violation.

In *In re Francisco Escobar*, P.Q. Docket No. 93-68, decided by the Judicial Officer on January 11, 1995 (36 pages), the Judicial Officer reversed the Decision by Judge Baker (ALJ), which assessed a civil penalty of $250 against Respondent for bringing prohibited articles into the United States from Mexico. The Judicial Officer increased the civil penalty to $2,000. Respondent's importation into the United States from Mexico of potatoes and pork chorizo violated the regulations even though the products were originally grown or produced in the United States. Headings and titles of regulations are not meant to take the place of detailed provisions of the text. An agency's interpretation of its own regulation is entitled to great deference unless it is clearly erroneous or inconsistent with the language it interprets. The importer of a pork product has the burden of proving, as an affirmative defense, that the product meets the exacting requirements of the regulations. The only mitigating circumstance which should be considered in a P.Q. case is if the presence of the prohibited article was declared to the Customs inspector in a manner sufficiently loud and clear that the inspector understood the declaration before a search began. Ignorance of the law and lack of knowledge that prohibited items are in a traveler's possession are not mitigating circumstances. It is not important whether the inspector asked the right questions or even asked any questions before a search is made. It is immaterial whether Respondent had an opportunity to amend his declaration. It is irrelevant that the Notice of Alleged Baggage Violation did not cite the same sections of the regulations as the Complaint. The holding in *Lopez*, that where a Respondent files an Answer that forces the Department to hold a hearing, if Respondent had a reasonable basis for such action, the minimum civil penalty should be one-half the amount requested, is overruled. If a hearing is not avoided, whether reasonably or unreasonably, and Respondent is found to have violated the regulations, the full penalty warranted by the evidence will be imposed. The small settlement offers at the border, $25 in this case, are dictated by the sheer volume of violations, and are not relevant in determining the sanction to be imposed after a hearing.

In *In re The Produce Place*, PACA Docket No. D-93-550, decided by the Judicial Officer on January 17, 1995 (1 page), the Judicial Officer denied Respondent's Petition for Reconsideration for the reasons set forth in Decision previously filed herein.

In *In re Jerald Brown*, P.&S. Docket No. D-93-66, decided by the Judicial Officer on January 19, 1995 (54 pages), the Judicial Officer affirmed the Decision by Judge Baker (ALJ) assessing a civil penalty of $10,000 and ordering Respondent to cease and desist from various practices involving arbitrarily and fraudulently adding weight to the actual purchase weight when selling livestock to customers on an actual weight basis, and failing to pass the shrink amount on to customers. Practices resulting in misrepresentation of the true weight of livestock, such as pencil markups, are unfair and deceptive practices. Where livestock is sold on the same weights at which it was procured, pencil shrink must be passed on to the purchaser. A preponderance of the evidence shows that arbitrary weights were added without reweighing the cattle, and that the invoices showing arbitrarily increased weights were prepared under Respondent's direction. Great weight is given to the credibility determinations of the ALJs. The formalities and technicalities of court pleading are not applicable in administrative proceedings. Civil penalty, cease and desist, and record-keeping orders can be issued against non-registered market agencies or dealers.

In *In re Stimson Lumber Company*, FSSAA Docket No. 95-1, decided by the Judicial Officer on February 3, 1995 (17 pages), the Judicial Officer affirmed the Initial Decision and Order by Chief Judge Palmer (Chief ALJ) approving the Applicant's proposed sourcing area. The sourcing area is geographically and economically separate from any area from which the Applicant or its affiliates have exported or expect to harvest for export timber originating from private lands. The evidence adequately supports the Chief ALJ's Findings and Conclusions. Alleged violations of the Act by the Applicant are not relevant to this proceeding. The Rules of Practice permit an amendment of the sourcing area boundaries prior to the close of the hearing, if there is a hearing. The review by the Forest Service was adequate, but even if it were not, that is irrelevant as long as a preponderance of the evidence supports the Applicant. There was no failure to comply with the 4-month statutory deadline, but even if there were, it would have no effect on granting the application. Sourcing area applications can be filed after December 20, 1990. New issues cannot be raised for the first time on appeal to the Judicial Officer. The failure of Stimson to follow the exact wording of the regulations as to the certification was harmless error.

In *In re John J. Conforti, d/b/a C&C Produce*, PACA Docket No. D-94-524, decided by the Judicial Officer on February 28, 1995 (50 pages), the Judicial Officer reversed the Decision by Judge Hunt (ALJ) suspending Respondent's license for 30 days for permitting Joseph S. Cali to continue Cali's affiliation with Respondent after being notified that Cali was ineligible to be employed by or affiliated with any PACA licensee without a surety bond and USDA approval, because Cali was responsibly connected with a PACA licensee (Royal Fruit Co., Inc.) which failed to pay reparation orders. The Judicial Officer increased the suspension to 90 days. There is much more than a preponderance of the evidence supporting the Complaint, which is all that is required. The evidence shows that Cali was responsibly connected with Royal, but Respondent has no standing to challenge Complainant's determination that Cali is subject to employment restrictions. The bonding procedures are not unreasonable, unfair, or in violation of the Act. The Act expressly provides for a reasonable time within which to obtain an increased bond, but contains no such provision (other than 30 days' notice) for obtaining the initial bond. The inclusion of a provision in one part of a section, while omitting it in another, emphasizes that the provision should not be implied in the place at which it is omitted. In view of the clarity of the warning letters, there is no basis for estoppel. In addition, estoppel does not apply to the government acting in its sovereign capacity. The employment-restriction provisions do not deprive Respondent of due process and equal protection. Even if Respondent had obtained the bond, a disciplinary proceeding could have been instituted for employing Cali without the bond

after the 30-day notice period. Official notice taken of the Initial Decision of another ALJ (and the Complaint and testimony) in the administrative proceeding relating to Royal Fruit Company. A 90-day suspension order is appropriate here. *ABL Produce, Inc. v. USDA*, 25 F.3d 641 (8th Cir. 1994) distinguished.

In *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer, d/b/a Oppenheimer Stables), HPA Docket No. 91-207, decided by the Judicial Officer on March 6, 1995 (102 pages), the Judicial Officer reversed the Decision by Judge Kane (ALJ), which dismissed the Complaint alleging that Respondent entered for the purpose of showing or exhibiting a horse while the horse was sore. The Judicial Officer assessed a civil penalty of $2,000 and disqualified Respondent for 5 years (with 3½ years suspended), *inter alia*, from showing, exhibiting or entering a horse in a horse show. Much more than a preponderance of the evidence supports the allegations of the Complaint, which is all that is required. A horse may be found to be sore based solely upon the professional opinion of veterinarians from their palpation of the horse's pasterns. Past recollection recorded, in the form of affidavits and a summary form, made while the events were fresh in the witnesses' minds, is reliable, probative and substantial. Abnormal way of going, or gait deficit, is not required. The Ames and Auburn studies are outdated. The general consensus of a 1991 Atlanta meeting and the 1991 Recommended Protocol for DQP examinations are not persuasive. The amendment to the Fiscal Year 1993 budget for APHIS, prohibiting the payment of salary to any Department veterinarian who relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore, and the language in the 1994 appropriations bill conference report that digital palpation should not be used as the sole means of determining soring, are not applicable. Bilateral, reproducible pain in response to palpation, standing alone, is sufficient to be considered abnormal sensitivity and thus raise the statutory presumption of a sore horse, and to support a finding of a violation of the Act. Examination of a private veterinarian was not as persuasive as those of the USDA veterinarians. The evidence as to a scar-rule violation was not sufficient to overturn the ALJ's finding of no scar-rule violation. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum disqualification order (5 years for a second violation) on the person who entered the sore horse, in addition to a $2,000 civil penalty.

In *In re S W F Produce, Inc.*, PACA Docket No. D-94-532, decided by the Judicial Officer on March 16, 1995 (9 pages), the Judicial Officer affirmed the Decision by Judge Hunt (ALJ) publishing the finding that Respondent has committed flagrant and repeated violations of section 2 of the Act (7 U.S.C. § 499b), by failing to make full payment promptly to 39 sellers for 161 lots of produce totalling $637,635.78. However, the Judicial Officer held that the ALJ erred in failing to take official notice of Respondent's bankruptcy petition, and failing to make a finding that Respondent merely "rolled over" its debt. The 9-month statute of limitations in section 6(a) of the Act (7 U.S.C. § 499f(a)) applies only in reparations proceedings, and not in disciplinary proceedings. Where Respondent alleges that, by the time of the hearing, or, if no hearing is held, by the time the Answer is filed, it has paid for all of the produce involved in the violations alleged in the Complaint, Complainant can, without amending the Complaint, refute Respondent's allegation--that the sanction for the Complaint-transactions should be mitigated because of later compliance--by requesting that official notice be taken of Respondent's bankruptcy pleadings, showing that Respondent is merely "rolling over" its debt.

In *In re Atlantic Produce Co.* (Decision as to Joseph Pinto), PACA Docket No. D-94-533, decided by the Judicial Officer on March 22, 1995 (16 pages), the Judicial Officer affirmed the decision by Judge Kane (ALJ) publishing the finding that Respondents committed willful, flagrant and repeated violations of section 2(4) of the Act (7 U.S.C. § 499b(4)), by failing to make full payment promptly, during the period October 1991 through November 1992, to 15 sellers for 65 lots of produce totalling $280,634.96. The ALJ properly issued a Bench Decision, based upon Respondent Pinto's failure to attend the hearing, where Respondent Pinto did not call the ALJ's office to advise that he would not attend the hearing until 4:25 p.m. the afternoon

before the hearing was to begin, which was after the ALJ, Complainant's attorney, and witnesses had already left for the hearing. Respondent Pinto's claim, made for the first time after the Initial Decision was issued, that he was too ill to attend the hearing, is not just cause for overturning the Initial Decision and Order. The sanction policy set forth in *S.S. Farms Linn County* does not change the policy set forth in *Caito* that the Act calls for payment--not excuses, and that excuses why payment was not made in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money, usually over an extended period of time.

In *In re Samuel J. Dalessio, Jr.* (Decision as to Samuel J. Dalessio, Jr., and Douglas S. Dalessio, d/b/a Indiana Farmers Livestock Market, Inc.), P.&S. Docket No. D-93-76, decided by the Judicial Officer on March 31, 1995 (30 pages), the Judicial Officer affirmed the Decision by Judge Baker (ALJ) ordering Respondents to cease and desist from issuing checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the bank account, failing to pay when due the full purchase price of livestock, misrepresenting to principals the purchase prices of livestock, issuing false or misleading invoices, and exchanging checks to conceal the true amount of funds available in an account, or creating a false "float" or balance in the account. The Order suspends Respondents as registrants for 5 years, but provides for the issuance of a Supplemental Order after 210 days if all unpaid livestock sellers are paid in full. A violation is willful, within the meaning of the Administrative Procedure Act, if a person carelessly disregards regulatory requirements. There is much more than a preponderance of the evidence supporting the ALJ's findings, which is all that is required. Respondents' conduct was willful, inasmuch as the acts of their employee, Mr. Bandy, are "deemed" the acts of the Dalessios, as well as that of Bandy (7 U.S.C. § 223). By virtue of the statute (7 U.S.C. § 223), the Dalessios are just as culpable as Bandy.

In *In re Don Tollefson*, P.Q. Docket No. 94-35, decided by the Judicial Officer on April 6, 1995 (16 pages), the Judicial Officer affirmed the Decision by Judge Hunt (ALJ) in which he assessed a civil penalty of $1,500 ($750 for each of two violations) against Respondent for mailing 25 bags of fresh assorted palm fruit and 28 live palm plants in soil, addressed from Hawaii to the continental United States. There is much more than a preponderance of the evidence supporting the ALJ's finding that the approximately 28 live palm plants were "in soil," which is all that is required. The fact that the face of the search warrant fails to specify the location of the property to be searched does not render the evidence resulting from the search inadmissible in this administrative proceeding, considering all of the relevant facts.

In *In re James N. Wilson, Sr., d/b/a Modern Locker Plant and/or Cattlemen's Co-op*, FMIA Docket No. 94-6, PPIA Docket No. 94-4, decided by the Judicial Officer on April 13, 1995 (20 pages), the Judicial Officer affirmed the decision by Judge Hunt (ALJ) withdrawing inspection services indefinitely from Respondent James N. Wilson, Sr., d/b/a Modern Locker Plant and/or Cattlemen's Co-op, because Wilson, who owns the Modern Locker Plant, a slaughtering and meat packing facility, leased the plant to Respondent Yellowstone Meat Company, which is unfit to receive inspection services because Respondent Rudolph G. Stanko, a.k.a. Rudy "Butch" Stanko, who has a record of having committed criminal violations of the FMIA, is "responsibly connected" with Yellowstone and Modern Locker. Much more than a preponderance of the evidence supports the ALJ's findings, which is all that is required. Whether a person is "responsibly connected" with a plant depends upon the duties performed by the person, rather than upon the person's title. Stanko is an employee of Yellowstone in a managerial or executive capacity, even though his title is "consultant." Wilson was prohibited by the regulations from transferring his grant of inspection to Yellowstone.

In *In re Patrick D. Hoctor*, AWA Docket No. 93-10, decided by the Judicial Officer on May 5, 1995 (31 pages), the Judicial Officer affirmed the Order by Judge Bernstein (ALJ) requiring Respondent to cease and desist from failing to keep primary enclosures sanitary and in

suitable condition, failing to keep watering receptacles clean, failing to provide adequate veterinarian care, and failing to establish and maintain an appropriate plan for environmental enhancement adequate to primates. However, the Judicial Officer increased the ALJ's $1,000 civil penalty to $7,500, and the ALJ's 15-day suspension of Respondent's license, and thereafter until he is in full compliance with the Act, regulations and standards, to 40 days, and thereafter until full compliance is demonstrated. The Judicial Officer also ordered Respondent to cease and desist from failing to construct and maintain housing facilities for animals so that they are structurally sound and appropriate for the safe and effective containment of the animals involved, including the construction of a perimeter fence at least 8 feet in height for carnivorous wild animals, and failing to individually identify cats, as required. 9 C.F.R. § 3.125(a) has been properly interpreted by the agency to require a perimeter fence 8 feet high in certain circumstances, including those involved here. An agency's interpretation of its own regulation is entitled to great deference. Headings and titles of regulations cannot undo or limit requirements set forth in the text of the regulation. The fact that the standards were amended so as to impose an absolute requirement for a perimeter fence for nonhuman primates and dogs in certain circumstances does not detract from the fact that the more general language of 9 C.F.R. § 3.125(a) can be reasonably interpreted to require a perimeter fence for all animals in appropriate circumstances. Clarifying amendments, or amendments expressly requiring certain conduct in specific situations, do not render invalid agency interpretations of more general language. Respondent violated 9 C.F.R. § 2.50 by not individually identifying cats, notwithstanding the fact that APHIS was considering his request for an interpretation of the regulation that would not require tattooing. However, since the inspector listed the violation as one in which "time remains for correction," only a cease and desist order will be issued as to this violation.

In *In re Mil-Key Farm, Inc.*, 93 AMA Docket No. M 124-4, decided by the Judicial Officer on May 25, 1995 (64 pages), the Judicial Officer reversed the Decision by Judge Kane (ALJ), who held that Mil-Key Farm, Inc. (Mil-Key), was a producer-handler exempt from the pooling provisions of Federal Milk Marketing Order No. 124 regulating the handling of milk in the Pacific Northwest Marketing Area. Glacier Dairy Corporation (Glacier), which took over the distribution of Mil-Key's products, purchased more than a daily average of 100 pounds of milk from a pool plant, which exceeds the amount permitted to be received by a producer-handler. In view of interlocking relationships, the Judicial Officer pierced the corporate veils of Mil-Key and Glacier, and treated the family enterprise as a single entity. In addition, the Judicial Officer held that Glacier is at least "indirectly or partially owned, operated or controlled" by Mil-Key, within the meaning of 7 C.F.R. § 1124.10(b)(2)(i), or Mil-Key "indirectly exercises [at least some] degree of management or control" over Glacier, within the meaning of 7 C.F.R. § 1124.10(b)(2)(ii), so that Glacier and Mil-Key are "deemed to constitute an integrated operation," within the meaning of 7 C.F.R. § 1124.10(b). Also, the milk Glacier purchased from a pool plant was actually "receive[d]" at the Mil-Key facilities, within the meaning of 7 C.F.R. § 1124.10(a)(2), which disqualifies Mil-Key from producer-handler status. Ownership of milk is irrelevant in determining whether milk is received at a plant. In addition, under the express terms of the Order, which have the force and effect of law and must be followed, the term "producer-handler" is defined as a person who has been "so designated by the market administrator" (7 C.F.R. § 1124.10) (1992). Since Mil-Key was not "designated" by the Market Administrator as a producer-handler, and Mil-Key has not challenged the provisions of the Order requiring such designation, as an essential element of the producer-handler definition, Mil-Key cannot be exempt from the pooling provisions of the Order. Provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given controlling weight, unless it is plainly erroneous or inconsistent with the regulation. Burden of proof and scope of review explained.

In *In re Keith Becknell*, HPA Docket No. 92-3, decided by the Judicial Officer on June 1, 1995 (16 pages), the Judicial Officer affirmed the Decision by Judge Bernstein (ALJ) in which he found that Respondent entered, for the purpose of showing or exhibiting, a horse at a horse show

while the horse was sore. The ALJ assessed a civil penalty of $1,000 and disqualified Respondent for 1 year from showing, exhibiting, or entering any horse, and from judging, managing, or otherwise participating in any horse show. Although the application of wart medication prescribed by a veterinarian to the horse's pasterns 3 weeks prior to the show may have contributed to the pain responses, the pain responses were also caused by a workout with action devices. The exhibitor of a horse is an absolute guarantor that the training methods and action devices used during or prior to a show will not sore the horse. There is much more than a preponderance of the evidence that Respondent violated the Act, as alleged in the Complaint, which is all that is required. Administrative agency investigators conducting noncustodial interviews have no obligation to give *Miranda*-type warnings. Respondent received the Complaint 7 months after the violation, not 2½ years later, as claimed by Respondent. In any event, however, laches does not apply to the Government acting in its sovereign capacity. Although there is no factual basis for Respondent's argument that the standards have been changed so that the horse would not have been written up as sore in 1993 or 1994, even if his argument were correct, as long as the Act was properly applied in this case, it is no defense that others may have fared better.

In *In re Don Tollefson*, P.Q. Docket No. 94-35, decided by the Judicial Officer on June 8, 1995 (3 pages), the Judicial Officer denied Respondent's Petition for Reconsideration, which raises the issue of Respondent's inability to pay a $1,500 civil penalty. The issue of inability to pay was not timely raised, the violations were too serious for the penalty to be reduced because of inability to pay, and Respondent's documentation falls short of that required by *Heywood* to prove inability to pay. However, the civil penalty will be paid in two installments of $750 each, one year apart.

In *In re Gary R. Edwards*, HPA Docket No. 91-113, decided by the Judicial Officer on June 9, 1995 (23 pages), the Judicial Officer vacated the Second Initial Decision and Order filed by Judge Kane (ALJ) dismissing the Complaint, and remanded the proceeding to the ALJ. The ALJ erred in assigning slight credibility to one USDA veterinarian and no credibility to the other solely because of their lack of memory as to their examinations. Both veterinarians had recorded the results of their examinations while the events were fresh in their minds. The ALJ erred in drawing an adverse inference that the testimony of additional USDA experts, if called, would have been adverse to USDA, since the two USDA veterinarians who examined the horse testified at the hearing. The statutory presumption of soreness is frequently relied on, in addition to a conclusion of soreness reached in the absence of the statutory presumption. In this Department, there is no debate as to the sufficiency of palpation evidence alone as serving as a highly reliable method of determining whether a horse is sore, within the meaning of the HPA. The ALJ erred in stating that evidence obtained by palpation is prohibited to the Department's veterinarians by an Appropriations Act.

In *In re John Casey*, A.Q. Docket No. 93-48, decided by the Judicial Officer on June 21, 1995 (24 pages), the Judicial Officer affirmed in part and reversed in part the Decision by Judge Hunt (ALJ) assessing a civil penalty of $1,000 against Respondent John Casey for moving brucellosis exposed cattle interstate without moving them directly to slaughter or through a stockyard approved to receive brucellosis exposed cattle. The ALJ dismissed the Complaint against Respondents Monty Milhous and Timothy Puckett. No appeal was filed by John Casey. The Judicial Officer assessed a civil penalty of $1,000 against Respondent Monty Milhous for the same violation, holding that it is not necessary to show that the violations were committed knowingly or with intent to violate the regulations. Respondents "moved" animals interstate when they moved them to a stockyard that was not approved to receive brucellosis exposed cattle, and an out-of-state buyer then moved them to another state. As to a separate transaction, the evidence was not sufficiently strong to overturn the ALJ's finding that other cattle moved by Respondents John Casey and Timothy Puckett did not cross the state line. The civil penalty imposed is lenient based on the potential damage to the Brucellosis Eradication Program.

In *In re Ronald DeBruin*, AWA Docket No. 95–20, decided by the Judicial Officer on June 29, 1995 (13 pages), the Judicial Officer affirmed the Decision by Judge Bernstein (ALJ) assessing a civil penalty of $5,000, and directing Respondent to cease and desist from various practices, including failing to keep primary enclosures clean and sanitized, failing to establish and maintain programs of disease control and adequate veterinary care, failing to individually identify dogs, and failing to construct the housing facilities so that they remain structurally sound, provide shelter from the elements and contain the animals. Respondent's failure to file a timely Answer or deny the allegations of the Complaint constitutes an admission of the allegations and a waiver of hearing. The sanctions sought by Complainant and imposed by the ALJ are consistent with the sanctions imposed in other AWA cases of a similar nature.

In *In re Gaylon Georges, d/b/a J.D. Cattle Co.*, P&S Docket No. D-95-3, decided by the Judicial Officer on July 11, 1995 (3 pages), the Judicial Officer issued a Consent Decision under the Packers and Stockyards Act requiring Respondent to cease and desist from issuing checks without having an active and open bank account and from failing to pay the full purchase price of livestock when due. Respondent is suspended for a period of 5 years, provided, however, that a supplemental order may be issued terminating the suspension after 150 days upon demonstration that all unpaid livestock sellers have been paid in full. The Order may be modified upon application to permit Respondent's salaried employment after the 150-day period of suspension upon demonstration of circumstances warranting modification of the Order.

In *In re C.I. Ferrie*, NDPRB Docket No. 93-1, decided by the Judicial Officer on August 7, 1995 (40 pages), the Judicial Officer affirmed the initial Decision and Order by Judge Bernstein (ALJ) holding that the 1993 National Referendum conducted under the Dairy Production Stabilization Act of 1983 relating to the continued existence of the Dairy Promotion and Research Order was conducted in accordance with law. Petitioners have the burden of proving that the 1993 Referendum was not conducted in accordance with law. The Act provides for bloc voting by cooperatives on behalf of producer-members. Therefore, it would be inappropriate to rule on the constitutionality of bloc voting, since no administrative tribunal has authority to declare unconstitutional the Act it administers. Nonetheless, if I were to decide the issue, I would hold that the bloc voting provisions are constitutional. The procedural safeguards employed by the Referendum Agent during the collection, sorting and counting of ballots ensured the fairness of the process and the accuracy of the vote tabulation. Producers were made aware of the Referendum and could easily obtain ballots, which contained adequate instructions. The Milk Market Administrators properly verified the number of producers eligible to be bloc-voted by cooperatives. The Department was not obligated to generate a list of producers for Petitioners' use to attempt to defeat the Order. Petitioners failed to show that the National Dairy Promotion and Research Board (NDPRB) improperly expended funds to support the Order. The use of USDA employees in connection with the Referendum does not improperly taint the Referendum. The auditing process used by the Referendum Agent employed safeguards necessary to reasonably ensure that members of cooperatives received an individual ballot. The ballots, along with their supporting instructions, were not confusing or intimidating. The confidentiality requirements of the Act and regulations were complied with. Requiring the cooperatives to decide by May 17, 1993, whether they would bloc vote violated no provisions of the Act or regulations. The Referendum Agent employed safeguards sufficient to intercept voting errors, such as those made by Wisconsin Dairies Cooperative, and adjusted the vote appropriately, without any dilution of individual votes. Designating April as a representative period for voting was not unfair to any cooperative member.

In *In re Mike Thomas*, HPA Docket No. 94-28, decided by the Judicial Officer on August 10, 1995 (2 pages), the Judicial Officer ruled in response to a question certified by Judge Hunt (ALJ) that the proviso in APHIS' Fiscal Year 1993 appropriation in Public Law No. 102-341, 106 Stat. 873, 881-82 (1992), does not prohibit the finding that the horse was sore

based solely on digital palpation as the only diagnostic test to determine whether the horse was sore.

In *In re Midland Banana & Tomato Co., Inc.* (Decision as to Midland Banana & Tomato Co., Inc., Susan E. Heimann, and Robert S. Heimann), PACA Docket Nos. D-93-548, D-93-549, decided by the Judicial Officer on August 16, 1995 (122 pages), the Judicial Officer affirmed the Decision and Order by Judge Bernstein (ALJ). The ALJ found in No. D-93-548 that Respondents Midland Banana & Tomato Co., Inc., Susan E. Heimann, and Robert S. Heimann made false and misleading statements on Midland's PACA application, in violation of section 8(c) of the PACA (7 U.S.C. § 499h(c)), and revoked Midland's license. In No. D-93-549, the ALJ published the finding that Respondents Royal Fruit Co., Inc. (Royal), and Robert S. Heimann committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly for purchases of perishable agricultural commodities in interstate and foreign commerce. Royal filed no appeal and the evidence shows that Royal is the *alter ego* of Robert S. Heimann. State law is not controlling as to whether the corporate veil may be pierced in order to make the Order applicable to the responsible directing officials and owner, or part owner, of a corporation involved in violations. Robert S. Heimann is also subject to discipline for the payment violations because he fits the definition of a "dealer" under the Act. Accordingly, the same sanction should apply to Royal and Robert S. Heimann. The license application of Midland was false and misleading in that it failed to reveal that Midland was a successor to the then-defunct Royal, and concealed the identity of the true principal of the firm, Robert S. Heimann. Midland's license application was also false in that it failed to reveal that Robert S. Heimann had previously had a license revoked and had failed to pay reparation awards. Complainant need only prevail by a preponderance of the evidence. The doctrine of laches does not apply to the Federal Government acting in its sovereign capacity. Complainant was not required to use the procedure in 7 C.F.R. §§ 47.47-.68 to decide Robert S. Heimann's responsibly connected status. Sanction policy explained. Respondents' violations were willful. Willfulness includes a careless disregard of regulatory requirements. The Judicial Officer denied a petition to intervene filed by Joseph Cali and Jeffrey B. Heimann on the grounds that the interests of responsibly connected parties can be addressed only in responsibly connected proceedings, and not by intervention in disciplinary proceedings.

In *In re Bama Tomato, Co., Inc.*, PACA Docket No. D-94-554, decided by the Judicial Officer on August 17, 1995 (35 pages), the Judicial Officer affirmed Judge Hunt's (ALJ) Order suspending Respondent's license for permitting Jimmy Mims to be employed by, or continue his affiliation with, it after being notified that Mr. Mims was ineligible to be employed by or affiliated with any PACA licensee for a 1–year period (and, thereafter, only with the Secretary's approval and a bond) because of a disciplinary order issued against a company with which Mr. Mims had been determined to be responsibly connected. However, the Judicial Officer increased the ALJ's 14-day suspension order to 30 days. The issue of whether the definition of "employ" is unconstitutionally vague cannot be raised for the first time on appeal. In addition, an administrative tribunal has no authority to declare unconstitutional the Act it administers. Since Jimmy Mims did not contest the administrative determination that he was responsibly connected with a firm that had its license revoked, Respondent is not in a position to raise this issue here. Permitting a person to be employed in violation of the employment restrictions is a very serious violation. Hardship to Respondent's employees is given no weight in determining the sanction.

In *In re Otto Berosini*, AWA Docket No. 93-20, decided by the Judicial Officer on September 11, 1995 (46 pages), the Judicial Officer affirmed the Decision by Chief Judge Palmer (Chief ALJ) imposing a cease and desist order, assessing a civil penalty of $7,500, and suspending Respondent's license for 60 days because Respondent, *inter alia*, failed to keep primary enclosures sanitary and in suitable condition; failed to keep food and water receptacles clean; failed to provide adequate veterinary care; failed to establish and to maintain an

appropriate program for disease control and prevention, and euthanasia, under the supervision of a veterinarian; failed to maintain and to make reasonably available his records; and failed to have a proper license for those regulated activities which require a license. Without changing the sanction, the Judicial Officer reversed the Chief ALJ's decision on three points, finding inadequate veterinary care and recordkeeping violations on additional dates, finding that Respondent exhibited without a license on additional dates, and finding that Respondent provided inadequate veterinary care to a leopard, because Respondent failed to follow the veterinarian's instructions. Complainant's proof far exceeds a preponderance of the evidence, which is all that is required. No administrative tribunal has authority to declare unconstitutional the Act which it is called upon to administer, but it is clear that Congress has the power to delegate to USDA authority to regulate interstate activities within the purview of the Animal Welfare Act. The fact APHIS directed Respondent to correct certain violations by a particular date, which Respondent complied with, might mitigate the sanction, but does not eliminate the violations. Respondent violated the standards by failing to follow the directions of his veterinarian even though, in hindsight, it was determined that the animal would not have survived. Respondent violated the Act by exhibiting without a license notwithstanding his claim that he was confused by a letter advising him of a $10 increase in the fees, and irrespective of the fact that he failed to pick up his mail at the address which he had listed with APHIS. In future cases, "transport cages" which are reasonably shown to be used as primary housing shall be regulated under the space requirement standards for permanent housing, irrespective of whether the standards are amended to provide for a time limit on the use of "transport cages." Also, in future cases, the perimeter fence requirement will be governed by *In re Patrick D. Hoctor*, 54 Agric. Dec. ___ (May 5, 1995), appeal pending. An unappealed ALJ ruling is not precedential.

In *In re Granoff's Wholesale Fruit & Produce, Inc.*, PACA Docket No. D-95-520, decided by the Judicial Officer on September 19, 1995 (7 pages), the Judicial Officer affirmed the Decision and Order by Chief Judge Palmer (Chief ALJ) publishing the finding that Respondent committed willful, flagrant and repeated violations of section 2 of the Act (7 U.S.C. § 499b), by failing to make full payment promptly for produce. Since Respondent violated express requirements of the Act and regulations by failing to make full payment promptly, the violations were willful. The violations were also repeated, in view of the number of violations, and they were flagrant because the failures to pay were in amounts that are not *de minimis*. A hearing is not required where the bankruptcy documents show that Respondent has failed to make full payment exceeding a *de minimis* amount. Publication of the finding of the violations is the only sanction permitted by the Act where Respondent does not have a license.

In *In re Potato Sales Co.* (Decision as to Potato Sales Co., Inc.), PACA Docket No. D-93-513, decided by the Judicial Officer on September 21, 1995 (35 pages), the Judicial Officer affirmed the Decision by Chief Judge Palmer (Chief ALJ) revoking Respondent's license for misrepresenting the place of origin of nine containers of New Zealand apples consisting of 7,554 cartons purchased in foreign commerce by Potato Sales, sold to SL International and resold to Ever Justice, which shipped them in foreign commerce to its customer in Taiwan. Respondent (and the two former Respondents) accomplished the misrepresentation by removing the lids on the cartons which identified the apples as New Zealand apples and replacing them with lids identifying the apples as Washington State apples. A finding of "repeated" violations is appropriate wherever there is more than one violation of the Act. The violations were flagrant, rather than "very serious," since they involved an intentional scheme to misrepresent a massive quantity of New Zealand apples purchased, relidded and shipped to a foreign country, Taiwan, on three occasions over a period of a month and a half. This hurt the credibility of the United States produce industry with a major trading partner, Taiwan, which caused Taiwan to inspect United States produce much more thoroughly, severely delaying the shipping process. The violations were willful in view of Respondent's blatant disregard of express provisions of the Act and regulations. Notwithstanding Respondent's alleged mitigating circumstances, a revocation order is appropriate.

In *In re Kreider Dairy Farms, Inc.*, 94 AMA Docket No. M-1-2, decided by the Judicial Officer on September 28, 1995 (65 pages), the Judicial Officer reversed the Decision by Judge Bernstein (ALJ) in which he held that Petitioner is a producer-handler under the New York-New Jersey Milk Marketing Order, and that it is relieved of the obligations determined by the Market Administrator (totalling $543,864.48 from November 1991 to November 1994), but denied Petitioner interest on any refund from the producer-settlement fund. The Judicial Officer held that Petitioner was not a producer-handler because it delivered milk to subdealers, and, therefore, did not maintain complete and exclusive control over its distribution. The Order requires that "all" of a producer-handler's facilities and resources for the production, processing and distribution of milk constitute an integrated operation over which the producer-handler has and exercises complete and exclusive control. The word "all" is a comprehensive and all-inclusive word. Petitioner has the burden of proof. The language of the Order is clear, and, therefore, there is no need to resort to legislative history. An agency's construction of its own regulation has controlling weight unless it is plainly erroneous or inconsistent with the regulation. This is particularly true in the technical area of milk marketing. The promulgation record of the producer-handler exemption does not show that the Market Administrator's interpretation was unreasonable. Prior Departmental precedents support the Market Administrator's interpretation, rather than that of the ALJ. Petitioner's interpretation of the exemption would defeat the purpose of the milk order. Situations in other milk orders are not relevant because the Act instructs the Secretary to make regional application, insofar as possible, to the same commodity. Even if Petitioner met the qualifications for a producer-handler, the ALJ correctly held that interest would not be appropriate, since there is no provision in the Act for an award of interest to a handler prevailing in a section 8c(15)(A) proceeding. In fact, since a person meeting the requirements of a producer-handler does not become a producer-handler under the Order until designated as such by the Market Administrator, Petitioner would not even be entitled to a return of the principal, inasmuch as the Market Administrator never designated Petitioner as a producer-handler.

In *In re Kim Bennett*, HPA Docket No. 93-6, decided by the Judicial Officer on September 28, 1995 (2 pages), the Judicial Officer vacated the decision by Judge Kane (ALJ) which dismissed the Complaint. The Judicial Officer remanded the proceeding to the ALJ for the purpose of filing a further Initial Decision and Order, which does not discount in any respect the weight of the expert opinions by the Department's veterinarians merely because they had no present recollection of their examinations at the time of the hearing.